



SMITH HAUGHEY

RICE & ROEGGE

ATTORNEYS AT LAW

MEDICAL MALPRACTICE DEFENSE

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DEFENDANTS DO NOT RECEIVE THE BENEFIT OF THE BARGAIN

BY MICHAEL T. MILLER, ATTORNEY

An important issue in any tort litigation, especially medical malpractice, is the amount of the plaintiff's damages. These are generally comprised of economic damages, such as lost wages and medical expenses, and non-economic damages, namely pain and suffering. Economic damages are especially important because, unlike non-economic, they are not capped. Paramount among these are medical expenses.

In today's healthcare environment, there is often a great discrepancy between the amount a provider bills and the amount it actually recovers. Anyone who has ever reviewed an Explanation of Benefits can attest to this fact. Often insurers, including Medicare and Medicaid, pay only a fraction of the actual charges. These insurers have negotiated with the providers to pay far less than what a given treatment or procedure may cost an uninsured individual. This

difference between the unadjusted billed amount and the contracted discount with the insurer is referred to as a "write-off."

In Michigan there has been a persistent question: whether a plaintiff is entitled to recover the amount of the unadjusted medical bills or only the amount actually paid by the insurer in satisfaction of these bills. Unfortunately for defendants, the Michigan Court of Appeals has tentatively resolved that debate by deciding that it is the amount billed, not paid, that the plaintiff can recover. *Greer v Advantage Health Physicians*.

By way of explanation, Michigan law permits introducing evidence post-judgment of compensation that a plaintiff has received from other (i.e. collateral) sources associated with the claim at issue in the case. Collateral sources include expenses paid by health insurance, social security, and

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Smith Haughey Successes

Smith Haughey attorneys, **Carol Carlson** and **Megan VerMerris**, obtained a circuit court dismissal of a case by the plaintiff against a hospital. Plaintiff sought damages for cognitive deficits from hypoxia suffered during a cervical laminectomy. The plaintiff claimed negligence by an anesthesiologist and a CRNA, and that the hospital was liable because they were its "ostensible agents." The judge agreed the undisputed facts showed them to be independent contractors. The hospital could not be vicariously liable for their negligence, if any. The plaintiff's deposition testimony was a key to the judge granting summary disposition.

Jason R. Sebolt, Past MSHRM President



Smith Haughey thanks our own Jason Sebolt for his year of dedicated service as MSHRM's President.

Jason has been a member of MSHRM since 2004 and has previously served as Chair of its Government Affairs Committee and on its Board of Directors. He was President Elect prior to election as President in 2013. As President, Jason oversaw a number of important accomplishments including the Society's financial stabilization for the future, successful redesign of the MSHRM website, and continuing increase in MSHRM membership.

Jason oversaw MSHRM's annual conference in Bay Harbor held in May of this year. The convention included presentations on important recent case law, Medicaid and Medicare issues, and hospital safety concerns.

Jason's term ended in July, 2014, and Janet Bigalow from Port Huron Hospital succeeds him as President. Jason and Smith, Haughey wish Ms. Bigelow the best in the year ahead.

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workers compensation benefits.

Typically, if the evidence is adequate, a plaintiff's award is reduced by the amount of the collateral source to prevent a plaintiff from obtaining a double recovery. However, there is a key exception. If an insurer has a lien against the plaintiff's recovery for benefits provided associated with the claim or injury, then the payment is not considered a collateral source. Thus, the verdict is not adjusted. This is logical because the plaintiff is responsible for payment of the lien amount.

This rationale does not apply in the context of write-offs. Despite this, the Court in *Greer* concluded that write-offs are collateral sources because they are benefits received pursuant to an insurance contract. However, because they are considered collateral sources, the "lien exception" still

applies. Therefore, if a health insurer has a lien for the amount it has paid on behalf of the plaintiff, the defendant is not entitled to a reduction in the verdict for the amount of the insurer's discount. Neither the amounts paid nor the amounts written off will be applied to reduce the verdict, allowing a plaintiff to collect the entire billed amount.

Clearly, this decision is not favorable to defendants. An application for leave to appeal has been filed with the Michigan Supreme Court and Smith Haughey Rice & Roegge has been retained as amicus counsel.



Contact Michael Miller at mmiller@shrr.com or 734-913-6907.

