IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TRAVELERS PROPERTY CASUALTY CORP. a/s/o DENNIS LATINA,	)	
Plaintiff,	)	
5.	)	C.A. No. 01C-01-254(CHT)
GEORGE KLEDARAS, OD., P.A.,d/b/a PENNY HILL EYE CENTER; PAUL C. MITCHELL, O.D., EYE CARE OF DELAWARE, LLC, and ST. FRANCIS HOSPITAL, INC.,	)	
Defendants.	)	

OPINION AND ORDER

On the Defendants' Motion to Dismiss

Submitted: May 10, 2001
Decided: September 18, 2001

Louis J. Rizzo, Esquire, REGER & RIZZO, 1225 North King Street, Legal Arts Building, Suite 900, Wilmington, DE 19801, Attorney for the Plaintiff, Travelers Property Casualty Corporation.

William J. Cattie, III, Esquire, 1201 Orange Street, Suite 502, P.O. Box 588, Wilmington, DE 19899-0588, Attorney for the Defendant, George Kledaras, O.D., P.A.

Christian J. Singewald, Esquire, WHITE AND WILLIAMS LLP, 824 Market Street, Suite 902, P.O. Box 709, Wilmington, DE 19899, Attorney for the Defendant, St. Francis Hospital.

TOLIVER, Judge

STATEMENT OF FACTS

On January 30, 1998, Dennis Latina was employed and working at the Port of Wilmington in Wilmington, Delaware.[1] On that date and unbeknownst to him, a foreign object was blown into Mr. Latina's eye during the course of his employment causing him injury and discomfort. He sought treatment from Dr. George Kledaras that same day. His employer was insured for purposes of the Delaware Workers' Compensation Act, 19 Del. C. Ch. 21, et seq. (hereinafter referred to by section only), by Travelers Property Casualty Corporation.

[1] The record does not reflect the nature of Mr. Latina's employment nor his employer. However, these facts bear no relevance to the disposition of the issues before the Court.

Based upon his examination, Dr. Kledaras diagnosed Mr. Latina with acute bacterial conjunctivitis[2] and prescribed some medications. Two days later, Mr. Latina sought treatment at St. Francis Hospital for a tearing sensation in the same eye. The medical personnel at St. Francis also diagnosed Mr. Latina with conjunctivitis. Dr. Kledaras continued to treat Mr. Latina for conjunctivitis over the next two months. It appears that neither Dr. Kledaras nor St. Francis Hospital examined Mr. Latina's upper right lid for the presence of a foreign object. On March 23, 1998, Dr. Kledaras referred Mr. Latina to Dr. Paul Mitchell. Dr. Mitchell examined the affected area and found a "stone" imbedded in his upper right eye lid. In spite of the action taken by Dr. Mitchell, Mr. Latina's vision worsened, forcing him to seek further treatment at the Wills Eye Hospital in Philadelphia, Pennsylvania. There he received treatment for a corneal ulcer and underwent an operation on May 4, 1998, to repair the

[2] Inflamation of the mucous membrane investing the anterior surface

damage to his eye. Despite this operation, Mr. Latina's vision in his right eye remained at 20/200, requiring that he wear a contact lens in that eye. He received workers' compensation benefits as a result of this injury.

On January 28, 2000, Mr. Latina filed a medical malpractice action against Dr. Kledaras and St. Francis Hospital. See Latina v. Kledaras, Del. Super., C. A. No. 00C-01-230 (CHT). Approximately one year later, on January 29, 2001, Travelers, having paid the aforementioned workers' compensation benefits of behalf of Mr. Latina's employer, asserted its rights to subrogation pursuant to 19 Del. C. §2363, and commenced this action against Dr. Kledaras and St. Francis Hospital Inc. The essence of Travelers' cause of action is the claim that the Defendants were negligent in failing to locate, diagnose and treat the foreign object that was in Mr. Latina's eye. Travelers asked that the Defendants be required to reimburse it for monies that it had to pay, and

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of the eyeball and the posterior surface of the eye lids.

will have to pay in the future, to Mr. Latina in the form of workers' compensation benefits.

Dr. Kledaras and St. Francis have filed motions to dismiss pursuant to Superior Court Civil Rule 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. It is the Defendants' contention that the commencement of Travelers' law suit in this matter is barred by the statute of limitations as provided for by 18 Del. C. §6856. The Defendants also argue that 19 Del. C. §2363 does not provide a right of action by the employer's workers' compensation carrier against a treating physician for that physician's negligence in his or her treatment of a work-related injury suffered by an employee.

