JACKSON & CAMPBELL, P.C.

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Decisions

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Massachusetts High Court Upholds Enforcement of Consent to Settle Clause in Liability Policy, Releasing Insurer from Liability for Insured's Refusal to Settle

In a decision issued on December 16, 2019, the Massachusetts Supreme Judicial Court held that "consent-to-settle" clauses permitting professional liability insurers to hand settlement power over to their insureds are enforceable, affirming a decision of the lower court finding that the insurer of an engineer was not liable for the insured engineer's refusal to settle litigation over home design defects. *Rawan v. Continental Casualty Company*, --- N.E.3d ----, Case No. SJC-12691, 2019 WL 6838013 (Mass. Dec. 16, 2019). The defendant insurer issued a professional liability policy to an engineer that contained a consent-to-settle clause. After the plaintiff homeowners sued the engineer for engineering design errors, he refused to consent to settle as recommended by the insurer. The homeowners eventually commenced an action against the insurer under a state statute regulating unfair or deceptive acts or practices of insurers, alleging that the insurer failed to effectuate a prompt, fair, and equitable settlement once liability had become reasonably clear. The insurer filed a motion for summary judgment, arguing it was bound by the consent-to-settle clause in the engineer's policy, which limited its ability to engage in further settlement practices with the plaintiffs once the engineer refused to give the insurer consent to settle the claims against him. The policy provided that the insurer would "not settle any claim without the informed consent" of the engineer. The consent-to-settle clause did not contain a "hammer clause" requiring the insurer to obtain the insured's approval before settling a claim for a certain amount. The trial judge granted the insurer's motion for summary judgment, finding it had not violated the state statute for failing to effectuate a prompt, fair and equitable settlement. At issue before the Court on appeal was whether consent-to-settle clauses in professional liability policies violate the state statute, G.L. c. 176D, § 3 (9) (f), which holds an insurer liable for unfair claim settlement practices for "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]" The Court, as a matter of law, held that consent-to-settle clauses do not violate G.L. c. 176D, § 3 (9) (f), but that an insurer still

owes residual duties to a third-party claimant, such as plaintiffs, under G.L. c. 176D even when an insured refuses to settle. The Court held that the insurer made good faith efforts to investigate the claim and encouraged its insured to settle several times, reiterating the real possibility of an excess verdict against him. In evaluating the legality of consent-to-settle clauses, the Court held that it found no legislative intent to preclude consent-to-settle clauses in professional liability policies. It noted that professional liability insurance is an area of insurance that is voluntary, not mandatory, and thus is subject to the freedom of contract principles absent legislative direction to the contrary. The Court saw no reason to void it on public policy grounds. The Court also noted that consent-to-settle clauses predate the passage of the state statute and serve valuable purposes in the professional liability context -- including a professional's reputation and good will. The Court further noted that professional liability insurance is not mandated by law nor legislatively dictated with defined provisions. Discussing the purpose of consent-to-settle clauses, the Court held that, most importantly, they encourage professionals to purchase such insurance, thereby providing coverage for the insured and deeper pockets to compensate those injured. The Court differentiated liability policies with consent-to-settle clauses from homeowners and commercial general liability policies, which commonly provide the insurer with the "right and duty to defend" any suit against the insured and "may make such investigation and settlement" as the insurer deems expedient. "Control over settlement is particularly important to professionals," the Court stated, because "settlement of malpractice claims directly implicate[] their reputational interests." Among other things, a professional's settlement with one claimant may encourage future lawsuits against the professional. The Court further stated that insurers and professionals have very different perspectives regarding malpractice settlements because an insurer sees the benefit in a small dollar settlement, outweighing the costs of reputational damage to the professional; for professionals, the opposite may be true. In ruling for the insurer, the Court held that consent-to-settle clauses are valid under Massachusetts law, but that a consent-to-settle clause is not carte blanche for an insurer to engage in unfair or deceptive conduct with a third-party claimant merely because the insured declines to reach a settlement.

