

DECISIONS

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Tennessee Supreme Court Upholds State’s Civil Noneconomic Damages Cap

In a decision issued on February 26, 2020, the Tennessee Supreme Court accepted certification of three questions from the United States District Court for the Middle District of Tennessee pertaining to the constitutionality of Tennessee’s noneconomic damages cap in civil liability cases, which limits the monetary amount of damages a plaintiff can recover. *McClay v. Airport Management Services, LLC*, 2020 WL 915980 (Tenn. Feb. 26, 2020). The Court concluded that Tenn. Code Ann. § 29-39-102, which caps noneconomic damages, does not violate the Tennessee Constitution. The lawsuit at issue involved injuries a woman sustained in a store at the Nashville International Airport. A jury returned a verdict for the plaintiff in the amount of \$444,500 for future medical expenses and \$930,000 for noneconomic damages, including pain and suffering, permanent injury, and loss of enjoyment of life. The district court entered judgment for the plaintiff, and the defendant moved to apply Tenn. Code Ann. § 29-39-102, which generally limits noneconomic damages in civil liability actions to \$750,000. Though not applicable in the instant action, the statute expanded recoverable damages to \$1,000,000 for certain “catastrophic loss or injury” and exempted certain other injuries from the cap. The plaintiff responded to the defendant’s motion by arguing that the statutory cap was unconstitutional. As a result, the district court certified the following questions to the Tennessee Supreme Court: (1) Does Tennessee’s noneconomic damages cap in civil cases violate a plaintiff’s right to a trial by jury, as guaranteed in Article I, section 6, of the Tennessee Constitution? (2) Does Tennessee’s noneconomic damages cap in civil cases violate Tennessee’s constitutional doctrine of separation of powers between the legislative branch and the judicial branch? (3) Does Tennessee’s noneconomic damages cap in civil cases violate the Tennessee Constitution by discriminating disproportionately against women? The State of Tennessee entered an appearance in the Tennessee Supreme Court in order to defend the constitu-

tionality of the statute. On certified question one, the Court acknowledged the Tennessee Constitution’s mandate that the right to a trial by jury envisions that all contested factual issues be decided by jurors who are unbiased and impartial and that ascertainment of the amount of damages is a question of fact. But the Court also acknowledged the constitutional authority of the Tennessee General Assembly to legislatively alter common law causes of action and available remedies, which represents the legislative expression of the public policy of the state. The Court also noted that the right to a jury trial does not entitle a plain-

legislative authority and does not interfere with the judiciary’s ability to interpret and apply the law. “To the contrary,” the Court stated, “courts exercise their judicial authority, and fulfill their constitutional responsibilities, by applying the statutory cap on noneconomic damages to the cases before them.” On the third certified question, the Court found little support for the plaintiff’s argument that the law disproportionately discriminated against women. Indeed, the Court weighed heavily that the plaintiff acknowledged the statutory cap was facially neutral and that, fatal to her claim, she made no allegation that the General Assembly had a discriminatory intent or purpose in enacting the statute: “Plaintiff has done little more than reference a 2004 law journal article regarding tort reform, and has provided no evidence that Tennessee’s statutory cap . . . has a disparate impact on women in Tennessee.” In a concurring opinion, one justice undertook a scholarly analysis of the distinction between legislative and judicial power, dismantling the dissent’s reliance on remittitur and additur cases in which a judge unilaterally adjusts a jury’s damage award: “Appellate decisions indicating that a *judge’s* undue limitation on a jury’s damage assessment may violate the constitutional right to a jury trial are of no use to determine whether the *legislature’s* enactment does so, even for purposes of analogy.” The concurrence also acknowledged that while the Court will often demonstrate displeasure with the legislature’s policy choice, it does so while upholding a statute to demonstrate principles of judicial restraint; that despite displeasure, it adheres to the longstanding precept that “the wisdom, or unwisdom of a statute lies solely with the Legislature and is not the concern of the Court.”