Travelers has responded by arguing that the Defendants' reliance on 18 Del. C. §6856 is misplaced. That section, Travelers argues, applies to personal injuries arising from medical negligence. Its claims are by way of subrogation for

workers' compensation benefits and are subject to the three-year statute of limitations set forth in 18 Del. C. §8106. Travelers also asserts that the language of 19 Del. C. §2363 does not bar an insurer's subrogation action against a physician who treats the employee negligently. Nor is there is any case law which would support such a proposition.

DISCUSSION

When reviewing a motion to dismiss, the Court must view the record in a light most favorable to the nonmoving party. All reasonable inferences must be construed most strongly in favor of the plaintiff. Greenly v. Davis, Del. Supr., 486 A.2d 669, 670 (1984); Harmon v. Eudaily, Del Super., 407 A.2d 232 (1979), aff'd, Del. Supr., 420 A.2d 1175 (1980); and Double Z Enter., Inc. v. Gen. Mktg. Corp., Del. Super., C. A. No. 97C-

08-076, Del Pesco, J., (June 1, 2000)(ORDER). A motion to dismiss for failure to state a claim upon which relief can be sustained will not be granted unless the plaintiff will not be able to recover under any circumstances susceptible of proof given the allegations raised in that document. Browne v. Saunders, Del. Supr., 768 A.2d 467 (2001); Spence v. Funk, Del. Supr., 396 A.2d 967 (1978); and Bissel v. Papastavros' Assocs. Med. Imaging, Del. Super., 626 A.2d 856 (1995), appeal denied, Del. Supr., 623 A.2d 1142 (1993). For purposes of reviewing the complaint, those allegations are accepted as true and the test of sufficiency is lenient. State ex rel. Certain-Teed Prods. Corp. v. United Pac. Ins. Co., Del. Super., 389 A.2d 777 (1978); and Daisy Constr. Co. v. W.B. Venables & Sons Inc., Del. Super., C. A. No. 95C-02-011, Babiarz, J. (Jan. 14, 2000)(Mem. Op.)

Entitlement to Subrogation Pursuant to §2363

The authorities are generally in accord - an employer's

right of action against a third party tortfeasor for compensation benefits paid or that will be paid in the future is derivative. Stated differently, this right of subrogation mirrors any rights the employee might have against any tortfeasor unrelated to the employee's employer. This rule applies with equal force to an insurer standing in place of the employer. Southland Corp. v. Self, Conn. Super., 419 A.2d 907 (1980); see also 82 Am. Jur. 2d Workers' Compensation §451 (1992). The purpose of such a provision is to prevent the tortfeasor from avoiding responsibility for the consequences of its wrongdoing, and at the same time, eliminating the possibility of a double recovery by the employee. Dickinson v. Eastern R.R. Bldrs., Del. Supr. 378 A.2d 650 (1977); and Moore v. Gen. Foods, Del. Super., 459 A.2d 126 (1983).

In Delaware, an employee injured in the course of his employment cannot bring suit against his employer even if the employer was negligent. The employee is instead limited to compensation under the Workers' Compensation Act. §2304. That

limitation, however, does not prohibit suit against a third party not involved in that employment who may be responsible for the employee's injury. Section 2363, in this regard, states:

> (a) Where the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee . . . may also proceed to enforce the liability of such third party for damages in accordance with this section. If the injured employee . . . does not commence such action within 260 days after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within the period of time for the commencement of actions prescribed by statute, enforce the liability of such other person in the name of that person . . . .

Subsection (c) dictates that a settlement by either the employee or the employer and the tortfeasor does not bar suit by the nonsettling party. Lastly, Subsection (e) states:

> (e) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable . . . .

It is readily apparent upon viewing the language set forth above, that in this state the compensation carrier has a right of action against any third-party tortfeasor. Dickinson v. Eastern R.R. Bldrs., Del. Supr., 403 A.2d 717 (1979). The extent of that right is derivative of the employee's rights against the tortfeasor and is limited to the compensation benefits paid to an employee injured during the course of his or her employment. Henshaw v. Mays, Ariz. Ct. App., 512 P.2d 604 (1973); see also 82 Am. Jur. §451. The case law is in accord with this conclusion. Distefano v. Lamborn, Del. Super., 84 A.2d 413 (1951), aff'd sub nom Frank C. Sparks Co., Del. Supr., 96 A.2d 456 (1953). Therefore, if

the injury is compensable and proximately caused, at least in part, by a third-party tortfeasor, the compensation insurer may recover any benefits it has paid to the employee pursuant to §2363.[3]

There is no doubt that Mr. Latina's initial injury was compensable. However, Travelers seeks to exercise its right of subrogation against Dr. Kledaras and St. Francis Hospital for the aggravation of that injury which resulted from what is alleged to have been the negligent failure to properly treat the same. In order to exercise that right, there must be a

[3] Weber v. The Medical Center of Delaware, Inc., Del. Super., C. A. No. 90C-MR-88-1 (SCD), Del Pesco, J. (April 26, 1994) (Mem. Op.), cited by the Defendants, is simply not on point. It involved a medical negligence claim wherein the treating physician attempted to bring a third-party action against the motorist who allegedly caused the initial injury which the physician was charged with having negligently treated. This Court held that the motorist and the hospital were not joint tortfeasors. As a result, there was no basis for the physician to seek contribution or indemnification. The case has no bearing on this controversy whatsoever.

determination that aggravation is compensable as well.

Generally speaking the authorities seem to be in accord. The aggravation of the initial injury as a result of medical treatment, even if that treatment was negligently administered, must be deemed as a continuation of that injury and compensable. Volterano v. Workmen's Comp. Appeal Bd., Pa. Commw. Ct., 613 A.2d 61 (1992). Fault is not relevant to causation or compensability. Page v. Hercules, Del. Supr., 637 A.2d 29 (1994); Histed v. E.I. DuPont de Nemours & Co., Del. Supr., 621 A.2d 340 (1993); and Duvall v. Charles Connell Roofing, Del. Supr., 564 A.2d 1132 (1989). Although there is no Delaware authority on this issue which is dispositive, given the scope of the definition of "injury" set forth in 19 Del. C. §2301,[4] there can be little doubt that this

[4] Section 2301 states that:

> "Injury" and "personal injury" mean violence to the physical structure of the body, such disease or infection as naturally results directly therefrom when reasonably treated and compensable occupational diseases and compensable ionizing

interpretation applies to the Delaware statute. But for the initial injury here there would have been no opportunity for the aggravation alleged to have been caused by the instant Defendants. That aggravation must, as a result, be deemed as a compensable continuation of the initial injury. If Travelers cannot escape responsibility to pay workers' compensation benefits in these circumstances, it is entitled to seek reimbursement of the cost of those benefits from the alleged third-party tortfeasor based upon §2363. However, the inquiry does not end here in light of the additional contention raised by the Defendants concerning whether the Travelers filed its claim within the time allotted by law.

The Applicable Statute of Limitations

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radiation injuries arising out of and in the course of employment.

The Defendants contend that since Travelers has alleged that they were negligent in administering medical treatment to Mr. Latina, their complaint should have been filed, as was the complaint filed of behalf of by Mr. Latina, within the two-year statute of limitations provided for 18 Del. C. Ch. 68. That law governs the prosecution of medical negligence actions in this state. The specific provision is set out in 18 Del. C. §6856 and requires that such actions be brought within two years of the date of the injury or death with two exceptions which do not apply here.[5] As noted earlier, Travelers did not file the complaint in this action until January 29, 2001; almost 3 years after Mr. Latina suffered his injury. The stated justification for doing so was that the

[5] The exceptions as provided for in §6856 are as follows:

> (1) Solely in the event of personal injury the occurrence of which, during such period of 2 years, was unknown to and could not in the exercise of reasonable diligence have been discovered by the injured person, such action may be brought prior to the expiration of 3 years from the date upon which such injury occurred and not thereafter; and
> (2) A minor under the age of 6 years shall have until the latter of time for bringing such action as provided for hereinabove or until the minor's 6th birthday in which to bring an action.

instant litigation sought to assert the right of subrogation conferred by §2363. Travelers was therefore pursuing an action based on a statute which would not bar litigation until three years had elapsed from the time the cause of action had arisen pursuant to 10 Del. C. §8106.[6] The Court does not agree.

