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Seeing Eye to Eye

Driven by coverage issues, lawyers reach multimillion-dollar settlement of malpractice suits against N.Y. tristate area's king of laser eye surgery

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Joseph Dello Russo, the eye doctor whose aggressive ad campaigns made him the king of laser surgery in the New York metropolitan area, wants to stop fighting 16 former patients from New Jersey who claim in malpractice suits he made their vision worse.

Without admitting that Dello Russo did anything wrong, his lawyers agreed on March 12 to settle on the issue of liability and let an arbitrator decide how much compensation, if any, is due to plaintiffs treated at one of his clinics, the New Jersey Eye Center of Bergenfield.

Under the agreement presented to Bergen County Superior Court Judge Peter Doyne, the decisions by the arbitrator, retired Judge Arthur Minuskin, will be nonappealable.

There was one glitch. Dello Russo wasn't happy that word of the settlement leaked out last week, and he said during a break in treating patients in his New York office on Friday that there was no deal.

His lawyer, Steven Kern of Bridgewater's Kern Augustine Conroy & Schoppmann, says Doyne told lawyers on Thursday that confidentiality appeared to be a central element of the settlement and that Dello Russo had a right to seek cancellation of the pact.

It remains to be seen whether Dello Russo exercises that right and tries to scuttle a settlement that looks like an ingenious compromise.

Insurance issues drove the warring litigants together.

Dello Russo's personal malpractice carrier, Interstate Insurance Co., has conceded it is on the hook for claims totaling up to $3 million. The purpose of the settlement was to lock in an even bigger policy with Princeton Insurance Co.

For weeks, Princeton had been denying that its $24 million worth of coverage on the Eye Center alone was not available for the claims in the case. That denial gave Dello Russo the right to settle on his own. Four days after his lawyers did so, Bergen County Superior Court Judge Joseph Yannotti ruled that Princeton has to provide coverage.

The company can appeal. It also would have an opportunity to prove that the separate peace between Dello Russo and the plaintiffs is collusive and therefore not binding.

Would Princeton's cash be needed? Plaintiffs' lawyers have said in the past that some of their cases might be worth seven figures, but the defense suggests that's hype.

"If you ask the plaintiffs, it's seven or eight hundred million dollars," Kern says. "If you ask the defendants, it's about $1.95. It's somewhere between those figures."

Dello Russo Not Liable for Claims

Lawyers for Princeton did not return calls for comment on whether they plan to appeal, bring a collusion charge or decide to go along hoping Minuskin will be stingy with Princeton's money. Under the settlement, Dello Russo is not personally responsible for the claims.

The suits allege that Dello Russo deviated from the standard of care, that patients were treated by at least one staff member who did not have the necessary licenses and that some patients suffered permanent eye damage.

The charges were repeated during years of pretrial maneuvering that required state Supreme Court intervention at one point. The allegations clashed with Dello Russo's much-advertised claims that his brand of laser surgery is safe and effective and that the number of patients with post-operative problems is low, given the thousands of people he has treated at his clinics in New Jersey, Manhattan and Brooklyn.

In a landmark decision in Febru-

ary, the Supreme Court ruled that as a doctor subject to professional negligence claims, Dello Russo couldn't also be sued for false advertising under consumer fraud statutes -- a ruling applicable to all professionals, including lawyers.

His principal adversaries throughout have been Bruce Nagel and David Mazie of Livingston's Nagel Rice & Mazie, who represent eight of the settling plaintiffs.

Three years ago, Dello Russo sued the firm for defamation for running newspaper ads inviting patients to seek the firm's legal advice. The suit was dismissed on free speech grounds.

As far as Nagel is concerned, the deal is a go. "I'm pleased that a large group of cases have settled," Nagel said on Friday, but he, Mazie and other lawyers didn't return calls or declined to comment on the settlement, citing the confidentiality clause.