tiff to any particular cause of action or any particular remedy. Instead, such causes of action and remedies are matters of law subject only to the legislature. Finding support in decisions of its sister states, the Court held that because the statutory noneconomic damages cap is not disclosed to the jury, but instead applied by the trial court to a jury award, it is not violative of a plaintiff’s constitutional right to have a jury determine the underlying facts of the case, including a factual determination of noneconomic damages. On the second certified question, the Court held that while the General Assembly can overstep constitutional boundaries in violation of the separation of powers by exercising its legislative power to directly contradict existing procedural rules, the separation of powers doctrine does not prevent the General Assembly from enacting substantive laws. As such, the substantive alteration of the common law, to a statutory cap on noneconomic damages, was within the General Assembly’s

SPECIAL POINTS OF INTEREST:

- *Tennessee Supreme Court Upholds Noneconomic Damages Cap in Civil Cases*
- *Louisiana Supreme Court Holds Negligent Credentialing is Statutory Malpractice*
- *Delaware Trial Court Admits Own Error, Orders New Trial*
- *Massachusetts Appeals Court Finds “Stop” Enough for Hospital Battery Suit*

Louisiana Supreme Court Holds Claims of “Negligent Credentialing” Fall Within Definition of “Malpractice” Under State’s Medical Malpractice Act

In a decision issued on January 29, 2020, the Louisiana Supreme Court reversed a ruling of the court of appeals and upheld a trial court’s judgment holding that claims based on re-credentialing were medical malpractice, subject to the Louisiana Medical Malpractice Act (“LMMA”), and to the extent the mother asserted claims based on initial credentialing, that claim was also subject to LMMA. *Thomas v. Regional Health System of Acadiana*, 2020 WL 500019 (La. Jan. 29, 2020). In the lawsuit at issue, a mother of a newborn infant sought damages for medical malpractice from several hospitals for failure to diagnose and treat pulmonary artery hypertension, asserting a single cause of action that the hospitals negligently credentialed and provided privileges to practice to the doctor who misdiagnosed her daughter and that they knew or should have known she was not board certified in the field of pediatric cardiology. The hospitals argued the suit was premature, asserting they were entitled to have the negligent credentialing claims presented first to a medical review panel pursuant to the LMMA. The trial court, relying on jurisprudence of the Louisiana Supreme Court, granted the hospital’s exceptions of prematurity and dismissed the suit. Plaintiffs appealed, arguing that the

LMMA’s definition of malpractice did not include reference to credentialing or re-credentialing, but they are included in other contexts, evidencing the Legislature’s clear intent to exclude them from the LMMA. The hospitals argued that while the initial act of credentialing may be administrative in nature, the “treatment-related medical decisions and dereliction of skill with which the



LMMA is concerned” fall under the definition of malpractice, which includes the supervision and training of health care providers once they enter the building and engage in the practice of medicine therein. Therefore, the periodic re-credentialing of doctors, after initial hiring, qualifies as “training or supervision” within the statutory definition of LMMA. The Third Circuit agreed with plaintiffs, reversing the trial court’s

dismissal. In reaching its decision, the Louisiana Supreme Court reviewed the affidavit of a hospital system director who testified that the hospital initially credentialed the doctor and granted her clinical privileges in 1987, re-credentialing her every two years until her retirement in 2017 through an ongoing process that included peer review of her patient care. The affidavit contended that peer review and re-credentialing are the means by which the hospital continually supervises its physicians, a process that is distinct from the administrative decision to credential a physician upon hiring. After considering these factors, the Court determined that the plaintiffs’ allegations against the hospital for negligent re-credentialing necessarily fell within the definition of malpractice under the LMMA because they constitute “any unintentional tort . . . [b]ased on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient . . . [i]n the training or supervision of health care providers.” Holding to the contrary, the Court held, would sidestep the statutory limitations prescribed by the LMMA.

