

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TERRY Y. LOFLAND and,	:
JOHN J. LOFLAND,	: C.A. No. K12C-09-044 WLW
	:
Plaintiffs,	:
	:
v.	:
	:
DAVID J. CLONEY, M.D.,	:
individually, and ATLANTIC	:
SURGICAL ASSOCIATES, LLC,	:
a Delaware limited liability company,	:
	:
Defendants.	:

Submitted: October 30, 2013

Decided: January 23, 2014

**ORDER**

Upon Defendants' Partial Motion to Dismiss  
the Amended Complaint. *Granted.*

William D. Fletcher, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware;  
attorney for Plaintiffs.

Colleen D. Shields, Esquire and Christopher C. Popper, Esquire of Eckert Seamans  
Cherin & Mellott, LLC, Wilmington, Delaware; attorneys for Defendants.

WITHAM, R.J.

## **INTRODUCTION**

Before the Court is Defendants' Motion to Dismiss the Amended Complaint. Specifically, the Court must decide whether to dismiss Count III of Plaintiffs' Amended Complaint, which asserts a private cause of action for double damages pursuant to 42 *U.S.C.* § 1359y(b)(3)(A).

## **BACKGROUND**

On September 26, 2012 Plaintiffs Terry Y. Lofland (hereinafter "Terry") and John J. Lofland (collectively "Plaintiffs") filed a complaint against Defendants David J. Cloney and Atlantic Surgical Associates, LLC (collectively "Defendants") asserting claims of medical negligence and loss of consortium. Plaintiffs allege that Terry suffered injuries as a result of a series of surgeries Defendants negligently performed on her. On September 5, 2013, the Court granted Plaintiffs' motion to amend the complaint.

Plaintiffs' Amended Complaint includes an additional count (Count III) asserting a private cause of action pursuant to the Medicare As Secondary Payer statute (hereinafter "MSP"). Specifically, Plaintiffs allege that Terry is a Medicare beneficiary, and Medicare has paid approximately \$42,185.23 towards Terry's medical expenses arising from the surgeries. Plaintiffs assert that Defendants' medical negligence caused Medicare to pay out this amount, and Plaintiffs now seek double recovery of this amount (\$84,370.46) "as a private attorney general" pursuant to the private cause of action provision of the MSP.

Defendants filed the instant Partial Motion to Dismiss on October 14, 2013.

Defendants argue that Count III of the Amended Complaint should be dismissed because Plaintiffs are not permitted to assert a private cause of action under the MSP. Plaintiffs respond that because a finding in favor of Plaintiffs on the state tort claims would give rise to a private cause of action under the MSP, this Court should either stay or sever the MSP claim until the tort claims are resolved.

### **STANDARD OF REVIEW**

When deciding a motion to dismiss under Rule 12(b)(6), all well-pleaded allegations in the complaint must be accepted as true.<sup>1</sup> The test for sufficiency is a broad one: the complaint will survive the motion to dismiss so long as “a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”<sup>2</sup> Stated differently, a complaint will not be dismissed unless it clearly lacks factual or legal merit.<sup>3</sup>

### **DISCUSSION**

Section 1395y(b)(3)(A) of the MSP provides for:

a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment(or appropriate reimbursement) in accordance with paragraphs (1) and (2) (A).<sup>4</sup>

---

<sup>1</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

<sup>2</sup> *Id.* (citing *Klein v. Sunbeam Corp.*, 94 A.2d 385 (Del. 1952)).

<sup>3</sup> *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

<sup>4</sup> 42 U.S.C. § 1395y(b)(3)(A).

Stated differently, the MSP creates a cause of action “allowing for the recovery of double damages where a primary payer fails to cover the costs of medical treatment.”<sup>5</sup> Tortfeasors fall within the scope of the MSP’s definitions of primary plan and primary payer.<sup>6</sup>

The Third Circuit has explained that the MSP actually provides for two causes of action: one for the United States government to pursue when the Medicare Trust Fund makes a conditional payment that is not reimbursed, and “a private cause of action with no particular plaintiff specified. . . anytime a primary payer fails to make required payments.”<sup>7</sup> Defendants urge this Court to follow a recent decision by the Sixth Circuit, in which that court found that the MSP only allows for causes of action against private tortfeasors brought by Medicare, not for lawsuits against tortfeasors by private parties.<sup>8</sup> Not only does this reasoning contradict the Third Circuit’s holding describing two separate causes of action, but it also seems counterintuitive to interpret a statute that by its express terms provides for a “private” cause of action to not permit causes of action by private parties. This Court does not find the Sixth Circuit decision relied upon by Defendants persuasive.

---

<sup>5</sup> *In re Avandia Mktg., Sales Practices and Prods. Liability Litig.*, 685 F.3d 353, 359 (3d Cir. 2012).

<sup>6</sup> *See Bio-Medical Applications of Tenn., Inc. v. Cent. States Southeast and Southwest Areas Health and Welfare Fund*, 656 F.3d 277, 287 (6th Cir. 2011).

<sup>7</sup> *In re Avandia*, 685 F.3d at 359.

<sup>8</sup> *Bio-Medical Applications of Tenn.*, 656 F.3d at 292-93.

This leaves the Court to resolve whether the Plaintiffs in the case *sub judice* can bring a claim under the MSP against Defendants. While there is no Third Circuit authority directly on point, the Court finds the holding of the Eleventh Circuit in *Glover v. Liggett Group, Inc.*<sup>9</sup> highly persuasive and consistent with the Third Circuit’s dual-cause of action theory. In *Glover*, private plaintiffs brought a class action against two cigarette manufacturers that alleged state tort claims and federal MSP claims against the defendants.<sup>10</sup> The Eleventh Circuit affirmed the district court’s granting of the defendants’ motion to dismiss the MSP claims.<sup>11</sup>

In reaching its holding, the *Glover* court carefully analyzed the language of § 1395y(b)(3)(A). In construing the text of § 1395y(b)(3)(A) and the other portions of the statute referenced in the provision, the court explained § 1395y(b)(3)(A) “does not create a private cause of action against alleged-as opposed to proved-tortfeasors whose responsibility for payment of medical costs has not been previously established. . . .”<sup>12</sup> The court found that under the statute, demonstrating the defendants’ responsibility to pay for a Medicare beneficiary’s expenses is a condition precedent to the defendants’ obligation to reimburse Medicare.<sup>13</sup> Such responsibility

---

<sup>9</sup> 459 F.3d 1304 (11th Cir. 2006).

<sup>10</sup> *Id.* at 1307.

<sup>11</sup> *Id.* at 1310.

<sup>12</sup> *Id.* at 1309.

<sup>13</sup> *See id.*

can be demonstrated by a judgment in favor of the plaintiffs.<sup>14</sup> Thus, the Eleventh Circuit held that “an alleged tortfeasor’s responsibility for payment of a Medicare beneficiary’s medical costs must be demonstrated *before* an MSP private cause of action for failure to reimburse Medicare can correctly be brought under section 1395y(b)(3)(A).”<sup>15</sup> The court explained that a separate cause of action under the MSP can be brought after defendants pay “a judgment or settlement to a Medicare beneficiary, but fails to pay Medicare its share.”<sup>16</sup>

Based on the persuasive reasoning of *Glover*, Count III of Plaintiffs’ Amended Complaint should be dismissed. Plaintiffs have yet to demonstrate Defendants’ responsibility to pay for Terryl’s medical expenses. In other words, Plaintiffs have not proven their tort claims against Defendants. Additionally, even if Plaintiffs do prevail in their tort claims, Defendants must still fail to reimburse Medicare before Plaintiffs can pursue their private cause of action under the MSP. Thus, the Court finds that Plaintiffs can only pursue an MSP claim for double damages against Defendants in a separate cause of action. Count III of the Amended Complaint clearly lacks legal merit.

Plaintiffs urge the Court to retain jurisdiction over the MSP claim by staying or severing the MSP claim until the tort claims are resolved. Plaintiffs provide no

---

<sup>14</sup> *Id.*

<sup>15</sup> *Glover*, 459 F.3d at 1309.

<sup>16</sup> *Id.* at 1310.

*Lofland v. Cloney, et al.*  
C.A. No. K12C-09-044 WLW  
January 23, 2014

legal authority for this proposition. Given Plaintiffs' failure to establish the condition precedent of demonstrated responsibility under the MSP, it is not proper for the Court to consider the MSP claim at this juncture. Thus, Count III of the Amended Complaint must be dismissed. However, because Plaintiffs may be able to establish their MSP claim if they receive a judgment against Defendants, the Court shall dismiss the count without prejudice.

### **CONCLUSION**

For the foregoing reasons, Defendants' Partial Motion to Dismiss is GRANTED. Count III of Plaintiffs' Amended Complaint is dismissed without prejudice.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh