

# Morris James<sub>LLP</sub>

## Medical Malpractice and Healthcare Quarterly SUMMER 2016

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### AFFIDAVIT OF MERIT NOT REQUIRED AS TO CLAIMS AGAINST DENTISTS

Limiting the scope of the affidavit of merit statute, the Superior Court recently held that an affidavit of merit was not required where a plaintiff filed a claim against dentists. In *Gerstley-Trask v. Felzer*, 2016 WL 1590979 (Del. Super. Ct. Apr. 13, 2016), the Superior Court held that dentists are not “health care providers” under Chapter 68 of Title 18 of the Delaware Code, meaning that no affidavit of merit was required to file a suit against them. The Court specifically noted that dentists are licensed and governed by a separate statute (Chapter 11 of Title 24 of the Delaware Code).

### AFFIDAVIT OF MERIT NOT REQUIRED TO STATE OPINIONS TO A REASONABLE DEGREE OF MEDICAL PROBABILITY

In a recent opinion, the Superior Court noted that an affidavit of merit need not state opinions “to a reasonable degree of medical probability” as required for trial testimony. The Court noted in *Porter v. Christiana Care Health Services, Inc.*, 2016 WL 2894038 (Del. Super. Ct. May 11, 2016) that the affidavit of merit need only state that the affiant has “reasonable grounds to believe” that medical negligence occurred pursuant to 18 Del. C. § 6853(c), which is a less stringent standard.

### PERSON NOT LEGALLY MARRIED DOES NOT HAVE STANDING TO MAINTAIN WRONGFUL DEATH ACTION

In *Lisowski v. Bayhealth Medical Center, Inc.*, 2016 WL 3043620 (Del. Super. Ct. May 11, 2016) the Superior Court interpreted the wrongful death statute, 10 Del. C. § 3721 et seq., held that it is unambiguous, and refused to permit a long-time girlfriend of a decedent from bringing a claim on her own behalf. In that case, the plaintiffs filed a wrongful death suit against Bayhealth Medical Center, Inc. The decedent’s father filed a suit behalf of his son’s estate. Separately, the decedent’s long-time girlfriend filed a claim on behalf of her three children, one of whom was not the decedent’s biological or adopted child.

The Court noted that the wrongful death statute, 10 Del. C. § 3721 et seq., applies only to the spouse, parent, child, and siblings of the decedent. Finding those terms unambiguous, the Court refused to expand the statute beyond its terms to allow a person functioning – but not legally identified – as a spouse from maintaining a wrongful death claim on her own behalf. Therefore, the Court prohibited the girlfriend from maintaining a claim on her own behalf, despite her long-standing relationship with the decedent. As to the one child, the Court noted that the record was unclear as to whether he stood in loco parentis (i.e., assuming the lawful obligations of a parent without

wrongful death suit against Bayhealth Medical Center, Inc. The decedent's father filed a suit behalf of his son's estate. Separately, the decedent's long-time girlfriend filed a claim on behalf of her three children, one of whom was not the decedent's biological or adopted child.

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## **PHARMACY THAT ALLEGEDLY DISCLOSES PROTECTED HEALTH INFORMATION TO FATHER OF SEPARATE CUSTOMER CANNOT FILE THIRD-PARTY CLAIM AGAINST FATHER**

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In an odd case, the Superior Court refused to allow a third-party claim by a pharmacy against a plaintiff's father to join him as a joint tortfeasor for its alleged disclosure of the plaintiff's protected health information (PHI). In *Spence v. Cherian*, 135 A.3d 1282 (Del. Super. Ct. 2016), an HIV-positive patient obtained his medications at Rite-Aid Pharmacy, but he had not disclosed his condition to his parents. His father, who also used the same pharmacy for himself, visited the pharmacy to obtain his wife's medications. While there, a Rite-Aid pharmacist informed the father that there were medications for someone with the same last name, and the father stated that the individual was his son. The pharmacist then gave the medications to the father and, upon questioning, mentioned that the medications were anti-retrovirals or anti-virals. The father left the medications but later learned that they were used for treatment of HIV and told his wife,

who contacted her son to discuss his diagnosis. As a result, the son filed a number of claims against Rite-Aid and the pharmacist for injuries resulting from the improper disclosure of PHI.