Massachusetts Appellate Court Holds That A Patient Asking A Doctor to Stop Medical Procedure Can Sue for Medical Battery

In a decision issued on February 11, 2020, an appellate court in Massachusetts reversed the trial court’s judgment in holding that a terminally ill cancer patient’s representatives could bring a viable cause of action for medical battery based on the withdrawal of consent because there remained factual disputes as to whether the patient withdrew her consent prior to completion of an x-ray exam. *Zaleskas v. Brigham and Women’s Hospital*, 2020 WL 634966 (Mass. App. Ct. 2020). On the evidence on appeal, the Court indicated that there were documents that the trial court may rule are admissible to prove that the patient asked the technologists to stop, provided the required evidentiary foundation is laid, including that as soon as the patient’s sister returned home, in the early morning

hours, she wrote a summary of the events in question and emailed it to her mother and other sister, describing the patient’s pleading to stop the x-ray that she heard. There also existed deposition testimony from the sister, five years after the event, which contradicted her earlier declaration that the patient had requested that the technicians stop. The trial court disregarded the declaration on these grounds, but the Court of Appeals noted that the declaration came before, not after, the deposition testimony and in the light most favorable to plaintiffs, the declaration and the later deposition were not in conflict. The Court also noted that all persons have a right to refuse medical treatment in appropriate circumstances and, as such, held that if a patient unambiguously withdraws consent

after medical treatment has begun, and if it is medically feasible to discontinue treatment, and treatment is continued, that it can give rise to a claim for medical battery. Based on the evidence before it, the Court concluded that a reasonable jury could find that saying “stop” was sufficient to withdraw consent. And viewing the evidence in the light most favorable to plaintiffs, the Court held that a jury could find that the x-ray technologist did not timely stop the exam and lied to the patient’s family. In reversing the part of summary judgment on battery by withdrawn consent, the Court noted that if the trial court finds any of plaintiff’s documents admissible, they amount to additional evidence of the patient’s withdrawn consent.

Delaware Trial Court Orders New Trial, Holding Preponderance of Evidence Weighed Heavily Against Defense Jury Verdict, Tainted by Court’s Legal Error in Allowing Defendant to Offer Inadmissible Expert Opinion

In a decision issued on February 12, 2020, a Delaware trial court granted a new trial to plaintiffs on the grounds that the defendants’ failure to disclose the defendant’s standard of care opinion prevented plaintiffs from taking appropriate discovery and preparing for trial. *Klosiewicz v. Stevenson*, 2020 WL 707639 (Del. Super. Ct. Feb. 12, 2020). Plaintiffs alleged that the decedent-plaintiff died of sepsis one day after presenting to defendant-hospital with acute onset symptoms misdiagnosed by defendant-doctor as the flu. The defendants originally named the defendant-doctor as an expert prior to trial, but changed their minds after plaintiffs discovered the doctor failed his board exams. Defendants agreed, however, that the doctor’s testimony would be limited to testimony offered at deposition. Plaintiffs reserved the right to call him as an expert at trial on standard of care. At trial, the parties stipulated that the plaintiff did not have a spleen, ensuring that no liability would attach against the doctor for not having that knowledge. During opening statements, however, defense counsel argued that the

doctor should not be found liable because the absence of the spleen is what caused the plaintiff’s death. Plaintiffs called the doctor to testify in their case in chief. On cross-examination, defense counsel asked the doctor if, hypothetically, he would have done anything differently had he known the plaintiff did not have a spleen. The cross-examination questions went beyond the scope of the doctor’s deposition. The doctor responded he would have sent the plaintiff to the emergency room instead of sending him home with flu medication, knowing the spleen is an important organ for infection response. On redirect, plaintiffs’ counsel asked similar questions, with the doctor again stating he would have sent the patient to the emergency room. Plaintiffs’ counsel then moved to strike the doctor’s responses as speculative and not relevant, arguing the opinion was not germane to the issue before the jury because the parties had agreed that the doctor did not know at the time he treated the plaintiff that he did not have a spleen. Defense counsel opposed the request and argued that the doctor’s opinion was not

only relevant, but went to the core of the dispute, classifying the opinions as “expert opinions.” The Court accepted the defense representations and overruled plaintiffs’ motion to strike. After a five-day trial, the jury returned a verdict in favor of the defendants. In doing so, it found that the doctor had met the standard of care. In evaluating plaintiffs’ motion for a new trial, the trial court looked to the defendant’s testimony and found the following facts undisputed: (i) plaintiff should have been sent to the emergency room because of the onset symptoms of sepsis, (ii) defendant failed to diagnose sepsis, (iii) defendant misdiagnosed the flu, and (iv) the diagnosis delayed care. The court also held that the jury considered the doctor’s testimony critical to the issue of standard of care and that testimony was an undisclosed and inadmissible expert opinion in violation of Rule 26 disclosures and at a minimum, the line of questioning inadmissibly called for speculation of a fact witness regarding treatment of his patient. The Court ordered a new trial as a result.

