

# DECISIONS

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## New Jersey Supreme Court Holds Third-Party Defendant Must Participate in Liability Trial in Med Mal Action Where Third-Party Defendant Was Sued By Joint Tortfeasor Only for Contribution

In a decision issued on March 16, 2020, the New Jersey Supreme Court held that a third-party defendant gynecologist was an active party as a joint tortfeasor, regardless of plaintiff's decision not to file an affirmative claim against him, and that the gynecologist must participate in a trial to establish underlying liability where he is subject to liability in contribution even though plaintiff cannot recover directly from him. *Mejia v. Quest Diagnostics, Inc.*, --- A.3d ---, 2020 WL 1239495 (N.J. Mar. 16, 2020). Plaintiff widower brought a complaint against a diagnostics company, two of its employees, and a family practitioner for failure to detect his late wife's cervical cancer. Plaintiff did not bring an action against his wife's gynecologist, but the diagnostic company and its employees filed a third-party complaint against the family practitioner and the non-party gynecologist asserting claims for contribution and common-law indemnification. The diagnostic company also filed a motion requesting a declaration that it was not required to serve an affidavit of merit, a procedural requirement to be filed by plaintiffs in any action for damages for personal injury resulting from alleged acts of malpractice or negligence by a person licensed in the medical profession. The affidavit is provided by an appropriate licensed person stating that there exists a reasonable probability that the care exercised in the treatment of the patient fell outside the acceptable professional standards or treatment practices. A failure to provide an affidavit of merit is deemed a failure to state a cause of action. The gynecologist did not oppose the diagnostic company's motion, which the trial court granted. Shortly before trial, however, the gynecologist filed a motion seeking to be treated as third-party defendants were treated in two other cases where third-party defendants were relieved from participating at trial and the remaining defendants were entitled to present evidence of the third-party defendants' negligence. The gynecologist argued that he had a right to dismissal because an affidavit of merit was never served on him by any party. The

trial court denied the gynecologist's motion and the New Jersey Appellate Division affirmed the trial court's judgment in an unpublished opinion, holding that unlike in the other two cases, the gynecologist had not been previously dismissed on the merits. The Appellate Division also held that the gynecologist's argument that he was not subject to liability because he was not sued by the plaintiff directly was without merit because, as the court noted, under New Jersey's Comparative Negligence Act and Joint Tortfeasors Contri-



butio Law, if the jury were to adjudge the diagnostic company or family practitioner defendants to be 60% or more at fault, and the gynecologist was also found to have a percentage of fault, then the gynecologist would be financially responsible for damages on the contribution claim brought by the co-defendants. The New Jersey Supreme Court affirmed the Appellate Division's ruling, holding that the trial court properly denied the gynecologist's motion for dismissal from trial. The Court agreed that third-party defendants must participate in a trial to establish underlying liability even where they are only subject to the contribution claims filed against them by joint tortfeasors, unless there exists a right to a dismissal, which there was not here. The Court explained that under the Comparative Negligence Act, the trier of fact makes two determinations: (1) the amount of damages which would be recoverable by the injured party regardless of any consideration of negligence or fault (the full value of the injured party's damages) and (2) the extent, in the form of percent-

age, of each party's negligence or fault. Then, the recovering party may recover the full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages, and that tortfeasor has a pro rata contribution claim against its joint tortfeasors under the Joint Tortfeasors Contribution Law. The Court held that the gynecologist was an active party in the litigation as a joint tortfeasor, regardless of the plaintiff's decision not to file an affirmative claim for recovery against him, and a trial of all parties was necessary for the trier of fact to determine the allocation of percentage of negligence to each defendant. In addition, if the gynecologist were determined to be more than 60% at fault, then plaintiff's recovery would be limited to the remaining percentage fault allocated to the diagnostic company and family practitioner, if any. As to the affidavit of merit, the Court noted that the Appellate Division had ruled in an earlier case that where a defendant subject to an affidavit of merit statute asserts a third-party claim in the nature of contribution or joint tortfeasor liability against another professional also subject to the statute, that no affidavit of merit is required. The basis for that reasoning rested on the proposition that a third-party plaintiff's claim for contribution against a third-party defendant is derivative of the original plaintiff's claim against the third-party plaintiff. The New Jersey Supreme Court held that it need not decide the derivative claim issue of whether a third-party plaintiff is required to serve an affidavit of merit because the gynecologist did not oppose the third-party plaintiff's motion for an order declaring it need not serve an affidavit of merit, never filed a motion for reconsideration of the trial court's order granting the motion, and never challenged the grant on appeal.

## SPECIAL POINTS OF INTEREST:

- *New Jersey Supreme Court Addresses Third-Party Claims and trial issues relating to such claims*
- *Gov't and States Enacting COVID-19 Immunity Legislation and Executive Actions*
- *Mississippi Supreme Court Applies Med Mal Statute of Limitations to Mis-Filled Prescription Claim*
- *Tennessee Supreme Court Finds Ex-Parte Interview Statute Violates Court's Discretion over Discovery*

## Massachusetts Appeals Court Upholds Amended Judgment Finding Surgeon and Nurse Liable for Death Resulting from Error in Hernia Surgery

