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# Recent Developments: Geisz v. Greater Baltimore Medical Center: Survival Actions Based on Medical Malpractice Accrue upon Discovery and Fraud Statute Tolls Time for Filing Wrongful Death Claims

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suggested "that a closed circuit television arrangement based on a 'case-specific finding of necessity' would be regarded as impermissible under the Confrontation Clause, that view was not shared by more than four of the justices who sat on the case." *Id.* at 280, 544 A.2d at 798.

Therefore, the *Craig* court felt compelled by necessity to decide the issue of exceptions to the confrontation clause that the Supreme Court had chosen to reserve for another day. The court, taking guidance from the Court of Appeals' of Maryland analysis in *Wildermuth* and following Justice O'Connor's lead in her concurring opinion in *Coy*, held that:

- (1) the requirement of a face-to-face meeting in court is *not* absolute, but *does* admit of exceptions;
- (2) where a face-to-face meeting would, in fact, so traumatize a child-witness as to prevent him or her from reasonably communicating, the State may provide for the testimony to be taken in a setting that, as nearly as practicable, preserves all other aspects embodied in the right of confrontation, but does not require the witness to look directly upon the defendant or to testify in his direct physical presence;
- and (3) if § 9-102 is implemented in the manner prescribed by *Wildermuth*, the implementation will not be deemed so violative of the defendant's right of confrontation as to constitute reversible error.

*Id.* at 280-81, 544 A.2d at 799 (emphasis in the original).

The procedure authorized in the Maryland statute and used in this case did not amount to the kind of face-to-face confrontation that the Supreme Court held was envisioned by the sixth amendment. The child-witnesses testified from the judge's chamber in the presence of a prosecutor, the lead defense attorney, and a technician, while the judge and everyone else remained in the courtroom. The proceedings were broadcast through a closed circuit television setup, with *Craig* having access to her attorney through a private telephone line. The court of special appeals conceded that if the confrontation requirement were absolute as interpreted by Justice Scalia, the "procedure [used in *Craig*] would not pass muster." *Id.* at 281, 544 A.2d at 799. However, the court emphasized that the requirement was not so rigid since "neither the Supreme Court nor the Maryland Court of Appeals—the two courts that bind us—has ever held any aspect of the Confrontation Clause...to the absolute." *Id.*

In *Wildermuth*, the court of appeals held

that the right to face-to-face confrontation was to be tempered by public policy considerations by which the state has a legitimate and compelling interest in authorizing the procedure stated in section 9-102. Articulating that interest more specifically, the *Craig* court held that the state has a two-fold interest in allowing the testimony of a child abuse victim to be given over closed circuit television. Foremost is the fact that if the child-witness is so traumatized by the confrontation so as to be unable to testify, the truth of the matter may never be revealed. Secondly, the state has a legitimate interest in protecting children generally from such trauma. *Id.* at 282-83, 544 A.2d at 800.

*Craig's* second argument was that the trial court failed to follow the proper procedure stated in section 9-102. Citing *Coy*, the court reemphasized that no individualized findings were made that the child-witnesses needed special protection in providing face-to-face testimony when the Supreme Court overturned that decision. The court distinguished *Wildermuth* in that that court's finding was based on testimony as to general perceptions on the difficulty children may have had testifying in court with the alleged abuser's presence. *Id.* at 285, 544 A.2d at 801. In the instant case, there was specific, focused testimony on each child by trained personnel that the child-witnesses would have extreme difficulty testifying in the presence of *Craig* which satisfied the requirements of the statute.

Finally, the court addressed *Craig's* assertion of right of presence. The *Wildermuth* court had also considered the argument that the closed circuit television procedure authorized by section 9-102 violated the defendant's common law and due process right of presence, because the witnesses and defendant were separated during testimony. The *Wildermuth* court rejected that contention since the defendant could hear the questions being asked and answered, could see the proceedings, and could readily communicate with his attorney. Thus, the *Wildermuth* court held that "[t]he statutory procedure did not thwart a fair and just hearing in terms of due process' and there was 'no violation of [the defendant's] due process right to be present.'" *Id.* at 287-88, quoting *Wildermuth*, 310 Md. at 529, 530 A.2d at 291. *Craig* had essentially the same setup and was given ample opportunity to cross-examine the witnesses. Also, there was no violation of the common law right of presence since it had been modified by statute.

The Court of Special Appeals of Maryland has carved out an exception in the sixth amendment's confrontation

clause concerning child abuse cases. Citing strong public policy and the state's legitimate interest in protecting children generally from abuse, the court has made a strong statement in both upholding the accused's rights but also protecting child-witnesses from being traumatized by the courtroom experience.

— George I. Cintron

#### *Geisz v. Greater Baltimore Medical Center*: SURVIVAL ACTIONS BASED ON MEDICAL MALPRACTICE ACCRUE UPON DISCOVERY AND FRAUD STATUTE TOLLS TIME FOR FILING WRONGFUL DEATH CLAIMS

In *Geisz v. Greater Baltimore Medical Center*, 313 Md. 301, 545 A.2d 658 (1988), the Court of Appeals of Maryland held that a wrongful death and survival action, based on medical malpractice, accrues upon discovery of fraud and that Md. Cts. & Jud. Proc. Code Ann. §5-203 (1984 Repl. vol.) operates to toll the time for filing a wrongful death claim.

Plaintiff Elaine Geisz (Elaine), as personal representative of the estate of Steven F. Geisz (Geisz) and as mother and next friend of Steven Geisz, II, brought a survival action and a wrongful death claim against Greater Baltimore Medical Center (GBMC) and Dr. George J. Richards, Jr., alleging medical malpractice ten years after Geisz died of Hodgkin's disease. The Circuit Court for Baltimore County entered summary judgment in favor of the defendants finding that the survival action accrued, as a matter of law, upon the death of Geisz and that the Plaintiff failed to show facts to support a finding of fraud to toll the general three year statute of limitations to bring a wrongful death claim.