Fourth Circuit Upholds N.C. Federal Court Decision to Clear Inpatient Rehab Company of Malpractice Based on Plaintiff’s Stricken Expert Affidavit

In a decision issued on January 15, 2020, the Fourth Circuit held that a North Carolina district court did not err in granting summary judgment to a rehabilitation company and did not abuse its discretion in striking conflicting portions of plaintiffs’ expert’s affidavit. *Riggings v. SSC Yanceyville Operating Co.*, 2020 WL 237989 (4th Cir. Jan. 15, 2020). Plaintiffs alleged that the decedent-plaintiff, who suffered from Alzheimer’s disease, entered the defendant’s nursing facility as a patient and years later was diagnosed with a condition that required her to be given nectar-thickened liquids. At trial, the plaintiffs’ expert offered evidence that the defendant maintained the plaintiff on a thin liquid diet, causing her to aspirate liquids and develop aspiration pneumonia, become septic, and die. In her report, Plaintiffs’ expert opined, within a reasonable degree of medical certainty, that Defend-

ants’ breached its standard of care and that this breach caused the plaintiff’s death. At her deposition, however, plaintiffs’ expert offered varying answers as to whether the plaintiff aspirated on liquids, declining to answer how certain she was in her opinions and stating she could not state with a reasonable degree of medical certainty that thin liquids were the cause of the aspirational pneumonia. Defendant then moved for summary judgment arguing that the plaintiffs

could not show by way of expert testimony that the defendant’s conduct caused injury to a reasonable degree of medical certainty. In

opposition, plaintiffs submitted an affidavit from the expert contradicting her deposition testimony. Defendant moved to strike the affidavit, and the district court agreed, additionally granting defendant’s motion that the doctor’s testimony absent the affidavit did not rise to the degree of medical certainty required for testimony to reach the jury. Plaintiff appealed, and the Fourth Circuit affirmed the district court’s decisions, concluding that the expert did not in fact hold her opinion to a reasonable degree of medical certainty, instead testifying that it was “more probable than not” the cause of plaintiff’s death. On the motion to strike the affidavit, the Fourth Circuit also held that the expert was asked straightforward questions at her deposition and her affidavit did not lend context to her denial of the requisite degree of certainty, which was only offered after faced with summary judgment.



Pennsylvania Court Affirms Trial Court's Decision to Uphold Defense Verdict on Grounds that Defense's Medical Expert Was Qualified to Testify

In a decision issued on January 8, 2020, a the Superior Court of Pennsylvania affirmed a trial court's denial of plaintiff's post-trial motion challenging a defense jury verdict in which it found that a defendant doctor and his employer were negligent in the care of a decedent patient, but that the defendants' negligence was not the factual cause of harm to the decedent. *McFeeley, individually and as administrator of the State of Kathleen McFeeley v. Shah, M.D., et al.*, 2020 WL 89340 (Pa. Super. Ct. Jan. 8, 2020). The plaintiff filed an action, individually and on behalf of the estate of his wife, against an imaging company and their employee doctor, among others. The plaintiff alleged that his deceased wife presented to her primary care physician with complaints of stomach and abdomen pain. Her physician referred her to a surgeon who ordered various tests, including a CT scan at an outpatient clinic where the defendant doctor reviewed the scan and issued a report, deeming the results "unremarkable" and "completely negative" and failing to mention the presence of multiple lesions. Seven months later, the decedent again complained of pain. She underwent

additional tests in which it was identified that she suffered from Stage IV ovarian cancer. The decedent underwent surgery for a hysterectomy, but because of the extensive tumors, the surgeon performed only a tumor