Rite-Aid then attempted to file a third-party claim against the father and claimed that he was a joint tortfeasor who was partially at fault for the injuries to his son. The Court noted, and Rite-Aid agreed, that the father could not be liable for many of the claims asserted against Rite-Aid. In addressing certain individual claims, the Court first noted that the father's disclosure of his son's condition to the son's mother did not constitute invasion of privacy because there was no "publicity" with this discussion. Second, the Court held that the father could not be liable for intentional emotional distress because his conduct was not "extreme or outrageous" by discussing his well-meaning concerns with his son. Third, the Court held that the father could not be liable for negligent infliction of emotional distress because the father owed no duty to his son to avoid causing him emotional distress or to avoid acting in a compassionate manner, even if that might cause his son discomfort. Fourth, the Court held that the father could not be liable for promissory estoppel because he did not make any type of promise to his son upon which his son relied to his detriment. As a result, the Court dismissed the third-party complaint and precluded any assertion of joint liability against the father for Rite-Aid's alleged actions.

## **PREJUDGMENT INTEREST IS COST THAT MUST BE TIMELY REQUESTED AFTER VERDICT**

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In a recent ruling, the Superior Court rejected a claim for prejudgment interest that was made more than ten (10) days after the verdict. In *Shen v. Nationwide Mutual Fire Ins. Co.*, C.A. No. S12C-07-007 ESB (Del. Super. Ct. Jul. 6, 2016), the plaintiffs won a verdict at trial. Seventeen (17) days later, the defendant tendered the amount for the verdict, but the plaintiffs refused to accept the amount and instead requested prejudgment interest by motion twenty-eight (28) days after the verdict. In response, the defendant opposed the request and asked the Court to find that the tender of the verdict amount satisfied the judgment

in full. The Court held that prejudgment is a “cost” of litigating a claim and that, therefore, it must be asserted in a timely motion for costs following a trial. Because the plaintiffs failed to file a timely motion for costs, the Court held that the plaintiffs were not entitled to prejudgment interest.

## RECENT DELAWARE MEDICAL MALPRACTICE JURY VERDICTS

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**John Wood, Individually and as Representative of the Estate of Charles Wood v. Dermatologist and his practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N14C-05-187 VLM:** The jury returned a defense verdict. The plaintiff was represented by Gilbert Shelsby, Esq., Robert J. Leoni, Esq. and James J. Meehan, Esq. of Shelsby & Leoni, P.A. The defendants were represented by Colleen Shields, Esq. and Peter Murphy, Esq. of Eckert Seamans

## RECENT DELAWARE MEDICAL MALPRACTICE CASE FILINGS

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**Michael M. McNulty Jr. v. Medical Groups, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-04-029 AML (filed on 4/5/2016):** The plaintiff alleges that Defendants failed to timely diagnose and treat the plaintiff’s Stage V kidney disease. The case was filed by David Culley of Tybout Redfearn and Pell.

**Terry Faupel, personal representative of the estate of Susan Soslow v. Rehabilitation facility and employees, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-04-039 CEB (filed on 4/6/2016):** The plaintiffs allege that Defendants failed to treat plaintiff’s pressure ulcer, so that it got worse and deteriorated. The case was filed by Lawrance Kimmel of Kimmel Carter Roman Peltz & O’Neill, P.A.

**John Boyer, as attorney in fact of Charles Boyer v. Rehabilitation facility, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-04-173 CEB (filed on 4/19/2016):** The plaintiffs allege that the Defendant allowed plaintiff

to contract a necrotic sacral wound and bedsores because of failure to turn him. The case was filed by Gary Nitsche of Weik, Nitsche and Dougherty, P.A.

**Michael Brown; Patricia A. Brown v. Plastic Surgeon and practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-04-181 ALR (filed on 4/20/2016):** The plaintiffs allege that the Defendant botched plaintiff’s leg surgery, making his pain worse, not better. The case was filed by Gary Aber of the Law Offices of Gary W. Aber.

**Matthew Kent; Renee Kent v. Ophthalmology practice and nurses, Superior Court of the State of Delaware in and for Kent County, C.A. No. K16C-04-222 RBY (filed on 4/26/2016):** The plaintiffs allege that the defendants caused an infection in plaintiff’s arm after using the same I.V. needle in his hand and then in his forearm. The case was filed by Lauren Cirrinicione of Murphy & Landon.

