

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROGER HAUTH, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 00-166-JJF
 :
 ROBERT P. LOBUE, ESQUIRE, :
 :
 Defendant. :

Kevin William Gibson, Esquire of Gibson & Perkins, L.P., Media,
Pennsylvania.
Attorney for Plaintiff.

Charles Slanina, Esquire of Tybout, Redfearn, & Pell, Wilmington,
Delaware.
Attorney for Defendant.

J.R. Julian, Esquire of J.R. Julian, P.A., Wilmington, Delaware
Attorney for Graver Technology, Intervenor.

OPINION

September 28, 2001
Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is Graver Technology's ("Graver") Motion To Intervene. (D.I.14). For the reasons stated below, the Court will deny the motion.

Background

On February 5, 1996, Plaintiff, during the course of his employment, was injured in an industrial accident at Graver. (D.I.24 at 1). Graver, Plaintiff's employer, paid worker's compensation benefits to or on behalf of the Plaintiff for his personal injuries arising out of the February 5 accident. (D.I.14 at 3).

Following the accident, Plaintiff retained the Defendant, Robert P. Lobue, Esquire, to pursue negligence actions against those third parties allegedly responsible for Plaintiff's injuries. (D.I.24 at 2). Plaintiff's actions were eventually dismissed for failure to file during the applicable statute of limitations. Id.

On March 10, 2000, Plaintiff filed an action against the Defendant alleging legal malpractice for failure to prosecute Plaintiff's claims against the third parties responsible for his injuries. (D.I.1). Graver then instituted a worker's compensation lien against any third party recovery resulting from the February 5, 1996 accident and associated personal injuries, pursuant to Del. Code Ann. tit. 19, § 2363 (1995). On January 5,

2001, Graver filed a Motion To Intervene, which is the subject of this memorandum order. (D.I.14)

DISCUSSION

A. Jurisdiction

This Court has proper diversity jurisdiction pursuant to 28 U.S.C. § 1332 (2000). Both parties agree that a federal court sitting in diversity jurisdiction is bound by the applicable state law. (D.I.23 at 3; D.I.24 at 5, each citing City of Philadelphia and Philadelphia Housing Authority v. Lead Industries Assoc. Inc., 994 F.2d 112, 122 (3d Cir. 1993)). Furthermore, both parties agree that Delaware law is controlling in this diversity action. (D.I.23 at 2; D.I.24 at 5). Therefore the Court will examine the applicable Delaware law.

B. Under Delaware Law, Will A Worker's Compensation Lien Attach To The Proceeds Of A Legal Malpractice Action

In support of its Motion To Intervene, Graver contends that under Delaware law, a worker's compensation lien should attach to the proceeds of a legal malpractice action and therefore, intervention should be permitted. There is no Delaware Supreme Court decision directly applicable to the instant case. (D.I.24 at 5). However, Graver contends that the Delaware Supreme Court's consistency in holding that an employer's worker's compensation lien is absolute, subject to a pro-rata sharing of the cost of recovery, is applicable to the instant case. Graver contends that their lien should be absolutely protected and

attach to the proceeds of the legal malpractice action, an action which arose from the original compensable injuries. (D.I.24 at 5, citing Cannon v. Container Corp. of America, 282 A.2d 614 (Del. Super. Ct. 1971)). Furthermore, Graver contends that the only case that has addressed subrogation and worker's compensation liens in legal malpractice actions, Mt.Pleasant Special School District v. Gebhart, 378 A.2d 146 (Del. Ch. 1977), is a Chancery Court case that is clearly distinguishable from the instant case and also widely criticized in other jurisdictions, (D.I.24).

In Mt. Pleasant, the Defendant, Gebhart, was injured during the course of her employment at Mt. Pleasant Special School District, and subsequently received worker's compensation benefits. 378 A.2d 146 (Del. Ch. 1977). Gebhart retained an attorney and brought suit against the third party responsible for her injury. Id. at 147. The suit was eventually dismissed for failure of counsel to prosecute. Id. As a result of the dismissal, Gebhart filed an action against her attorney for malpractice and breach of contract. Id. After a jury verdict in Gebhart's favor, Mt. Pleasant Special School District, asserted a worker's compensation lien, pursuant to Del. Code Ann. tit. 19 § 2363(e), over a portion of the judgment. Id. The Chancery Court found no evidence that the jury verdict was premised solely on the damages that Gebhart would have recovered for her physical injuries had her attorney properly prosecuted the suit. Id. at

150. Ultimately, the Chancery Court held that the employer had no right to subrogation in the legal malpractice action. Id.

In addressing Mt. Pleasant, Graver contends that it is distinguishable from the instant case. In Graver's view, the Mt. Pleasant holding was premised on a finding that the damages awarded were for malpractice damages, not specifically for the physical injury. Graver contends that in the instant case the Plaintiff's potential damages in the legal malpractice action are directly traceable to the personal injuries arising from the February 5, 1996 industrial accident.

In response, Plaintiff contends that Graver would have no right to a subrogation in a legal malpractice action under Delaware Law, and therefore, Graver's Motion To Intervene is futile and accordingly, should be denied. (D.I.23). Plaintiff contends that the Chancery Court's decision in Mt. Pleasant, holding that there was no right to a subrogation in a legal malpractice action, is the controlling Delaware law. (D.I.23 at 2-3). Specifically, Plaintiff responds that Mt. Pleasant precedent should not be disturbed by this Court to grant Graver's Motion To Intervene, thereby enabling Graver to assert their worker's compensation lien.