Assuming that the summary judgment record could support a finding of fraud, the Court of Special Appeals of Maryland nevertheless held that Elaine and Geisz "by the exercise of ordinary diligence should have discovered the fraud" more than three years prior to the filing of the wrongful death claim. *Geisz v. GBMC*, 71 Md. App. 538, 526 A.2d 635 (1987). The Court of Appeals of Maryland granted certiorari to address the issue of whether the survival claim and the wrongful death action were time barred pursuant to §5-203.

In 1971, Geisz had been diagnosed as suffering from Hodgkin's disease and had been referred to Dr. Richards, who was chief of radiation therapy at GBMC. At

that time, Dr. Richards informed Geisz that there was a 95% chance of cure. Thereafter, under the care of Dr. Richards, Geisz began a treatment program of chemotherapy and radiation therapy. Despite Dr. Richards' assurances that Geisz was receiving the best care possible, Geisz's condition steadily deteriorated. Dr. Richards attributed Geisz's failure to respond to treatment to Geisz being among the 5% of patients who do not improve. In 1975, Geisz died of Hodgkin's disease. According to plaintiff's experts, portal films should have been utilized in order to determine the effectiveness of the radiation therapy. But at no time during the course of Geisz's treatment were portal x-rays taken to show whether radiation was reaching the intended treatment areas.

Ten years after Geisz's death, Elaine read a newspaper article regarding malpractice actions against Dr. Richards, and subsequently, instituted these actions. Elaine contended that the survival claim did not accrue until she had discovered the causes of action in the newspaper article. With respect to the wrongful death claim, the plaintiffs submitted that Dr. Richard's statements constituted fraud, within the meaning of §5-203, and therefore, the time in which to bring the action should be measured from the discovery of the fraud. The defendants countered that the patient's death equated to an accrual for purposes of the survival claim. They further argued that the three year period for bringing the wrongful death claim should be measured from Geisz's death.

The Court of Appeals of Maryland first addressed whether the plaintiffs exercised due diligence to discover a cause of action. The defendants argued that the plaintiffs should have been aware of the malpractice since Geisz's condition deteriorated, even though the expected cure rate was 95%. The court noted that Dr. Richards, in his professional capacity at GBMC, assumed the responsibility to provide and supervise Geisz's treatment. Moreover, the plaintiffs believed that Geisz was among the unfortunate percentage of patients who fail to respond to treatment. Most important, "cancer which was not responding to proper treatment, as contrasted with cancer which was being negligently treated, could have explained Geisz's deterioration and death." *Geisz* at 317. Therefore, the court concluded that the issue as to when the plaintiffs should have discovered the survival claim should have been preserved for a jury.

Next, the court addressed defendants' contention that even if the plaintiffs did not fail to exercise due diligence, the cause of action accrued upon Geisz's death.

First, the defendants relied on CJ § 5-101, which provides that "a civil action at law shall be filed within three years from the date it accrues." *Id.* By analogy to *Trimper v. Porter-Hayden*, 305 Md. 31, 501 A.2d 446 (1985), in which the court held that a survival action predicated on latent disease accrued at death, the defendants argued that a survival action based on medical malpractice accrued at death. *Id.*

In response, the court looked at CJ § 5-109, which beginning July 1, 1975, established that medical malpractice actions "shall be filed (1) within five years of the time the injury was committed or (2) within three years of the date when the injury was discovered, whichever is shorter." *Id.* at 319. Notwithstanding that § 5-109 does not govern the claim since Geisz's injury occurred prior to its enactment, the court used § 5-109 for guidance in deciding the survival claim. Most persuasive was that under § 5-109 a "claim which remains undiscovered for more than three years after the death of the patient may still be brought if instituted within five years of the injury." *Id.* As a result, death of the patient has no impact on the limitations under § 5-109. *Id.* Thus if a medical malpractice claim was predicated on an injury prior to the enactment of § 5-109, then in some instances the five year period for undiscovered malpractice claims would be shortened. *Id.* Therefore, the court concluded that the survival claim was not barred under the discovery rule of the general three year statute of limitations.

The court went on to consider whether the wrongful death claim was timely filed. In an issue of first impression, the court discussed the applicability of CJ § 5-203, which provides:

"If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud."

*Id.* at 322.

The court concluded that fraud or fraudulent concealment of the cause of action, tolled the substantive limitations period in the wrongful death statute, CJ § 3-904(g).

Finally, the court considered whether there existed a factual issue that operated to keep the plaintiffs in ignorance of a wrongful death claim. Relying on *Brack v. Evans*, 230 Md. 548, 187 A.2d 880 (1963), the court reiterated that the fraud element of § 5-203 is satisfied when untrue representations are made with a reckless disregard for their truth or falsity. *Id.* at 331.

Since there was evidence that Dr. Richards made representations about Geisz's condition without the requisite clinical data and that it was possible that such statements were false, § 5-203 was properly invoked. For these reasons the court reversed the summary judgment granted in defendants' favor in order to preserve to the jury's determination as to whether the plaintiffs acted with diligence in view of the defendant's representations.

In summary, this case represents a significant step toward broadening the substantive interpretation of when a cause of action accrues based on the peculiar facts of a given case. Specifically, survival actions based on medical malpractice do not as a matter of law accrue upon death; but rather, accrual depends on discovery of the cause of action.

—Kelly Walfred Miller

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