**Shirley Gauani; Patricia Gauani, as guardian for Shirley Gauani v. Nursing home and employees, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-04-259 JAP (filed on 4/27/2016):** The plaintiffs allege that the defendants failed to care for plaintiff’s sacral wound so it became infected and festered, developing into sepsis. The case was filed by Brian Jordan of Jordan Law, LLC.

**Blanche Newborn, individually and as the executrix of the estate of Lindsay Hurley Ballas v. Psychiatrist and practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-05-047 VLM (filed on 5/4/2016):** The plaintiffs allege that the defendant gave the decedent samples of Brintellix as a substitute for Prozac, although the defendant was not officially her doctor. Decedent experienced negative side effects from Brintellix, and she ultimately committed suicide. The case was filed by Stephen Potter of Potter Carmine & Associates, P.A.

**Stephane de Roche v. Physician and hospital, Superior Court of the State of Delaware in and for Kent County, C.A. No. K16C-05-014 JJC (filed on 5/12/2016):** The plaintiff alleges that the defendants caused his health to deteriorate after he was catheterized. The case was filed pro se.



**Denise Rowley, administrator of the estate of Wayne Rowley; Wayne Rowley v. United States of America, U.S. District Court for the District of Delaware, C.A. No. 1:16 cv 364 (filed on 5/16/2016):** The plaintiff alleges that the decedent died at Veterans Affairs Medical Center due to medical malpractice. The case was filed by Brian Lutness of Silverman, McDonald and Friedman.

**Harper W. Savage III v. Surgeon and his Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-05-164 AML (filed on 5/17/2016):** The plaintiff alleges that the defendant botched plaintiff's surgery. The case was filed by Bernard Van Ogtrop of Seitz Van Ogtrop & Green, P.A.

**Yvonne Mollett v. Orthopaedic Surgeon and his Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-06-037 JRJ (filed on 6/3/2016):** The plaintiff alleges that the defendant left a drill bit in plaintiff's knee while performing surgery on her. The case was filed by Gilbert Shelsby, Jr. of Shelsby & Leoni, P.A.

**Deborah Knott; Charles Knott v. Podiatrist, his Practice, Hospital, and Home Care Facility, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-06-076 CEB (filed on 6/8/2016):** The plaintiffs allege that Defendants failed to properly care for plaintiff's burns on her feet so that they got infected and her leg had to be amputated to save her life. The case was filed by Gilbert Shelsby, Jr. of Shelsby & Leoni, P.A.

**Charuporn Robinson; Peter Robinson v. Oncologist and her Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-06-077 ALR (filed on 6/8/2016):** The plaintiffs allege that Defendants failed to address plaintiff's infection while she was on chemotherapy and in a weakened state. The case was filed by Randall Robbins of Ashby & Geddes.

**Mark E. Darby v. Nurse and Hospital, Superior Court of the State of Delaware in and for Sussex County, C.A. No. S16C-06-017 ESB (filed on 6/13/2016):** The plaintiff alleges that the defendant

nurse administered epinephrine to plaintiff intravenously instead of intramuscularly, sending plaintiff into a series of adverse reactions that cause him continuing problems. The case was filed by Philip Edwards of Murphy & Landon.

**Patrice Wise, individually and as executrix of the estate of Adelaide Wise v. Hospital, Nurses, and Doctor, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-06-115 DCS (filed on 6/13/2016):** The plaintiff alleges that the defendants failed to care for decedent's pressure wounds and ulcers, letting them fester and grow until they caused her death. The case was filed by Lauren Cirrinicione of Murphy & Landon.

**Maria Elena Juarez Vizcarra; Estate of Maria B. Williams v. Rehab Center and Care Providers, Superior Court of the State of Delaware in and for Sussex County, C.A. No. N16C-06-031 EMB (filed on 6/21/2016):** The Plaintiff seeks punitive damages for alleged gross negligence after suffering eleven falls and injuries causing wrongful death due to the defendants' care. The case was filed by Chase Brockstedt of Baird Mandalas Brockstedt LLC.

**For more information on the Morris James LLP Healthcare Industry team, please visit [www.MorrisJames.com](http://www.MorrisJames.com)**

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<sup>1</sup> Defendants' names have been purposefully redacted.

<sup>2</sup> Id.