Despite the clause, none of the plaintiff, defense or insurance company lawyers at two settlement hearings requested that the record of the proceedings be sealed and the video system Doyne uses churned out a tape that was placed in the courthouse inventory of recordings available to the public.

The agreement, in *Dell'Ermo v. New Jersey Eye Center*, Ber-L-009074-01, calls for the plaintiffs to stop pursuing Dello Russo on liability or for personal contribution, to take assignment of his rights to the Princeton policy and to consolidate the cases.

Dello Russo waived his right to contest liability or proximate cause. His lawyers will not be allowed to present live witnesses on his behalf. They will be allowed to rebut the plaintiffs or their experts and make arguments to the arbitrator, whose decisions will not be appealable. One plaintiff who is taking part in the process has reserved the right to appeal.

Removing the Tinge of Collusion

The impetus for the settlement was Princeton's refusal to provide coverage. Under the so-called *Griggs* doctrine, named for *Griggs v. Bertram*, 88 N.J. 347 (1982), defendants whose carriers deny coverage can settle with the plaintiffs. That settlement binds the carrier if the courts later find coverage exists.

To prevent collusion against a carrier by the defendant and plaintiff, an insurer doesn't have to pay unreasonable sums. In this case, Dello Russo and the plaintiffs are betting that bringing in a respected former jurist, like Minuskin, to set the damage amounts will dispel any suggestion of collusion.

Kerns told Doyne on March 11 that Dello Russo settled because of the position taken by Princeton Insurance Co. and otherwise would contest the allegations vigorously "and is of the position that he has engaged in no wrongdoing and has not deviated from recognized standards of care and would vigorously defend the care he rendered to patients as appropriate."

For any plaintiff, using *Griggs* as a weapon is dangerous because there is a risk that the carrier will prevail in the declaratory judgment action, leaving behind a judgment-proof defendant. In this case, the carrier didn't prevail.

In his March 16 ruling in *New Jersey Eye Center v. Princeton Insurance Co.*, Ber-L-299-04, Yannotti rejected the carrier's assertion that its policies on the clinic for the relevant years, 1999 through 2001, didn't cover Dello Russo and his medical staff.

The company had argued that the Eye Center wasn't vicariously liable for physician malpractice and that the doctors' acts were intentionally excluded.

"Princeton's assertions are without merit," Yannotti ruled. "In general, the Princeton policy provides that Princeton will pay all sums that the New Jersey Eye Center may be legally required to pay for an act or omission resulting from a 'medical incident,' which involves the provision of professional services."

He added, "Under Princeton's interpretation, the policy would only cover medical incidents involving the Center's two receptionists, its office manager and the information systems employee."

He also suggested that the size of the premiums belied the suggestion that coverage was limited. The Eye Center paid premiums of $39,000, $104,000 and $106,000. That provided coverage of $6 million per medical incident with an $8 million aggregate, bringing the total limit to $24 million.

Mazie says the coverage decision has wider application because it rejects the theory that an insurance company can provide medical liability protection for a professional association or corporation without implicating the professionals in the group.

Daniel Pomeroy of Springfield's Mortenson & Pomeroy, a firm outside the case that has done defense and plaintiffs' work in medical malpractice cases, says policies tend to differ, so it's hard to make generalizations about a ruling like Yannotti's. He also says many doctors in groups rely solely on their personal coverage and do not obtain separate medical liability policies for the practice as a whole.

In Dello Russo's case, if only the $3 million Interstate coverage is available and the claims exceed that sum, each plaintiff would receive a pro rata share.

At one point during the March 11 hearing when the issue of who would pay the costs of the arbitration arose, Kern got a laugh when he blurted out, "Princeton." In the end, the lawyers decided the parties would share the costs.

If the arbitration goes forward in Dello Russo's case and the coverage is there, it won't be the end of litigation for Dello Russo.

A federal case against him remains and at least one new case against him is in the pipeline. "I'm preparing one right now," says Alan Medvin, of Newark's Medvin & Elberg.■