debulking. After surgery, decedent developed sepsis from a bowel perforation and subsequent surgery, dying as a result. Both parties presented expert doctors at trial who offered varying opinions on the factual cause of the decedent's death, and whether or to what extent an earlier diagnosis and treatment of her ovarian cancer could have prevented, or decreased, the risk of her death. Ultimately, the jury concluded that while the defendant doctor's reading of decedent's original CT scan was negligent, it was not the factual cause of her death. On appeal from denial of its post-trial motion,

plaintiff contended that the jury's verdict was against the weight of evidence. The Court disagreed, finding that the facts and inferences of the record did not disclose an abuse of discretion, and that it was the obligation of the Court to respect the fact finder's credibility determinations and the weight it accorded to the evidence. The plaintiff also appealed the decision of the trial court denying plaintiff's motion in *limine* to exclude an expert radiologist from providing expert testimony on the issue of the cause of decedent's bowel perforation as diverticulitis, and not a delay in cancer diagnosis. The Court affirmed the trial court's denial, holding that the board-certified radiologist possessed the qualifications of an "expert" under the law in that he had more experience than is within the ordinary range of training, knowledge, intelligence, or experience and he had a reasonable pretension to specialized knowledge on the subject matter in question. The Court also found that the trial court did not err in ruling the radiologist qualified as an expert for causation purposes under the State's MCARE Act, which it reviewed de novo.

Kentucky Appeals Court Affirms Summary Judgment in Favor of Defendant Doctor, Finding Plaintiff's Medical Expert and Record Citations Inadequate

In a decision issued on November 22, 2019, a Kentucky appeals court upheld a trial court's grant of summary judgment in favor of a defendant doctor who brought the motion after plaintiff's expert's failure to testify as to the doctor's deviation in standard of care at his deposition. *Hackner v. Edwards*, 2019 WL 6245830 (Ky. Ct. App. Nov. 22, 2019). The plaintiff brought allegations against his doctor that he deviated from the standard of care during and after his gallbladder surgery. Post-surgery, the plaintiff presented to the emergency room ("ER") complaining of intense abdominal pain and right shoulder pain, consistent with gas in a post-surgery patient. All tests performed were in normal limits. The ER telephoned the defendant and the defendant requested to see the plaintiff the next morning. The following day, the plaintiff called the defendant's office reporting severe pain, and the defendant prescribed additional medications. Later that morning, the defendant received a

call from an ER doctor stating the plaintiff arrived at the hospital complaining of severe pain. A CT scan revealed a small amount of free fluid, but no leak was confirmed. The plaintiff was subsequently admitted to the hospital where, after additional testing, it was determined that he had a small bilirubin leak. In discovery, the plaintiff presented an expert board-certified internist for deposition who was offered to provide testimony that the defendant deviated from the standard of care. The internist, who was not certified in general surgery, testified that the plaintiff should have been admitted to the ER when he first presented with severe pain, but he also testified that it was reasonable for the defendant to see the plaintiff the next day given his negative test results and that treatment to fix the leak would have been the same whether performed on the day of his initial surgery, the following day, or the day his leak was repaired. Post-deposition, the defendants sought summary judgment on

the grounds that the doctor did not deviate from the standard of care. The trial court affirmed, entering final judgment. On appeal, plaintiff alleged that both the internist and a paramedic it was also offering as an expert did and would testify on the doctor's deviation from the standard of care. The Appeals Court held that neither the internist nor the paramedic were qualified to provide testimony on the standard of care of a surgeon. The internist's deposition failed to identify any deviation and failed to establish he negligently performed the surgery or negligently provided post-surgery care. The paramedic's testimony also held no weight because her testimony, if any, would be derived from her own personal experience in having the procedure herself. Throughout the opinion, the Court also took to task the plaintiff's failure, at almost every point, to provide citations to the record: "[W]e have no responsibility to search the record to make his argument for him."