SPECIAL POINTS OF INTEREST:

- *Massachusetts Supreme Judicial Court Upholds Enforcement of Consent-to-Settle Clauses*
- *New York Court Denies Admissibility of Doctor's Habit Testimony Absent Evidentiary Support*
- *Florida Court Upholds Constitutionality of Damages Cap in Med Mal Pre-suit Arbitration Cases*
- *Louisiana Appellate Court Imposes Duty on Medical Staffing Agency for Nurse's Negligent Malpractice*

New York State Appeals Court Orders New Trial in Med Mal Suit Which Allowed Doctor to Testify , Absent Evidentiary Support, Regarding His "Custom and Practice" in Performing Hernia Repair Surgeries

In a decision issued on October 16, 2019, the New York Supreme Court Appellate Division reversed a judgment entered for a doctor and against an injured plaintiff, remitting the case to the trial court for a new trial on the grounds that the trial court erred in permitting the doctor to testify as to his custom and practice in performing hernia repair surgery. *Martin, et al. v. Timmins*, 178 A.D.3d 107 (N.Y. App. Div., 2d Dep't Oct. 16, 2019). Plaintiff brought an action against a doctor who treated her for an incisional hernia. The doctor attempted to repair the hernia by suturing a mesh patch against the plaintiff's abdominal wall. The mesh patch was designed with a rough side and a smooth side, the latter of which was smooth to prevent organs from sticking to it. After the procedure, the plaintiff experienced severe pain, and it was discovered that a portion of the mesh patch was displaced and the rough part of the patch was facing the plaintiff's internal organs, adhering to her intestines and omentum. The plaintiff and her husband brought a medical malpractice claim against the doctor and others, contending that the doctor departed from good and accepted practice by failing to properly suture the mesh patch to the injured plaintiff's abdominal wall. During his deposition, the doctor testified that he had no independent recollection of performing the insured plaintiff's surgery. At the start of trial, the plaintiff moved *in limine* to preclude any testimony from the doctor regarding his custom and practice related to performing incisional hernia repairs using the specific brand of mesh patch. The trial court granted the motion, finding the doctor failed to demonstrate that the relevant procedures were invariably used in every prior surgery. After plaintiffs' case-in-chief, the doctor made an offer of proof regarding his custom and practice for placing sutures during a ventral hernia repair using mesh patches. The trial court allowed the testimony as to the doctor's method of suturing during hernial surgery. After the trial, the jury rendered a verdict in favor of the doctor and the trial court entered judgment, dismissing the complaint against the doctor. The Court of Appeals, in reviewing the judgment on appeal, stated that a party can rely on custom and practice evidence to fill evidentiary gaps "where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances." The Court also stated that evidence of conduct, however frequent, yet likely to vary from time to time depending on surrounding circumstances, is not admissible: "To justify the introduction of habit evidence, a party must be able to show on voir dire, to the satisfaction of the court, that the party expects to prove a sufficient number of instances of the conduct in question." The Court found that the evidence did not show that the doctor's suturing of the mesh panel represented a deliberate and repetitive practice by a person in complete control of the circumstances, but rather, that the suturing, per the doctor's own testimony, depended on the surrounding circumstances not within the doctor's complete control. The Court also held that the doctor failed to show he "expected to prove a sufficient number of instances of the conduct in question," finding relevant that the doctor could not remember how many times he had used the specific brand of patch before he performed the plaintiff's surgery, and that the procedure and method of suturing was unique to the patch. Refusing to find the trial court's error harmless, the Court instead stated that the doctor's habit testimony bore upon the ultimate issue to be determined -- whether the defendant negligently performed the injured plaintiff's hernia repair.

New York State Appeals Court Reviews Med Mal Burden-Shifting Standard, Finding Burden on Plaintiff Inconsistent with Summary Judgment Law

In a decision issued on November 15, 2019 a New York state appeals court overturned its prior precedent, ruling that the burden placed on a plaintiff opposing summary judgment on a medical malpractice claim is inconsistent with the law applicable to summary judgment motions in general. *Bubar v. Brodman, et al.*, Case No. CA 18-01785, 2019 WL 6042393 (N.Y. App. Div. Nov. 15, 2019). Plaintiff brought a medical malpractice action individually and on behalf of her decedent husband, against her husband's doctor and nurse for claims arising from her husband's coronary artery bypass and aortic valve replacement surgery and his post-operative care. The Fourth District, in *O'Shea v. Buffalo Med. Group, P.C.*, 64 A.D.3d 1140 (N.Y. App. Div., 4th Dep't 2009), established that a defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. In addition, *O'Shea* established that once a defendant meets that prima facie burden, the burden shifts to the plaintiff to raise triable issues of fact by submitting a physician's affidavit attesting to both a departure from accepted practice and containing the attesting physician's opinion that the defendant's omissions or departures were a competent producing cause of the injury. Overruling *O'Shea*, the Court held that when a defendant moves for summary judgment seeking the dismissal of a medical malpractice claim, the burden shifts to the plaintiff to demonstrate the existence of a triable fact only after the defendant physician meets the initial burden, and only as to the elements on which the defendant met the prima facie burden.

Florida Appeals Panel Reverses Trial Court's Decision Holding State Cap on Noneconomic Damages in Med Mal Cases Involving Presuit Arbitration Unconstitutional, Distinguishing Florida Supreme Court Precedent

In a decision issued on December 18, 2019, a Florida appellate panel reversed a trial court's ruling that a state cap on noneconomic damages in medical malpractice cases that involved presuit arbitration was unconstitutional, finding that recent Florida Supreme Court precedent holding noneconomic damages caps unconstitutional in traditional wrongful death and non-death personal injury medical malpractices cases was inapplicable. *Poole, et al. v. DeFranko*, No. 3D18-1809, 2019 WL 6884501 (Fla. Dist. Ct. App. Dec. 18, 2019). Defendants, doctor and medical practice, appealed a final judgment entered following a jury verdict in favor of an injured plaintiff and her husband. Prior to judgment, the doctor moved the trial court to enter a final judgment in conformance with Florida statutes that reduce damage awards for noneconomic damages to maximum amounts allowed when a claimant, like plaintiff here, refuses to accept a defendant's offer of voluntary binding arbitration. The trial court denied the doctor's motion, ruling the statutory sections unconstitutional in violation of Florida's constitutional guarantee of equal protection. Reviewing the case de novo, the Panel noted that the Florida Supreme Court in *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993) upheld the constitutionality of the statutory provisions at issue, and that the Panel relied on that decision in denying a constitutional challenge to the statutory provisions in 2016. However the trial court found, and the plaintiffs urged on appeal, that (1) the Supreme Court's precedent did not rule on the equal protection issue raised by the present case, and (2) the precedent was overtaken by later, more persuasive decisions in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014) (plurality opinion) and *North Broward Hosp. Dist. V. Kalitan*, 219 So. 3d 49 (Fla. 2017). *North Broward* expanded the ruling in *McCall* to conclude noneconomic damages caps in medical malpractice cases involving non-death personal injury cases violated Florida's Equal Protection Clause because a cap arbitrarily reduced awards for those claimants who suffer the most drastic and grievous injuries. The court in *North Broward* further concluded that there was no evidence of a continuing medical malpractice insurance crisis justifying the arbitrary and invidious discrimination of medical malpractice victims. The Panel, addressing the plaintiff's reliance on *McCall* and *North Broward*, noted that those cases did not address the statutory provisions for voluntary arbitration remedies, but the decision in *Echarte* did (with the Panel previously adhering to the decision). Finally, the Panel cited its de novo standard of review and its policy of restraint concerning constitutional questions in reversing the trial court's determination and remanding with instructions to reduce the award to the statutory cap.

Sixth Circuit Vacates and Remands Ohio District Court's Dismissal of Prisoner's FTCA Action, Finding Federal Rules Govern Pleading Standards

In a decision issued on November 7, 2019, the Sixth Circuit Court of Appeals vacated and remanded an Ohio district court's dismissal of a prisoner's Federal Tort Claims Act (FTCA) action, alleging medical negligence for a surgery on his hand. *Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019). While in federal prison, the plaintiff prisoner had surgery that left him permanently disabled. The plaintiff filed a claim against the United States in federal court alleging that the Bureau of Prisons was negligent and the United States was liable under the FTCA. The district court, denying the plaintiff's claim, ruled that the plaintiff failed to follow an Ohio civil rule requiring a person alleging medical negligence to include a medical professional's affidavit stating the claim has merit with the complaint. The plaintiff appealed, arguing the Ohio rule does not apply in federal court. On appeal, the government argued that no conflict analysis between the Ohio rule and the Federal Rules of Civil Procedure should occur. The Sixth Circuit rejected the argument, stating although substantive law governs the merits of a FTCA claim, the Federal Rules govern procedural issues. Second, a Federal Rule, if valid, displaces inconsistent state law, and third, the government's argument would displace Congress' power to prescribe housekeeping rules for federal courts. The government also argued that even if the Court did a conflict analysis, the Ohio rule does not conflict with the Federal Rules because requiring an affidavit is an element of a medical-negligence claim. The Court again rejected the argument, stating that the Ohio Supreme Court has expressly rejected the possibility that the Ohio rule is anything more than a heightened pleading requirement. Instead, the Sixth Circuit relied on a two-part test. First, the Court stated that it must ask whether the Federal Rules answer the question in dispute: Does someone need an affidavit of merit to state a claim for medical negligence? In looking to the Federal Rules, the Court answered no. Rule 8 requires only a short a plain statement of jurisdiction and of the claim and an explanation of the relief sought, implicitly excluding any other requirements. Rule 12 simply requires alleged facts sufficient to state a claim on which relief can be granted. And Rule 9 specifies the few situations in which heightened pleadings are required, which are inapplicable to an FTCA action. Second, the Court asked whether the relevant Federal Rules are valid under the Constitution and the Rules Enabling Act (REA). The Court found the Federal Rules presumptively valid, stating the Supreme Court has rejected every challenge to the Federal Rules under the REA.

Illinois Appellate Court Affirms Trial Court Denial of Plaintiff's Motion for Mistrial After Defendant Doctor and His Attorney Come to Aid of Ill Juror

In a decision issued on November 19, 2019, an Illinois appellate court held that a trial court did not abuse its discretion in denying plaintiffs' motion for a mistrial, where there was no evidence of prejudice when a juror became ill during closing arguments and the defendant's attorney, a registered nurse, and the defendant doctor, came to the aid of the juror. *Tirado, et al. v. Slavin*, Case No. 1-18-1705, 2019 IL App (1st) 181705-U (Ill. App. Ct. Nov. 19, 2019). Guardians of a plaintiff's estate brought a medical malpractice action against two doctors alleging that the physicians negligently performed the plaintiff's spinal surgery and were negligent in follow-up care, causing the plaintiff's death. During plaintiff's closing arguments, a juror became ill, and the judge called for a break, instructing the juror to go to the jury room. Two jurors followed, one of whom was a registered nurse. At some point, the juror stopped breathing. Defense counsel, also a registered nurse, followed by her client doctor, proceeded to the jury room to provide assistance. According to defense counsel, the juror was lying on the floor, unresponsive, and pale. As defense counsel knelt to feel for a pulse, the juror awoke and appeared stable. Defense counsel then stated that the deputy instructed her to return to counsel table, which she did. After being examined by paramedics, the juror declined further treatment and asked to be discharged. The juror was replaced by an alternate. Closing arguments resumed and after

instructions on the law, the jurors retired to the jury room. The next day, plaintiff's counsel presented an emergency motion for mistrial, which the trial court denied, finding no prejudice because the exchange was quick and human, and the jurors had a night to cool off. The jury returned a verdict in favor of the defendant doctor and plaintiffs' post-trial motion was denied. On appeal, plaintiffs asserted, that they were entitled to a new trial for several reasons, including because the assistance of the defense warranted a mistrial. The Court disagreed, finding that nothing chaotic or extraordinary occurred when the juror became ill, and no objections were made by counsel. The Court distinguished the instant events from the events in an Illinois Supreme Court decision in which the Supreme Court found a new trial was necessary. In that case, the defendant doctor rendered aid, on counsel's table, to a juror who became unconscious during the plaintiff's opening statements. The Court stated that although the jurors in that case stated that they could be fair and impartial, the Supreme Court observed that the effect of the unusual events in the case were so apparent, making it doubtful whether the jurors could make a dispassioned evaluation of defendant's testimony *after* witnessing his attempt to render treatment to one of the fellow jurors. Plaintiffs also appealed on the grounds that the defense had ex parte communications with the jurors, but the Court struck the argument, finding it was devoid of authority or support.

Louisiana Appeals Court Revives Suit Against Med Staffing Company Holding Staffing Company Had Contractual Duty to See Nurse Supervised

In a decision issued on November 20, 2019, the Louisiana Court of Appeals overturned a grant of summary judgment in favor of defendants and against plaintiff for severe hypoxic brain injuries sustained from repeated incorrect intubations by an nurse anesthetist subsequent to her C-section. *Hawkins v. Schumacher Group of Louisiana, Inc.*, Case No. 53,137-CA, 2019 WL 6140057 (La. Ct. App. Nov. 20, 2019). The anesthesia defendants, who assumed a contract to staff the hospital with anesthesia services, filed a motion for summary judgment alleging no liability for any acts, including those of the certified registered nurse anesthetist that intubated the plaintiff, because the agreement between the anesthesia defendants and the nurse defined the nurse as an independent contractor, giving the anesthesia defendants no right to control the delivery of the nurse's services at the hospital and no involvement in the nurse's supervision, training, or direction. Therefore, the anesthesia defendants claimed they were neither vicariously liable nor independently negligent with regard to plaintiff's medical care. The district court agreed, finding the nurse was an independent contractor and the anesthesia defendants had no duty to the plaintiff except to provide a qualified nurse anesthetist during plaintiff's procedure. The Court of Appeals held that de novo review of the record showed genuine issues of material fact rendered summary judgment improper. Under its contract, the medical staffing agency was required to conduct periodic review of a sample of nurse anesthetists, conduct oversight of the anesthesia quality assurance program, including policy and procedure review, and ensure supervision of anesthesia services by a qualified doctor of medicine or osteopathy. In the hospital's requests for admission, the hospital admitted among other things, that the anesthesia department and the professional anesthesia services were the responsibility of the anesthesia defendants, that the hospital policies with respect to equipping the PACU with necessary items for intubation and respiratory monitoring was the responsibility of the anesthesia defendants, that the anesthesia defendants were responsible for updating and implementing department policies, and that the anesthesia defendants never communicated to hospital staff that it was the operating surgeon's responsibility to supervise nurse anesthetists at any time before the plaintiff coded. The nurse anesthetist, in his deposition, testified that he was in no way supervised by the anesthesia defendants. And the corporate representative for one anesthesia defendant testified that he "couldn't say" whether the doctor who performed plaintiff's C-section had agreed to sponsor or supervise the nurse. The Court held that all of the evidence before it clearly established a duty existed on the part of the anesthesia defendants to ensure supervision of the nurse, and reversed the judgment.

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Jury Verdicts/Settlements

Norfolk County, MA — July, 2019. After a three-week trial, a Norfolk County awarded $4 million to the family of a 30 year-old decedent who suffered fatal cardiac arrest from blood loss following a C-Section performed by the defendant Ob-Gyn and their practice group. Plaintiff alleged that the defendants failed to properly treat the decedent's uterine atony and severe bleeding and they failed to order blood transfusions in a timely fashion. Defendants argued that the decedent died from an amniotic fluid embolism.

