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HEALTHCARE LAW PRACTICE GROUP NEWS REPORT

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BUCK v. HENRY

A PHYSICIAN DEFENDING AGAINST A MALPRACTICE CLAIM MUST INCLUDE IN HIS ANSWER THE FIELD OF MEDICINE IN WHICH HE IS SPECIALIZED, IF ANY, AND WHETHER HIS TREATMENT OF THE PLAINTIFF INVOLVED THAT SPECIALITY

By: Peter A. Marra, Esq.

In Buck v. Henry (August 22, 2011) the New Jersey Supreme Court held that a physician defending against a malpractice claim (who admits to treating plaintiff) must include in his answer the field of medicine in which he specializes, if any, and whether treatment involved that specialty.

In Buck, Plaintiff appealed defendant’s summary judgment which was granted by the trial court citing Plaintiff’s failure to provide a proper affidavit of merit. The facts indicated that Dr. Henry treated Mr. Buck for mild depression and insomnia, and prescribed an anti-depressant and sleep aid. Three weeks later, after taking Ambien, Mr. Buck fell asleep while inspecting his gun. He was awakened by what the plaintiff believed was the phone ringing. Forgetting that he had the gun in his right hand, “he reached for the phone with his left hand, somehow causing the barrel of the gun to enter his mouth and discharge.” Plaintiff suffered permanent injuries.

The Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29, requires a plaintiff who files a medical malpractice or negligence action against a licensed professional to provide “an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.” In addition, an affidavit of merit in a medical malpractice matter must also meet the provisions of the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-27, which provides that the challenging expert who executes an affidavit of merit “should be **equivalently-qualified** to the defendant physician.” [emphasis added].

The plaintiff proffered two affidavits of merit. The first affidavit was from a licensed psychiatrist who opined that Dr. Henry’s treatment of the plaintiff fell below the acceptable professional standards.

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Defense counsel stated that the affidavit was deficient because Dr. Henry was engaged as a family practitioner at the time of plaintiff’s care and treatment. After determining that Dr. Henry was board certified in emergency medicine, plaintiff filed a second affidavit from a physician specializing in emergency medicine.

The trial court did not hold the required Ferreira conference, which would have alerted plaintiff to the affidavit of merit deficiencies. The defendant subsequently filed a motion for summary judgment claiming that the affidavits from plaintiff’s physicians specializing in psychiatry and emergency medicine were not from equivalent specialists. In support of the motion for summary judgment, Dr. Henry executed a certification stating that he was acting as family medicine practitioner at the time he treated the plaintiff. The trial court granted the motion for summary judgment and the Appellate Division affirmed.

The New Jersey Supreme Court disagreed. The Court stated that the purpose of the Affidavit of Merit Statute “is to weed out frivolous complaints, not to create hidden pitfalls for meritorious ones.” The Supreme Court noted that there are times when a plaintiff may not know the specific specialty of the physician who rendered his care and treatment and this lack of knowledge should not be the basis for the dismissal of a meritorious medical malpractice claim. Moreover, the alleged inadequacies of the affidavit should have been addressed at a Ferreira conference which was never held in this matter. In order to make it more likely that the timely filing of an affidavit of merit conforms to the statute, a defendant physician must indicate in his answer, if he acknowledges treating the patient, the specialty, if any, in which he was involved when rendering treatment.

For more information regarding the affidavit of merit or any other healthcare law issue, please do not hesitate to contact our Healthcare Law attorneys at Schenck, Price, Smith & King, LLP at 973-539-1000.