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Recent Notable Verdicts and Settlements

Jury Verdicts/Settlements

Macon County, GA — February, 2020. A jury took just 30 minutes to award \$12.5 million in damages to a man whose doctor failed to diagnose a cancerous growth on his neck despite an MRI indicating it could be malignant, which the defendant doctor admitted he never reviewed. The insurer for the defendant doctor and his practice refused to provide any type of high-low offer in two mediations and only chose to engage meaningfully in any serious settlement discussions until just before the jury came back with the award.

Davidson County, TN — January, 2020. A federal district court judge awarded \$15.1 million in damages against the United States for a hypoxic-ischemic brain injury suffered by an infant pre-birth, which resulted in cerebral palsy and lifelong neurological deficits as a result of im-

proper counseling and post-cesarean care at a military base hospital. The court held that the hospital deviated from the standard of care in failing to fully assess the patient's individual risk factors for vaginal birth after cesarean and to intervene with intrauterine resuscitative measures.

Berk County, PA — December, 2019. A Berk County jury awarded a gross \$9.6 million damage award to an 11-year old female patient whose hospital and ER physicians, each 50% negligent, failed to diagnose her cervical cancer when presenting with sustained and reoccurring vaginal bleeding which they treated as early onset menses. The patient's primary care and ob/gyn physicians settled prior to trial. Due to the nine-month delay in diagnosis, the patient's cancer progressed from Stage I or II to Stage IV.

New Britain, CT — January, 2020. A superior court jury awarded a \$3.3 million verdict to a man who alleged that a nurse perforated his rectum while administering an enema after presenting to the hospital with severe diarrhea. The award included \$770,000 in loss of consortium damages to the patient's wife. The defense's expert witnesses, in deposition, testified that an enema could have perforated the rectum, whereas at trial, the experts testified the enema could not have been the cause.

Pennsylvania Supreme Court — February, 2020. The Pennsylvania Supreme Court denied the petition of hospital seeking to challenge a \$3.5 million verdict in a case over its alleged failure to timely diagnose a patient's heart disease.

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Notable Defense Verdicts

Porter County, IN — February, 2020. An Indiana appellate court upheld a Porter County superior court judge's defense verdict in a suit accusing an emergency room doctor and hospital of failing to inform a patient of an enlarged heart that led to his death, rejecting the patient's family's argument that the trial judge should have provided certain jury instructions on negligence in the discharge of patients, contributory negligence, and pre-existing conditions.

Texas Supreme Court — February, 2020. Texas Supreme Court granted a new trial to an obstetrician who was ordered to pay \$2.7 million to the parents of a baby he delivered who suffered permanent nerve damage. The Court found that the trial court wrongly influenced the jury's decision by giving an erroneous charge instructing the jury on the incorrect law and failing to allow a charge as to whether the doctor provided emergency medical care.

Illinois Appeals Court — February, 2020. An Illinois state appellate panel upheld a doctor's trial win over claims that he perforated a patient's esophagus while removing a dental device the patient had swallowed. The Court held that the patient's expert was properly blocked from using his hands to demonstrate a safer procedure.

Morris County, NJ — January, 2020. A New Jersey appeals court refused to give a man whose brain tumor went undiagnosed by a doctor a second chance at a motion for directed verdict dismissed by a Morris County trial court. Plaintiff's argument that both of its experts agreed defendant deviated from the standard of care ignored much of the record and trial testimony, and "cherry-picked" portions of the testimony to support its claims. The Court found that, looking to the record as a whole, the trial court properly denied plaintiff's motion.

Pinellas County, FL — December, 2019. A Florida appellate panel ruled that a hospital need not produce certain investigations, proceedings, and credentialing records of a hospital board in a civil action against the provider arising out of matters subject to purview of the board. The panel determined that an amendment that partially trumps application of statutory discovery protections was inapplicable to hiring and credentialing information held by the board.

Cook County, IL — October, 2019. An Illinois appellate court affirmed a hospital's trial win over claims that its negligence led to a woman's fatal pulmonary embolism after surgery, ruling that the trial court was justified in excluding a plaintiff's expert slated to testify on the neurological standard of care post-surgery due to his lack of experience with the methods, procedures, and treatments.