Furthermore, Plaintiff contends that the Delaware Superior Court considered the Mt. Pleasant case in Stevenson v. Haveg Indus. and concurred with the denial of subrogation in a legal malpractice action. No. 84A-AP-19, 1985 Del. Super. Ct. LEXIS

1075 (April 15, 1985). Plaintiff contends that the Superior Court concurred with the Chancery Court's Mt. Pleasant opinion in that "even if it appears that a party is getting a double recovery, the fact that it involves a claim of legal malpractice will not support the assertion of a comp lien." (D.I.23 at 3).

In Stevenson v. Haveg Indus. the Plaintiff, Stevenson, was injured during the course of her employment. No. 84A-AP-19, 1985 Del. Super. Ct. LEXIS 1075, *1 (April 15, 1985). Ultimately surgery was required to treat Stevenson's injury; however, the surgery resulted in severe disabilities. Id. at *2. Stevenson subsequently sued and settled with the surgeon. Id. Following the settlement, Haveg Industries asserted a worker's compensation lien against Stevenson's recovery. Id. In Stevenson the Parties stipulated to the Superior Court that Stevenson's "condition both before the surgery and after the surgery was work related," and that Stevenson's "injuries are related to the original injury." Id. at *6, *8. The Superior Court found that "workmen's compensation is allowed for the direct and natural consequences of the injury caused by a compensable industrial accident." Id. at *7 citing 1 Larson, The Law of Workmen's Compensation §13.11, p3-348.91. Accordingly, the Superior Court held that "fault on the part of the physician does not break the chain of causation" and allowed the worker's compensation lien. Id. The Superior Court held that "worker's compensation extends to the result of the faulty medical treatment," and distinguished Mt. Pleasant

because "the recovery against the attorney was not compensation for [Gebhart's] physical injury." Id. at *7, *8.

In response, Graver contends that Stevenson stands for the proposition that "one of the objectives of the Delaware Workers Compensation Act was to prevent double recovery." (D.I.24 at 6 citing Stevenson v. Haveg Indus., No. 84A-AP-19, 1985 Del. Super. Ct. LEXIS 1075 (April 15, 1985)). Graver contends that denying intervention and subrogation, and thereby disallowing their worker's compensation lien, would result in double recovery for the Plaintiff and therefore be in violation of Delaware Law.

The role of this Court is to apply the current law of Delaware, the controlling state law in this diversity action, leaving it undisturbed. City of Philadelphia and Philadelphia Housing Authority v. Lead Industries Assoc. Inc., 994 F.2d 112, 123 (3d Cir. 1993). The Court "must apply the law of the forum as we infer it presently to be, not as it might come to be." Id. citing Tilder v. Eli Lilly & Co., 851 F.2d 418, 424 (D.C. Cir. 1988). The Court concludes that it will apply the law of Delaware as stated in Mt.Pleasant Special School District v. Gebhart. 378 A.2d 146 (Del. Ch. 1977).

After examination, the Court can find no distinction between the facts of Mt. Pleasant and the facts of the instant case. Each case started with a compensable personal injury, followed by a suit against the responsible third parties that resulted in dismissal for failure to prosecute, and ended with a legal

malpractice action against the attorney. Additionally, as in Mt. Pleasant, there is no evidence before the Court that the potential damages awarded to the Plaintiff for legal malpractice will be premised solely upon the damages that the Plaintiff "would have recovered for her physical injuries had her attorney properly prosecuted the suit." 378 A.2d 146, 150 (Del. Ch. 1977). Furthermore, there is no evidence that any recovery against the Defendant will be compensation for Plaintiff's physical injuries. See Stevenson v. Haveg Indus., No. 84A-AP-19, 1985 Del. Super. Ct. LEXIS 1075, *9 (April 15, 1985). As a result, the Court is not persuaded by Graver's attempts to distinguish Mt. Pleasant from the instant case. Accordingly, the Court will apply the law of Delaware, as stated in Mt. Pleasant Special School District v. Gebhart, 378 A.2d 146 (Del. Ch. 1977), that there is no right to subrogation in a legal malpractice action.

The Court recognizes that "workmen's compensation is allowed for the direct and natural consequences of the injury caused by a compensable industrial accident." Stevenson v. Haveg Indus., No. 84A-AP-19, 1985 Del. Super. Ct. LEXIS 1075, *7 (April 15, 1985) citing 1 Larson, The Law of Workmen's Compensation §13.11, p3-348.91. However, after review, the Court is not persuaded that the Defendant's legal malpractice is a direct and natural consequence of the February 5, 1996 industrial accident and corresponding injuries. Furthermore, there is no stipulation by

the Parties that the Plaintiff's legal malpractice injuries are one in the same with the personal injuries from the February 5, 1996 accident. Additionally, the Court is more persuaded by the precedential weight of Mt. Pleasant, addressing similar facts and holding that, in Delaware, there is no right to subrogation in a legal malpractice action.

A Motion To Intervene must be denied if the Motion is "futile." In Re Fine Paper Antitrust Litigation, 695 F.2d 494 (3d Cir. 1982). Because the Court finds no right to subrogation in a legal malpractice action under Delaware Law, Graver's Motion To Intervene and the assertion of its worker's compensation lien is futile. Accordingly, the Motion To Intervene will be denied.

Conclusion

For the reasons discussed, the Motion To Intervene (D.I.14) will be denied.

An appropriate Order will be entered.

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FOR THE DISTRICT OF DELAWARE

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O R D E R

At Wilmington this 28 day of September, 2001, for the reasons set forth in the Opinion issued this date;

IT IS HEREBY ORDERED that Graver Technology's Motion To Intervene (D.I.14) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE