ECKERT SEAMANS

Fall 2009

ATTORNEYS AT LAW
www.eckertseamans.com | info@eckertseamans.com

Philadelphia Report

In This Issue…

Page 1
EMTALA
Third Circuit clarifies "Patient Dumping" Statute
Dead Man's Statute
Disqualifying a witness from testifying about conversations with a decedent

Page 2
Forum Non Conveniens
Underscoring the *Cheeseman* Standard

Page 3
Common Pleas
When should a party **not** move to strike a jury demand?

Page 4
U.S. Supreme Court
Pleading requirements post-*Twombly* and *Iqbal*

PHILADELPHIA, PA
BOSTON, MA
CHARLESTON, WV
HARRISBURG, PA
PITTSBURGH, PA
RICHMOND, VA
SOUTHPOINTE, PA
WASHINGTON, DC
WEST CHESTER, PA
WHITE PLAINS, NY
WILMINGTON, DE

EMTALA

Third Circuit clarifies "Patient Dumping" Statute

In *Torretti v. Main Line Hospitals, Inc.*,[1] the United States Court of Appeals for the Third Circuit held that the Emergency Medical Treatment and Active Labor Act ("EMTALA") does not apply to any individual who, before the individual presents to the hospital for examination or treatment for an emergency medical condition, has begun to receive outpatient services as part of an encounter. EMTALA was enacted to curb the problem of "patient dumping" by creating a statutory duty for hospitals to examine and treat individuals who come to them for emergency care. This is a landmark case and is of vital importance to hospitals in Pennsylvania and across the country. Eckert Seamans attorneys, Peter Hoffman and Ann Cairns, represented Paoli Hospital and obtained summary judgment which was affirmed on appeal. Peter Hoffman argued the case in both the district court and court of appeals.

The plaintiff, Honey Toretti, was 34 weeks pregnant and high risk due to insulin-dependent diabetes. She complained of contractions and decreased fetal movement and was instructed by her obstetrician to drink ice water in an attempt to stimulate the baby. The contractions subsided and fetal movement increased. She then arrived at the Perinatal Testing Center[2] for

continued on page 2

Dead Man's Statute

Disqualifying a witness from testifying about conversations with a decedent

In a recent application of the Dead Man's Statute, the Philadelphia Court of Common Pleas reaffirmed the prohibition of testimony from an interested witness with respect to conversations or transactions with a decedent. *Segal, Wolf et al.*[1] involved a law firm's claim that a former shareholder (the decedent) was bound by an alleged oral partnership agreement and, pursuant to that agreement, referral fees received by the decedent belonged to the firm. The court precluded the firm from introducing testimony about the existence and/or terms of the alleged agreement between the decedent and the firm in accordance with the Dead Man's Statute. In so holding, the court reaffirmed that the statute is designed to balance the position of the parties by precluding testimony from the survivors as to transactions with or statements by the decedent.

continued on page 3

EMTALA

(continued)

a previously scheduled routine check-up where she underwent a routine fetal ultrasound and a fetal non-stress test. Because the non-stress test did not show the expected fetal heart rate variability, coupled with Mrs. Torretti's continuing contractions and diabetic condition, the perinatologist decided to send Mrs. Torretti to Lankenau Hospital (where her obstetrician worked) for extended perinatal monitoring. The perinatologist contacted Mrs. Torretti's obstetrician to alert her that Mrs. Torretti would be coming to Lankenau. Shortly after she arrived at Lankenau, Mrs. Torretti underwent a stat c-section and gave birth to a son who was found to have brain damage. The Torrettis sued Paoli Hospital and the perinatologist, among others, alleging a violation of EMTALA and claiming that the child's brain damage was the result of the delay in treatment caused by the perinatologist's decision to transfer Mrs. Torretti to Lankenau. The district court granted summary judgment in favor of defendants on the EMTALA claim.

> "EMTALA does not apply to any individual…who has begun to receive outpatient services as part of an encounter…."

Under EMTALA, a hospital is required to conduct an appropriate medical screening and to stabilize known emergency medical conditions and labor in individuals who present for emergency treatment. In addition, the statute restricts transfer of unstabilized individuals to outside hospital facilities. If a hospital violates this mandate, resulting in personal harm to an individual, a private civil action for damages may be brought.

The Third Circuit held that EMTALA does not apply to an individual (such as Mrs. Toretti) who has begun to receive outpatient services as part of an encounter, before presenting to the hospital for examination or treatment for an emergency medical condition. The court agreed with the Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS") rules clarifying the reach of EMTALA, which triggers EMTALA's requirements when an "individual comes to the emergency department" and that person is not already a "patient." A "patient" is defined in the Act as "[a]n individual who has begun to receive outpatient services as part of an encounter…." Further, EMTALA does not apply to outpatients, even if during an outpatient encounter they are later found to have an emergency medical condition and are transported to the hospital's dedicated emergency department. The court adopted the "actual knowledge" standard for EMTALA liability, which requires that the hospital actually knew of the emergency medical condition and transferred the patient to another facility before stabilizing the patient. Since there was no evidence the perinatologist or Paoli Hospital's staff actually knew that Mrs. Torretti had an emergency medical condition before directing her to Lankenau Hospital for further monitoring, the defendants were entitled to summary judgment on the Torretti's "stabilization" claim.

[1] 2009 U.S. App. Lexis 19766 (3d Cir. Sept. 2, 2009).

[2] The Perinatal Testing Center is located adjacent to Paoli Memorial Hospital.

Forum Non Conveniens

Underscoring the *Cheeseman* Standard

When arguing improper forum shopping, be sure to allege it and have evidence to support it.

The Pennsylvania Superior Court's recent application of the Cheeseman[1] "oppressive and vexatious" standard to an intrastate forum non conveniens analysis shows the importance of not only raising the argument in your motion, but establishing a record to support it.

Zappala v. The James Lewis Group[2] has a protracted procedural history. In a nutshell, *Zappala* was a personal injury action filed in Philadelphia. Venue of the action in Philadelphia was based on "sham" Philadelphia County defendants who were eventually dismissed (as unopposed) on summary judgment. The remaining defendants, all from Chester County (where the accident took place), filed a motion to transfer venue. The trial court transferred the action to Chester County. The case made its way up to the Pennsylvania Supreme Court which remanded the case to the trial court so that the Chester County defendants could raise their venue challenge pursuant to Rule 1006(d)(1) *(forum non conveniens)* or 1006(d)(2) (inability to hold a fair and impartial trial).[3]

On remand and at the evidentiary hearing, the only evidence submitted by the Chester County defendants was an affidavit attesting to the inconvenience of Philadelphia County as a forum for witnesses. The trial court transferred the case to Chester County, concluding that Zappala's decision to file suit in Philadelphia "was designed to harass the Chester County defendants and a vexatious form of forum shopping" since the Philadelphia County defendants should have never been named to begin with. On appeal, the Superior Court reversed the order to transfer, finding that the Chester County defendants never raised the argument of improper forum shopping in their motion, but instead relied upon

"conventional" *Cheeseman forum non conveniens* allegations and affidavits relating to location of the witnesses in Chester County. For the first time at oral argument, the Chester County defendants argued that Zappala filed suit in Philadelphia because of the high Philadelphia jury awards in personal injury actions. No evidence was presented by the defendants to support those allegations or to establish the lack of relationship of the Philadelphia County defendants to Zappala's claims. The Superior Court concluded that the mere fact that the Philadelphia County defendants were dismissed as unopposed on summary judgment does not establish that the plaintiff was engaged in improper forum shopping. The lesson learned from Zappala is that intrastate *forum non conveniens* motions are determined by fact-intensive considerations. *Cheeseman* required the Chester County defendants to present evidence to demonstrate that the plaintiff's inclusion of the Philadelphia County defendants in the case was designed to harass them. Simply pointing to the inclusion of "sham" defendants will not satisfy a moving party's burden under *Cheeseman*.