First, Travelers, as Mr. Latina's subrogee, stands in his place to the extent of workers' compensation benefits paid. Dickinson, 403 A.2d 717. In that regard, its rights are no greater than the rights of the injured employee. Southland, 419 A.2d 907; see also 82 Am. Jur. §451. And, no one disputes that the action filed by Mr. Latina against the Defendants alleges medical negligence and must be brought with the two-

[6] 10 Del. C. §8106 holds in relevant part:

> No action . . . based on a statute . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . .

year period set forth in 18 Del. C. §6856. One must conclude as a result that Travelers is bound by the same statute of limitations. It would certainly be an oddity to say the least, if the insurer's right of subrogation pursuant to §2363 was greater than that allowed the injured employee upon which it is based. Second, Travelers argument that §8106 applies is misplaced. This is not an action based upon a statute. Section 2363 does not confer any substantive rights, just the right to bring suit. Again, it only allows the insurer to stand in place of the injured employee and attempt to recover against a third-party tortfeasor in order to prevent the tortfeasor from avoiding responsibility or unjust enrichment on the part of the employee. Dickinson, 378 A.2d 650; and Moore, 459 A.2d 126. The distinction, albeit a fine one, is nevertheless important and which has been recognized by the Delaware Supreme Court.

In Harper v. State Farm Mut. Auto. Ins. Co., Del. Supr., 703 A.2d 136 (1997), the Court ultimately held that an action

by an injured party for personal injury protection ("PIP") benefits against his insurer was subject to the three-year statute of limitations set forth in §8106, and not the two-year period in §8119. The Superior Court had held that the two-year period was controlling, relying on Nationwide Ins. Co. v. Rothermel, Del. Supr., 385 A.2d 691 (1978). The Supreme Court distinguished Rothermel, reasoning that because of legislative amendments to the PIP provisions of this state's No-Fault Insurance Statute, 21 Del. C. §2118, suits for PIP benefits were causes of action based upon a statute and must be commenced within the three-year period set forth in §8106.

Of particular moment to this case, is the Supreme Court's discussion of the rationale underlying Rothermel. The relevant language is as follows:

> In Rothermel, the majority opinion harmonized the limitation period for an insured's cause of action against a PIP insurer with the limitation period for the PIP insurer's right of subrogation against the individual tortfeasor. The majority noted that a PIP insurer's subrogation rights

> against the tortfeasor were based on or derived from the plaintiff's cause of action against the tortfeasor for negligence. Consequently, the majority decided that a cause of action based upon the right to subrogation for PIP payments should be subject to the two-year limitation period in 10 Del. C. §8119. Nationwide Ins. Co. v. Rothermel, 385 A.2d at 693. Accordingly, the majority declined to apply the 10 Del. C. §8106 limitation period to the plaintiff's action against the PIP insurer because '[i]t would create an unreasonable anomaly to hold that a claim against an insurer for no-fault [PIP] benefits arising out of a personal injury is subject to a different and longer limitations period than the insurer's subrogation right against the [tortfeasor]'.

703 A.2d at 138.

Although Harper is not directly on point, the reasoning employed by the Supreme Court in reviewing Rothermel illustrates and persuasively supports the distinction drawn herein. Moreover, there have been no amendments to §2363 amplifying, altering or otherwise modifying an insurer's right to subrogation since the statute's enactment. Consequently, there is nothing in the statute which would lead to the conclusion that the aforementioned right is distinguishable from or has a basis other than in the rights of the injured

employee to bring suit against someone other than his employer.[7]

[7] In Harper, the Supreme Court also stated:

> Although a claim for PIP benefits still arises from a personal injury, the current statute has at least four provisions that together demonstrate an unambiguous legislative intention to completely separate all litigation regarding the statutory right to PIP benefits from any independent cause of action at common law against a tortfeasor for personal injury.

703 A.2d 139. The absence of any such legislative intent is conspicuous in §2363.

Any way it is viewed, the Court must reach the same result. Travelers had two years within which to file the instant action. It did not do so. Prosecution of whatever cause of action it may have had in this context against the Defendants is therefore barred.[8]

[8] In reaching this result, the Court has not ruled upon the obligations between Travelers and Mr. Latina regarding any lien Travelers may have against the proceeds of the litigation, if any, Mr. Latina instituted against Dr. Kledaras and St. Francis Hospital.

CONCLUSION

For the reasons stated herein, the Defendants' Motion to Dismiss must be, and hereby is, **granted.**

IT IS SO ORDERED.

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TOLIVER, JUDGE