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Recent Developments: Jones v. Speed: Each Appointment at Which a Physician Negligently Fails to Correctly Diagnose His Patient May Constitute a Separate Negligent Act under Maryland's Medical Malpractice Statute of Limitations

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Estates and Trusts Article and the paternity statutes, was intended to provide a mechanism to assure that children born out of wedlock after their putative father's death may obtain a judicial determination of their paternity for purposes of establishing inheritance and other rights. *Id.* at 481, 578 A.2d at 766. Thus, the court concluded that the circuit court was empowered under the paternity statute to declare whether Brown was the father of Leah, despite the fact that he had died before the paternity action was filed and without regard to whether an award of child support could be made against his estate. *Id.* at 482, 578 A.2d at 766. Consequently, the court reversed the circuit court's judgment and remanded the case with directions to conduct further proceedings to determine, by a preponderance of the evidence, whether Brown was Leah's father. *Id.*

Thus, the court significantly expanded Maryland's paternity laws, as children born out of wedlock may now obtain a declaration of paternity even if the alleged father's death occurred prior to the petition. While the number of fraudulent paternity claims may increase, this concern, as the court noted, does not outweigh the legitimate purpose of promoting the general welfare and best interests of illegitimate children through their right to establish paternity.

— Steven Vinick

***Jones v. Speed*: EACH APPOINTMENT AT WHICH A PHYSICIAN NEGLIGENTLY FAILS TO CORRECTLY DIAGNOSE HIS PATIENT MAY CONSTITUTE A SEPARATE NEGLIGENT ACT UNDER MARYLAND'S MEDICAL MALPRACTICE STATUTE OF LIMITATIONS.**

In the recent decision of *Jones v. Speed*, 320 Md. 249, 577 A.2d 64 (1990), the court of appeals ruled that Maryland's five year statute of limitations does not prevent a patient from bringing a medical malpractice claim against her negligent physician in spite of the fact that the initial misdiagnosis occurred more than five years before bringing suit.

In July of 1978, Elizabeth Jones consulted Dr. William Speed about her severe headaches. Although Mrs. Jones

expressed concern that the headaches may have been caused by an intracranial abnormality, the doctor did not perform a Computerized Axial Tomography study (CAT scan) or other diagnostic studies. Mrs. Jones continued to see Dr. Speed until September 16, 1985. During this period she made sixteen visits to the doctor, but Dr. Speed never ordered diagnostic studies of any kind despite her persistent headaches. On February 13, 1986 she suffered a nocturnal seizure. A neurologist ordered a CAT scan, noted a brain tumor and had it surgically removed. Since then, she has been free of headaches and related symptoms. On July 14, 1986, the Joneses filed suit against Dr. Speed for failure to diagnose the tumor despite his seven years of treatment. *Id.* at 254, 577 A.2d at 66.

Mr. and Mrs. Jones first filed their claim against Dr. Speed with the Health Claims Arbitration Panel. *Id.* at 252, 577 A.2d at 65. Dr. Speed moved for summary judgment claiming that even if he had been negligent in failing to diagnose Mrs. Jones' brain tumor, the injury occurred upon the plaintiff's first visit to him on July 17, 1978, more than eight years before the complaint was filed. As such, her claim was barred by section 5-109(a) of the Courts and Judicial Proceedings Article of the Maryland Code which requires that an action be brought within "[f]ive years of the time the injury was committed," or three years from the date which the injury was discovered. Md. Cts. & Jud. Proc. Code Ann. section 5-109(a)(1), (2) (1989).

Finding that the injury occurred on July 17, 1978, the Chairman of the Health Claims Arbitration Panel granted the doctor's motion. *Jones*, 320 Md. at 252, 577 A.2d at 65. The Joneses filed a notice of rejection of the Chairman's order and filed a complaint in the Circuit Court for Baltimore City. Agreeing that the claim was barred by the statute of limitations, the circuit court also granted Dr. Speed's motion for summary judgment. On appeal, the Court of Appeals of Maryland granted certiorari before the court of special appeals heard the case. *Id.* at 253, 577 A.2d at 65-66.