[1] *Cheeseman v. Lethal Examiner Inc.*, 701 A.2d 156 (Pa. 1997).

[2] *Zappala v. The James Lewis Group et al.*, 2009 PA Super 179 (Sept. 11, 2009).

[3] The Superior Court and Supreme Court agreed that the Chester County defendants failed to raise their challenge to venue by way of preliminary objection pursuant to Rule 1006(e), and thus waived any objections pursuant to that section.

Common Pleas

When should a party **not** move to strike a jury demand?

According to the court in *Miller v. Santilli* et al.[1], the answer to that question is more than three years after the commencement of the case, including two unsuccessful removals to federal court.

In *Santilli*, the court admonished a group of lawyers for their clients' last minute attempt to deny the plaintiff a jury trial. The opinion was issued in a case that was filed as part of the Philadelphia Court of Common Pleas Commerce Program. The court considered the co-defendants' motion to strike the plaintiff's jury demand based on a jury waiver provision found in certain written agreements entered into between the co-defendants and the plaintiff.

What the court seemed to find most egregious about this motion, aside from the fact that it was filed three weeks before trial, was that these same co-defendants had on multiple occasions themselves requested a jury trial. These co-defendants had apparently requested a jury trial on numerous occasions over the past three years of litigation, including in their two notices of removal to federal court, in opposition to the plaintiff's motion for remand and in their response to an additional defendant's petition for arbitration.

Counsel for the co-defendants acknowledged their inconsistent positions on the appropriate forum for their case and placed the blame for not making the motion to strike earlier on the "negligence of prior counsel." In pointing out that counsel for these defendants had not changed since the inception of the case, the court wondered how, "the superb counsel hailing from the most respected law firms in the country who did not remember the first lesson of every law school trial advocacy class [jury or no jury], is not identified."

Needless to say, the court affirmed its decision to deny the motion to strike the jury demand, holding that the co-defendants' prior contradictory position constituted a waiver. Interestingly, even if the motion to strike had been granted, the court noted that other claims would have been tried to a jury, including other claims involving the co-defendants, and concluded that the parties would have been involved in a jury trial no matter how the motion was decided.

[1] July Term 2006, No. 1225 (Slip. Op. Sept. 16, 2009).

Dead Man's Statute (continued)

The court reasoned that the elements necessary to disqualify a witness under the statute had been met here, *i.e.*, the firm had an interest in the current suit, the interest was adverse to the decedent, and the decedent's interest had passed to a party of record. The Dead Man's Statute was designed to protect against a potential injustice where a party could lie and attempt to testify favorably to himself and adversely to the decedent, knowing that the decedent is incapable of contradicting false testimony.

[1] *Segal, Wolf, Berk Gaines & Liss, P.A. v. Arleen Wolf, et. al.*, 2008 PA Super 283 (Aug. 25, 2009).

U.S. Supreme Court

Pleading requirements post-*Twombly* and *Iqbal*

The U.S. Supreme Court clarified that the heightened pleading standard created in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applies to all civil suits, not *only* antitrust suits. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953 (2009). To date, the *Iqbal* decision has been cited to in over 2,500 judicial opinions nationwide, including 120 opinions in the Federal Courts of Appeal (31 of those 120 opinions coming from the Third Circuit). The *Iqbal* Court explained "[d]etermining whether a complaint states a plausible claim for relief will…be a context-specific task that requires the reviewing court to draw on its judicial experience and common-sense" and reiterated that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." The Court held that plaintiff's allegations did not cross the line between possibility and plausibility of entitlement to relief, explaining that there were "more likely explanations" for defendants' conduct than plaintiff's allegations of an illegal conspiracy.

