

Medical Malpractice Action Dismissed for Inadequate Certificate of Merit: In *Calcagno v. Orthopedic Associates of Dutchess County, P.C.*, No. 523454, slip op. (N.Y. App. Div., 3d Dept. Mar. 2, 2017), the Supreme Court of New York, Appellate Division, Third Department, affirmed the trial court's dismissal of a medical malpractice action on the basis of an inadequate certificate of merit. Civil Practice Laws and Rules (CPLR) 3012-a requires that in any action for medical malpractice, the complaint must be accompanied by a certificate executed by plaintiff's counsel declaring the attorney consulted with at least one licensed physician who the attorney believes is knowledgeable in the relevant issues involved in the action, and the attorney has concluded on the basis of such consultation that there is a reasonable basis for the commencement of the action. CPLR 3012-a also provides that if the complaint is not accompanied by the attorney's certificate of merit because of a limitation of time, the certificate of merit must be filed within 90 days after service of the complaint.

Following a motor vehicle accident, the defendant physician performed surgery on plaintiff's right ankle and prescribed physical therapy. Thereafter, plaintiff filed a medical malpractice complaint accompanied by a document claiming a certificate of merit would be filed within 90 days after service of the complaint. In March 2015, plaintiff's counsel still had not submitted a certificate of merit. Defendants moved for dismissal of the action for the failure of the plaintiff to submit a certificate of merit. Some twenty (20) months later, requesting the court to accept the late filing, plaintiff's counsel submitted a certificate of merit based on an affidavit of plaintiff's treating physical therapist, who opined that the defendant's actions were "departures from good and accepted medical practice." Without addressing the timeliness of the late filing, the trial court held the certificate of merit was inadequate and dismissed the action. On appeal, the Third Department unanimously affirmed, holding that, "by definition, a physical therapist cannot diagnose and is incompetent to attest to the standard of care applicable to physicians and surgeons."

Washington State Court Affirms Board Ruling Compelling "Bitterly Angry" Doctor to Undergo Psychological Evaluation: In an April 11, 2017 decision, a three-judge panel of Washington's Court of Appeals affirmed the state's medical board's directive that a "bitterly angry" physician must undergo a psychological evaluation before review of his application for a license to practice medicine in the state could move forward. The Court upheld the decision of the Washington Department of Health's Medical Quality Assurance Commission that the doctor must receive a psychological evaluation before his application for a medical license would be considered. The doctor argued that he did not receive due process in connection with his application, as he contended he did not receive notice that his mental condition was at issue in the process. The charging document stated the doctor was "unable to practice with reasonable skill and safety," and included a quotation from a state statute which clearly stated that this inability to practice was due to "a mental or physical condition," and the Court held this sufficient to satisfy the doctor's due process rights. The doctor had argued he had never been diagnosed with a mental illness, although a psychological evaluation had found him to be "bitterly angry, with little insight and little ability to reflect his own behavior in relationships with others." The Court held "mental condition" does not necessarily require a diagnosable mental illness, and that the doctor had previously been found to suffer from "disruptive physician behavior" which, while not recognized as a diagnosable mental illness, nevertheless constituted an occupational problem posing a potential danger should he be granted a license to practice.

New England Compounding Center Pharmacist Seeks New Trial: In 2012, the New England Compounding Center produced and shipped contaminated steroid injections. These caused the largest outbreak of meningitis in United States history, in which more than 700 people became ill and more than 60 died. In the first criminal case arising from the incident to go to trial, the head of the Center was accused of second degree murder in the deaths of 25 people, as well as conspiracy, fraud, and racketeering in connection with the outbreak. On March 22, the defendant was convicted of 47 out of 77 racketeering acts, all mail fraud, and of 52 identical direct mail fraud counts, in addition to racketeering conspiracy; he was convicted on 57 of the 96 charges he faced, including conspiracy, fraud and racketeering. He was, however, acquitted of the murder charges. Following his conviction, on April 10th, the pharmacist's attorneys petitioned the Federal Judge who heard the case for a new trial, on the grounds that the evidence introduced by the prosecution on the murder charges unfairly prejudiced the jury and tainted the case with respect to the remaining charges. The pharmacist's attorneys argue that the presence of the murder charges in the case, and the prosecution's focus on those charges, allowed the prosecution to introduce graphic evidence, such as stories about the pain and suffering of the individuals who died, as well as autopsy photographs, and testimony from sobbing physicians who had treated the deceased patients. The defendant's attorneys argue that the presence of this disturbing evidence tainted the entire case against the defendant and prejudiced the jury, preventing it from dispassionately considering the other charges of conspiracy, fraud, and racketeering. The defense also argues that the racketeering count and a knowing conspiracy count were too "vague" to support criminal convictions. The Judge will rule upon the application in due course.

For more information on the above items, contact Kern Augustine, P.C. at 1-800-445-0954 or via email at info@DrLaw.com



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