In their complaint, the Joneses alleged in their first count that Dr. Speed was negligent when Mrs. Jones first visited him and he failed to order tests which would detect her brain tumor. The fol-

lowing counts incorporated the first by reference but also stated that similar acts of negligence occurred on each of Mrs. Jones' subsequent visits. The final count was a joint claim for loss of consortium. *Id.* at 252-53, 577 A.2d at 65. According to the Joneses, each time that the defendant examined Mrs. Jones and failed to order tests which would have revealed the tumor, a separate act of negligence with its own injury occurred. Thus, because many of the appointments took place within five years of filing the complaint, they constituted negligent acts committed within the statute of limitations. *Id.* at 255-56, 577 A.2d at 67.

The Court of Appeals of Maryland agreed with the Jones' reasoning and held that §5-109(a) did not bar their medical malpractice claim by reason of the statute of limitations. However, the court cautioned that on remand they must prove that the defendant committed a separate act of negligence within that five year time frame. Mere proof that she continued to suffer because of an earlier negligent act would not be enough. *Id.* at 261, 577 A.2d at 70.

Dr. Speed advanced several attacks which failed to undermine the Jones' argument. He claimed that accepting the plaintiffs' rationale would breath life into the "continuous course of treatment rule." *Id.* at 256, 577 A.2d at 67. That rule, the court noted, tolled the statute of limitations by delaying the accrual date of undiscoverable medical malpractice until the termination of medical treatment. The rule had been explicitly rejected in *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985). Under that rule, Mrs. Jones would not have been barred from suing as to her first appointment because the treatment of her headaches continued to well within five years of her bringing her suit. However, under the court's decision, she was only permitted to bring suit as to any negligence committed within five years of her complaint, making clear that the "continuous course of treatment rule" remained dead. *Jones*, 320 Md. at 256-57, 577 A.2d at 67.

The court also rejected Dr. Speed's assertion that accepting the Jones' theory would "frustrate the legislative intent to provide absolute protection to health care providers for acts of negligence occurring more than five years before

the bringing of an action.” *Id.* at 257, 577 A.2d at 68. The court explained that the Joneses could only succeed in their suit if they could prove that Dr. Speed had been negligent within the five years prior to filing the complaint. Thus, the doctor could not be held liable for any negligence occurring before that period and, as such, he was protected to the extent that the legislature intended under §5-109. *Id.* at 257, 577 A.2d at 68.

Finally, Dr. Speed argued that the long-standing prohibition against splitting a cause of action prevented the Joneses from bringing suit. He argued that had they brought suit for the initial act of negligence occurring on July 17, 1978, their claim for relief would have necessarily included damages resulting from all subsequent negligent acts when her tumor remained undiscovered. Thus, because the Joneses were precluded from bringing suit on the initial negligence and the initial negligence was so intertwined with the later negligence, to allow the Joneses to proceed on the later counts was the same as permitting them to split their cause of action. *Id.* at 257-58, 577 A.2d at 68.

The court agreed that splitting a cause of action is prohibited in order “to prevent multiplicity of litigation and to avoid the vexation, costs and expenses incident to more than one suit on the same cause of action.” *Ex Parte Carlin*, 212 Md. 526, 532-33, 129 A.2d 827 (1957) quoted in *Jones*, 320 Md. at 258, 577 A.2d at 68 (1990). The flaw with Speed’s reasoning, noted the court, was that the rules prohibiting splitting a cause of action, and application of *res judicata* principles only apply to situations where the plaintiff has in fact brought suit and a final adjudication has occurred. *Jones*, 320 Md. at 259, 577 A.2d at 69. In the Jones’ situation the court explained that prior adjudication addressing the physician’s negligence had never occurred. As such, the court concluded, the Joneses were not precluded from bringing suit as to any acts of negligence occurring within five years of filing their complaint. *Id.*

Through *Jones v. Speed*, 320 Md. 249, 577 A.2d 64 (1990), the Court of Appeals of Maryland has clarified what constitutes a separate cause of action for negligence and thereby starts the accrual of Maryland’s statute of limitations for

medical malpractice. Where a physician repeatedly misdiagnoses his patient’s condition due to negligence, each visit with the doctor may constitute a separate cause of action and thus, begin a new statute of limitations.