> *"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."*

The Second Circuit recently addressed whether, post-*Iqbal*, plaintiffs can survive a motion to dismiss when the defendants possess the information necessary to establish a plausible entitlement to relief. In *South Cherry Street, LLC v. Hennessee Group LLC*, 573 F.3d 98 (2d Cir. 2009), the court, in dismissing plaintiff's complaint alleging securities fraud, held a plaintiff was not excused from alleging facts relating to defendants engaging in illegal activity, despite that such facts "would be peculiarly within the knowledge of defendants." The court cautioned, under Fed.R.Civ.P. 11, a plaintiff should not include such an allegation in a pleading without having a "factual basis or justification." The court noted, "a plaintiff whose complaint is deficient under Rule 8… is not entitled to discovery."

Another interesting, but less influential development occurred when the Seventh Circuit held that "the height of the pleading requirement is relative to the circumstances." *Cooney v. Rossiter*, __ F.3d __, 2009 WL 3103998 (7th Cir. Sept. 30, 2009). The court clarified that cases involving complex discovery – not only antitrust and governmental immunity cases – must meet a high standard of plausibility.

The overall effect of *Iqbal* and its progeny is that litigants can no longer make a speculative claim and proceed to discovery based upon the intuition that a defendant's conduct is consistent with liability – instead they must allege specific facts demonstrating their entitlement to relief is plausible – not merely possible. Undoubtedly, plaintiffs will continue to litigate the plausibility standard, as they contend *Iqbal* violates the liberal pleading standards of the Federal Rules of Civil Procedure. While there are no opinions from courts within the Third Circuit citing to *South Cherry Street*, it is likely the holding of the case will be litigated within the Third Circuit – otherwise local litigants will not be able to survive a motion to dismiss when the facts necessary to prove their entitlement to relief are within the sole possession of the defendants.

In light of *Iqbal*, litigants defending claims should be more aggressive in filing Fed.R.Civ.P. 12(b)(6) motions to dismiss – especially in cases involving complex litigation or burdensome discovery. On the other side of the table, litigants making claims need to conduct more thorough factual investigations so they can draft complaints with the requisite factual detail. Importantly, litigants must be cautious not to allege facts without a factual basis or justification just to survive a motion to dismiss; otherwise they could be subject to sanctions under Fed.R.Civ.P. 11.

Contributors to This Issue

Ellen D. Bailey
ebailey@eckertseamans.com

Ryan Boland
rboland@eckertseamans.com

Ann B. Cairns
acairns@eckertseamans.com

Joshua D. Hill
jhill@eckertseamans.com

Peter J. Hoffman
phoffman@eckertseamans.com

Rachel Castillo Rosser
rrosser@eckertseamans.com

Keith E. Smith
ksmith@eckertseamans.com

Contacts

Business Litigation
Mitchell L. Bach
mbach@eckertseamans.com

Product Liability/Civil Litigation
Edward A. Gray
egray@eckertseamans.com
Dennis P. Ziemba
dziemba@eckertseamans.com

Mass Tort/Class Action
Albert G. Bixler
abixler@eckertseamans.com

Mediation/ADR
Charles F. Forer
cforer@eckertseamans.com

ECKERT SEAMANS

Philadelphia, PA 215.851.8400
Boston, MA 617.342.6800
Charleston, WV 304.346.5500
Harrisburg, PA 717.237.6000
Pittsburgh, PA 412.566.6000
Richmond, VA 804.758.7760
Southpointe, PA 724.873.2870
Washington, DC 202.659.6600
West Chester, PA 610.738.8850
White Plains, NY 914.949.2909
Wilmington, DE 302.425.0430

The information in this publication is for the purpose of informing and educating our clients about various aspects of the law and is not intended to be used as legal advice. If you have questions concerning any of the topics, please contact your Eckert Seamans attorney.
Eckert Seamans Cherin & Mellott, LLC. All rights reserved © 2009.