Philadelphia County, PA — July, 2019. A Philadelphia County awarded $3 million to the plaintiff estate of a 42-year old unmarried and childness female decedent in a case in which plaintiff alleged the defendant emergency department physician and hospital caused a too rapid decline in her blood pressure causing a stroke which led to her death 3.5 months later. Defendants denied all of the allegations of negligence.

Monmouth County, NJ — October, 2019. A Monmouth County jury awarded $17 million to a 16 year-old female plaintiff who sustained hypoxia when she was seven years old after being intubated following surgery for pneumonia. Plaintiff alleged that the pediatric neurologist and pulmonologist negligently and prematurely extubated the child at a time when lab and clinical data demonstrated that her pulmonary function remained compromised and for removing the tube while the child was sleeping. Plaintiff allegedly suffered cognitive damage as a result of the hypoxia. The defendant argued that the intubation procedure was proper.

Lehigh County, PA — December, 2019. A Lehigh County awarded $6.3 million to a woman whose 48-year old husband died of a heart attack while jogging, six weeks after a cardiologist cleared him of any heart problems. An autopsy showed that he died from acute myocardial infarction and that his arteries were severely constricted. Plaintiff alleged that the cardiologist was negligent in failing to diagnose severe coronary disease despite symptoms of such disease.

Burlington County, NJ — July, 2019. The son of a 59-year old woman who died after neck surgery reached a $4.2 million settlement in a case involving a doctor who was allegedly out driving and making phone calls when he was supposed to be remotely monitoring the surgery. The woman suffered a catastrophic brain injury and later died.

Notable Defense Verdicts

Richmond County, NY — November, 2019. A Richmond County jury found in favor of a hospital in a medical malpractice lawsuit brought by a 73 year-old woman who alleged that she suffered an artery tear from the alleged rough turning of the woman while she recovered from an angiogram. The defense argued that there was no evidence that the manner of turning the patient was improper or that the femoral artery had been torn.

Wayne County, MI — November, 2019. After a three-week trial, a Wayne County jury entered a defense verdict in favor of a hospital who was sued in a medical malpractice action. Plaintiff claimed that he suffered cardiac arrest after being administered an excessive dose of the anti-anxiety drug Ativan. Plaintiff also alleged that the hospital failed to perform CPR timely. Plaintiff alleged he suffered permanent brain damage as a result of the hospital's negligence.

Atlanta, GA — December, 2019. A federal jury in the District Court of Atlanta returned a defense verdict in favor of a family practice physician and an orthopedist in a lawsuit alleging that they failed to appreciate worsening, weakness, numbness and urinary function in a 42 year-old male patient, which were alleged symptoms of transverse myelitis. Plaintiff alleged that the mistakes led to paraplegia, an inability to walk, and bowel and bladder problems.

DeKalb County, GA — December, 2019. A DeKalb County jury returned a defense verdict in favor of a gynecologist in a lawsuit in which a 30 year-old woman alleged that she suffered septic shock and respiratory failure after exploratory laparotomy to repair her bowel. Plaintiff also accused the physician of failing to fully inform her of the risks associated with the procedure and for improperly managing her post-operative care.

New York County, NY — December, 2019. A New York County jury returned a defense verdict after a three-week trial in a lawsuit in which a plaintiff claimed that a multi-practice group and internal medicine physician failed to timely diagnose a brain tumor leading to peripheral vision blindness. Defendants argued that they properly worked the patient up and referred her to a neurologist. They also argued that she failed to follow-up with a neurologist or the internist.

Sacramento County, CA — September, 2019. A Sacramento County jury entered a defense verdict in favor of a surgeon sued in lawsuit filed by a patient alleging that she sustained permanent injuries when hardware used during back fusion surgery failed. Plaintiff alleged that the surgeon negligently performed the surgery and that the hospital failed to provide proper post-surgical care.