— Michael P. Casey

***In re Billman*: DISPOSITION OF SUBSTITUTE ASSETS POSSESSED BY THIRD PARTY AND SUBJECT TO RICO FORFEITURE MAY BE ENJOINED**

In a case of first impression, the United States Court of Appeals for the Fourth Circuit ruled that it was within the power of the district court to enjoin the disposition of substitute assets pending criminal trial or forfeiture under Racketeer Influenced and Corrupt Organizations laws (RICO). The court held that the statute, codified at 18 U.S.C. 1963, prohibited a defendant from avoiding forfeiture of his substitute assets. As a result, transfer of a RICO target’s assets to a third person who did not qualify as a bona fide purchaser for value did not place the assets beyond the court’s jurisdiction. *U.S. v. McKinney*, 915 F.2d 916 (4th Cir. 1990). The Fourth Circuit determined that Congress intended Section 1963 to be construed liberally in order to effectuate its remedial purpose. The purpose, in the context of *McKinney*, was to preserve the defendant’s substitute assets for ultimate forfeiture upon conviction.

Tom J. Billman, implicated in the failure of a savings and loan, was indicted for racketeering, fraud, and conspiracy to commit mail and wire fraud. Before the indictment was issued, however, Billman became a fugitive. After Billman’s flight, Barbara A. McKinney, an alleged co-conspirator, received a number of cryptic telephone calls from Billman’s London attorney and from Billman himself. The purpose of these conversations was to arrange a wire transfer of approximately \$500,000 from the attorney to McKinney. In addition, McKinney agreed to accept \$50,000 from William C. McKnew in order to discharge a debt that McKnew owed to Billman. The debt was listed among Billman’s assets.

At the commencement of the action, the United States District Court for the District of Maryland entered a tempo-

rary restraining order (TRO) prohibiting McKinney from disposing of the \$550,000. *McKinney*, 915 F.2d at 919. The court subsequently held a hearing to determine the validity of the TRO, and to rule on a motion by the United States requesting an injunction restraining disposition of the funds pending the forfeiture proceedings. *Id.*

The district court vacated the TRO and denied the government’s motion for an injunction, reasoning that section 1963 makes only those assets which the government proves are connected to the fugitive’s alleged racketeering activity subject to pretrial restraint. *Id.* The court’s decision was based on the government’s inability to trace \$22,000,000 deposited by the conspirators in Swiss bank accounts to the assets held by McKinney. Specifically, the lower court ruled that the government had failed to prove that the funds in question were actual RICO proceeds, and further determined that after the wire transfer, the funds belonged to McKinney. *Id.*

Believing that a more liberal reading of the statute was appropriate, the court of appeals held that an injunction should have been issued. *Id.* at 919-20. Compelled to follow the lower court’s findings of fact the court treated the questioned funds as legitimate, despite its own opinion to the contrary. *Id.* at 920. Noting that under RICO the money was still subject to forfeiture as substitute assets, the court held that an injunction was proper against a third party who did not qualify as a bona fide purchaser for value. Thus, by determining that McKinney was not a bona fide purchaser, the court held that the TRO was proper. *Id.* at 921.

In its analysis of §1963 (a)(1) and (3), the court recognized that a forfeiture proceeding against funds derived from RICO criminal activity is “an *in personam* proceeding against the defendant, and the forfeiture constitutes partial punishment of the offense.” *McKinney*, 915 F.2d at 920.

Furthermore, amended section 1963 (m) provides for the forfeiture of substitute assets when actual RICO proceeds are unavailable. Subsection (m) specifically provides that “[i]f any of the property described in subsection (a), as a result of any act or omission of the defendant . . . (3) has been placed be-