Michigan Supreme Court to Decide Peer Review Privilege

BY CHRISTOPHER M. SPAIN, ATTORNEY

After significant turmoil was created by the Court of Appeals' decision in *Harrison v Munson*, where the Court held that "objective facts gathered contemporaneously with an event" are not subject to the peer review privilege, the Supreme Court quickly decided to weigh in on the issue. However, seemingly avoiding the procedural posture of *Harrison* in favor of a simpler, more stream-lined case, the Supreme Court will address the boundaries of peer review privilege in *Krusac v Covenant Healthcare*.ⁱ

Smith Haughey Welcomes Four Attorneys to Its Medical Malpractice Team

Attorneys Stacy C. Kramer, Edward N. Lynch, Michael T. Miller and Christopher M. Spain



Stacy Kramer, a Grand Rapids native, joined Smith Haughey in January. While building her legal career, Stacy had the opportunity to work in Chicago in defense litigation representing companies large and small.

While Stacy enjoyed her time in Chicago, she is glad to be home in Grand Rapids and discovering all the city now has to offer!



Ed Lynch joins Smith Haughey as a shareholder. Contributing over 25 years of experience, Ed has successfully defended clients ranging from solo practitioners to medical practice groups and large health systems.

If he's not at his desk, you can more than likely find him out in the community. Ed serves in various charitable volunteer and nonprofit advisory roles, including the Sisters of Mercy's Side-By-Side Committee which supports the work of Mercy Education Project in southwest Detroit.



Michael Miller joined Smith Haughey's Ann Arbor team earlier this year from South Carolina. As a newcomer to the area, Michael has been able to hit the ground running, as he has over seven years of experience defending clients both in and out of court in various matters including medical malpractice.

While Michael arrived in Michigan during the dead of winter, he has thoroughly enjoyed getting to know the city (especially during summer).



Chris Spain joins us from San Francisco, California. He brings several years of litigation experience in the areas of consumer finance, medical malpractice, and products liability.

In his short time living in Grand Rapids, he has completed his first triathlon and has officially "put down roots" by purchasing his first house.

Smith Haughey Successes

Jack O'Loughlin and Jason Sebolt obtained a no cause verdict based upon a finding that our client, a neurological surgeon, complied with the standard of care in his performance of a cervical laminectomy. The case involved a 73-year-old Plaintiff who had a history of chronic neck and low back pain following multiple prior surgeries. After the cervical laminectomy at issue, the Plaintiff had residual neurological deficits. After a very short deliberation, the jury returned its verdict in favor of the Defendants.

Attorneys Dale Hebert and Gary Eller received an opinion in favor of our client in a bench trial. The case involved the doctor's management of a chronically ill suicidal patient over a 21 month period in an outpatient setting, with an unfortunate eventual suicide, leaving a young family behind. The Judge ruled in favor of the Defendant— no negligence, after compelling expert testimony and work by Dale Hebert and Gary Eller.

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Both *Harrison* and *Krusac* deal with the discoverability and privilege of peer review materials. In *Harrison*, the Michigan Court of Appeals held that “objective facts gathered contemporaneously with an event” are not subject to the peer review privilege. The Court’s opinion hinged on its interpretation of a nurse’s statement made while completing an incident report. The Court distinguished between “records, data, and knowledge” gathered to permit review of professional practices and “factual information objectively reporting contemporaneous observations or findings[.]” holding the latter is outside the scope of the privilege.

In *Krusac*, the trial court ordered a

hospital to produce the first page of an internal “Improvement Report” completed by a nurse ten minutes after the event at issue. The trial court, relying on the Court of Appeals’ decision in *Harrison*, held the first page of the report contained “objective facts gathered contemporaneously with an event” and was not privileged. After the hospital’s application for leave to appeal was denied by the Court of Appeals, the Michigan Supreme Court granted leave and ordered the parties to address: (1) whether the Court of Appeals erred in its analysis of the peer review privilege in *Harrison*, and (2) whether the trial court in *Krusac* erred when it ordered the hospital to produce the first page of the Improvement Report.

For a copy of the *Harrison* or *Krusac* opinions, or to discuss further, please feel free to contact us.



Contact Chris Spain at
cspain@shrr.com or 616-458-5454.

SHRR is honored to have been selected to appear as amicus counsel in this case.