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IN PRACTICE

MEDICAL MALPRACTICE

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Supreme Court Explains Notice Provisions of Tort Claims Act

In two decisions that will have significant ramifications for medical malpractice cases, the New Jersey Supreme Court explained the application of the notice provisions of the Tort Claims Act in *Lowe v. Zarghami*, 158 N.J. 606 (1999), and *Eagan v. Boyarsky*, 158 N.J. 632 (1999).

Most importantly, the Court held that routine medical malpractice cases involve the kind of extraordinary circumstances that justify leave to file a late notice of tort claim against physicians who are employed by the University of Medicine and Dentistry of New Jersey (UMDNJ), but practice at private hospitals.

Furthermore, the Court held that the time to file a notice under the Tort Claims Act (TCA) does not begin to run until the patient knew or should have known that the doctor was employed by UMDNJ.

However, in future cases, filing a

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notice of tort claim within 90 days may be a prerequisite to the pursuit of a medical malpractice claim in cases involving UMDNJ doctors. It is therefore essential that lawyers handling medical malpractice cases familiarize themselves with these two decisions.

The Facts

The Supreme Court's analysis in *Lowe* and *Eagan* is best understood after a brief review of the relevant facts. In both cases, the defendants were physicians employed by UMDNJ but practicing medicine at two private hospitals — Kennedy Memorial-Stratford and Robert Wood Johnson, respectively.

In *Lowe*, the defendant operated on the plaintiff in September 1994, and the plaintiff discovered the possibility of malpractice in August 1995. The plaintiff filed suit in February 1996. The defendant filed an answer asserting that he was a public employee and that the plaintiff had failed to file a notice of tort claim.

In July 1996, *Lowe* filed a motion for leave to file a late notice of tort claim. The trial court denied the plaintiff's motion and granted summary judgment to the defendant. The Appellate Division reversed, holding that the defendant was not an employee of UMDNJ, but rather an

independent contractor, and therefore a notice of tort claim was not required. See *Lowe v. Zarghami*, 305 N.J. Super. 90, 97 (App. Div. 1997), rev. 158 N.J. 606 (1999).

In *Eagan*, the defendants operated on the plaintiff in October 1994, and the plaintiff discovered the possibility of malpractice in December 1994. The plaintiff filed suit in September 1996, and both defendants filed answers asserting that they were public employees and that the plaintiff failed to file a notice of tort claim.

Eagan never attempted to file a late notice because the counsel for the plaintiff believed that the trial court lacked jurisdiction to hear a motion for leave to file a late notice of claim after one year pursuant to N.J.S.A. 59:8-9. The trial court initially granted summary judgment to the defendants in October 1997, but then reconsidered and reversed after the Appellate Division issued its opinion in *Lowe*.

Notice Provisions of the Tort Claims Act

In *Lowe*, the Supreme Court first reiterated that UMDNJ is a public entity pursuant to the TCA, citing *Fuchilla v. Layman*, 109 N.J. 319 (1988). The Court then noted that the TCA did not require that notice be given to public employees until 1994 when — in response to *Chatman v. Hall*, 128 N.J. 394 (1992) — the TCA was amended to require that notice be given to public employees within 90 days of the accrual of the claim. *Lowe*, 158 N.J. at 615, citing N.J.S.A.

59:8-3 and 8-8.

The Court then held that the defendants were employees of UMDNJ and not independent contractors. Therefore, they were entitled to a notice of tort claim because "Dr. Zarghami was totally economically dependent on UMDNJ and his work constituted an integral part of UMDNJ's business, both aspects of the relative nature of the work test are satisfied. Therefore, we conclude that UMDNJ faculty, like Dr. Zarghami, practicing in affiliated private hospitals are public employees." *Lowe*, 158 N.J. at 623. Accord, *Eagan*, supra, 158 N.J. at 639-40.

The *Lowe* Court then noted that the time to file a claim may be extended to one year following the accrual of the claim if there are "extraordinary circumstances" that justify the failure to file a claim within 90 days. *Lowe*, 158 N.J. at 624, citing N.J.S.A. 59:8-9. The Court concluded that *Lowe*'s case presented extraordinary circumstances, and therefore the plaintiff should have been permitted to file a late notice of tort claim.

Although the exact identity of the tortfeasor, Dr. Zarghami, was known, his status as a public employee was obscured by his apparent status as a private physician. Plaintiff's failure to file a notice of claim arose not from any lack of diligence; to the contrary, plaintiff filed her claim within the two-year limitation period applicable to malpractice claims against a private physician. What is unusual in this case and in *Eagan v. Boyarsky*, supra, 158 N.J. at 638, also decided today, is that unlike most cases involving public entities and public employees, the defendant-doctors were performing tasks associated generally with private practice and not public service. *Id.* at 629.

The Court said that since *Lowe* had complied with all of the requirements of a typical malpractice claim, and since the plaintiff did not know that the defendant was employed by UMDNJ, "the circumstances in this case qualify as extraordinary" pursuant to the meaning of the Tort Claims Act. *Id.* The Court explained that a late notice of tort claim would not result in any prejudice to the defendant or

UMDNJ, primarily due to the requirement that the defendants maintain medical records. *Id.* at 631.

The *Lowe* Court concluded by instructing UMDNJ to "require clinical professors employed by them to advise their patients, both orally and in writing, that they are employees of UMDNJ." The Court added that it would "be helpful if

The Court held that routine medical malpractice cases involve the kind of extraordinary circumstances that justify leave to file a late notice of tort claim against physicians who are employed by UMDNJ, but practice at private hospitals.

clinical professors[] wore badges identifying themselves as UMDNJ employees." *Id.*

The Eagan Decision

However, in *Eagan*, the plaintiff never attempted to file a late notice of tort claim, even after being advised of the defendants' public employee status. Nevertheless, the Supreme Court held that this was not a bar to the pursuit of the claim:

However, unlike *Lowe*, *Eagan* did not file a notice of a late claim nor did he file a complaint within one year of the accrual of his claim.

However, within six months of his operation, plaintiff had contacted his original attorney, who apparently took no action, and within the normal two-year period for medical malpractice cases had filed medical malpractice complaints against defendants. *Eagan* did not receive information indicating that Dr. Boyarsky and Dr. Mackenzie were public employees until 17 months after the claim was filed. As a result, he undoubtedly believed that a late notice of claim would be barred by the one-year time barrier of N.J.S.A. 59:8-9. *Eagan*, 158 N.J. at 640-41.

The Court therefore permitted *Eagan* to pursue his claim, and in so doing held that the one-year time limit to file a late notice found in N.J.S.A. 59:8-9 is "tolled" until the plaintiff knew of the public employee status of the defendants. *Id.* at 643. The Court explained its rationale:

There is no evidence supporting the conclusion that plaintiff knew defendants were UMDNJ employees. Indeed, plaintiff had no reason to suspect that his doctors were even associated with a public entity. He followed the procedures necessary to claim medical malpractice against a physician in ordinary circumstances. Like plaintiffs in *Feinberg v. State D.E.P.*, 137 N.J. 126 (1994); *Zwirn v. County of Hudson*, 137 N.J. Super. 99 (Law Div. 1975); and *Dambo v. Union City Park Comm.*, 130 N.J. Super. 450 (Law Div. 1974), he diligently pursued his claim. Like those plaintiffs he was thwarted in his action because the employment status of his doctors was obscured. We do not think the Legislature contemplated that the one-year ban would be used to bar a plaintiff-patient from pursuing his medical malpractice claim against a physician whom he had no reason to believe was a public employee. In such unique circumstances, we find that the legislature intended the one-year ban provided under N.J.S.A. 59:8-9 to be tolled. Accordingly, plaintiff should be entitled to file a late notice of claim. *Id.* at 642-43. (Emphasis added.)

The Court added that a late notice of claim would not cause prejudice "because the doctors are required to keep medical records in the ordinary course." *Id.* at 643. The Court did not specify the length of time that the one-year provision of N.J.S.A. 59:8-9 is tolled. However, the only fair reading of the opinion is that the notice provision is tolled until the plaintiff knew or at least should have known of the public employee status of the doctor.

The Court reiterated that "to avoid this problem in the future," UMDNJ must require its employees to give written and oral notice that they are employees of UMDNJ, and the Court again suggested that identification badges be worn by the UMDNJ doctors. *Id.*

The Future of Notice of Tort Claims in Med Mal Cases

The *Lowe* and *Eagan* cases compel the conclusion that in any pending medical malpractice case where the patient did not know and should not have been

expected to know of the public employee status of the doctor — and otherwise acted diligently to pursue the claim — the plaintiff is entitled to file a notice of tort claim within 90 days of discovery of the public employment. In addition, a late notice should be permitted for up to one year.

This will eliminate the problem presented to the malpractice bar in cases arising out of private hospitals, such as *Wajner v. Newark Beth Israel Medical Center*, 298 N.J. Super. 116 (App. Div. 1997), where the plaintiff sued resident physicians employed by UMDNJ and assigned to the Newark Beth Israel Medical Center.

However, it would appear that claims arising out of University Hospital in Newark will require a notice of tort claim within 90 days. Furthermore, there are many other institutions that claim public entity status, such as the Ancora Psychiatric Hospital, the Bergen Pines County Hospital, the Eye Institute of New Jersey, Greystone Park Psychiatric

Hospital, the Marlboro Psychiatric Hospital, the N.J. Veterans Memorial Home, the North Jersey Developmental Center and the Woodbridge Developmental Center. (For those who are interested, the author of this article has a list of such institutions.)

The time limits for the filing of a notice of tort claim at such institutions is unclear, and may depend on whether the plaintiff was advised — orally and in writing — of the public entity status of the institution and public employee status of the doctors.

Finally, in all future cases, plaintiff's counsel will have to carefully inquire at the initial client interview about any notice of public employee status, and carefully check the medical records for the written disclosure mandated by the Supreme Court. Although the Court stated that: "The notice provisions of the Tort Claims Act were not intended as a trap for the unwary," *Lowe*, 158 N.J. at 629, plaintiff's counsel should be very wary in these cases. ■