In a decision issued on February 26, 2020, the Massachusetts Court of Appeals held that a jury's conclusion that a surgeon negligently caused a patient's injuries and death was reasonable and supported by evidence and that the jury had a substantial basis on which to reject the surgeon's and nurse's theory of the case. *Parsons v. Ameri*, 97 Mass. App. Ct. 96 (Mass. App. Ct. 2020). The estate of a patient brought an action for medical malpractice arising from the patient's death following hiatal hernia surgery in which defendants' surgeon and registered nurse attached a mesh closure to the patient's diaphragm with a medical device used to attach prosthetic material to soft tissue, or "tacker." The device manufacturer provided several cautions on use, including requirements of a minimum tissue thickness and that it should not be used to insert tacks in the diaphragm in the vicinity of the pericardium, aorta, or inferior vena cava. Two days after surgery, the patient complained of a racing heart and abdominal pain. An echocardiogram showed the presence of excess fluid in the pericardium near where the tacks were placed. After treatment with blood thinners and morphine, the patient went into cardiac arrest and efforts to resuscitate her were unsuccessful. An autopsy noted puncture marks on the posterior aspect of the

heart and inflammation of and blood in the pericardium which likely occurred at the time of hiatal hernia repair. At trial, the plaintiff presented expert testimony of a general surgeon who testified to a reasonable degree of certainty that the treatment of the patient was below the standard of care expected of a qualified surgeon and registered nurse and that their conduct was a



substantial contributing factor to the patient's death. Defendants contended that it was the CPR, not the surgical tacks, that caused the puncture marks on the patient's heart but the surgeon admitted that he did not measure the thickness of the diaphragm at the time of surgery and that puncturing the pericardium or the myocardium during hiatal hernia surgery would be below the standard of care expected of the average qualified general surgeon. After a six-day trial, the jury found that the surgeon and nurse were negligent in the treatment of the patient, that the surgeon was grossly negli-

gent, and that both the surgeon and the nurse's negligence was a substantial contributing factor in causing the patient's pain and suffering, and for the surgeon, also her death. The jury awarded \$100,000 to the estate for pain and suffering and \$1.5 million to the plaintiff in his individual capacity and \$500,000 each to the patient's son and daughter to compensate them for past and future loss of consortium. \$2.5 million was awarded against the surgeon in punitive damages for his gross negligence. Defendants filed a motion seeking a new trial or judgment notwithstanding the verdict, or in the alternative, exclusion of prejudgment interest on the damage awarded on gross negligence and remittitur of the damages awarded. The trial court denied the requests for a new trial or judgment notwithstanding the verdict, but allowed amendment to exclude prejudgment interest on punitive damages. On appeal, the Court of Appeals held that the jury's conclusion was reasonable and supported by the evidence and that the judge did not abuse his discretion in denying a new trial on the issues of negligence and causation. As for gross negligence, the court found that the jury could reasonably conclude that the surgeon's decision to use the tacker despite manufacturer warnings exhibited the hallmarks of gross negligence.

## Federal Government and States Enact Legislation and Executive Orders in Wake of COVID-19 to Provide Medical Malpractice Immunity Safeguards

Federal and state governments, in the wake of the spread of COVID-19 to the United States, have begun taking preventative and proactive measures to slow the spread of the virus and to treat those affected, including relaxing licensing and credentialing requirements to increase essential medical workforces. But one of the largest issues still facing health care providers remains a lack of resources and overrun hospitals. As such, medical professionals, medical facilities, and volunteers on the frontlines of the national emergency, faced with resource and facility scarcity, as well as threats to their own health, also face an increased risk of medical malpractice liability in their treatment of patients. The federal government, as well as several state legislatures and governors have

begun issuing various executive orders and legislation to protect health care providers from malpractice liability. For example, the federal Coronavirus Aid, Relief and Economic Security Act (CARES Act), protects volunteer healthcare professionals from civil liability for injury or death if they provide care during the COVID-19 emergency. New York, on the other hand, pursuant to a newly enacted Article 30-D of its Public Health Law, provides immunity from civil and criminal liability for health care professionals, health care facilities, and volunteer organizations, as defined, in the arranging or providing of health care services in response to a COVID-19 emergency order, or if the act or omission occurs in the course of providing health care services and the treat-

ment of the patient is impacted by the health care facility or professional's decisions or activities in response to or as a result of the COVID-19 outbreak. Almost all legislation or executive orders enacted to date carve out willful, criminal, gross, or reckless misconduct and require the person or facility to have acted in good faith. To date, more than 20 states have sought to provide these liability protections to providers, and many others have been urged by the health care industry representatives and the Secretary of the Department of Health and Human Services to do the same. *Attorneys at Jackson & Campbell have compiled, and will continue to update, a national survey summarizing the evolving legislation and executive actions, available here: <https://bit.ly/3eqTRZ0>.*

## Tennessee Supreme Court Finds Protective Order Statute Allowing Ex Parte Interviews of Patient's Non-Party Healthcare Provider Unconstitutional As Statute Improperly Strips Trial Courts of Discretion Over Discovery

In a decision issued on February 28, 2020, the Tennessee Supreme Court held that a statute providing that a trial court “shall” grant a petition to defendants for a qualified protective order to conduct an ex parte interview of a patient’s non-party healthcare provider improperly stripped trial courts of their discretion over discovery and was thus unconstitutional. *Willeford v. Klepper*, --- S.W.3d ---, 2020 WL 977073 (Tenn. Feb. 28, 2020). The daughter of a decedent patient brought a healthcare liability wrongful death lawsuit against medical defendants alleging negligent treatment of the decedent, resulting in her death. The defendants filed a motion for a qualified protective order under Tennessee Code section 29-26-121(f), specifically requesting that they be permitted to conduct interviews with the decedent’s non-party treating healthcare providers outside the presence of the daughter’s counsel. Despite the daughter’s argument that the statute was unconstitutional as a violation of separation of powers, the trial court granted the motion and ordered the interview, commenting that the statute went

too far in requiring the court to do something, but that it was not the trial court’s place to declare a statute unconstitutional. The trial court granted the daughter’s interlocutory appeal, but the Court of Appeals denied the daughter’s request. The Tennessee Supreme Court granted the daughter’s appeal, undertaking a survey of the history of ex parte interviews, noting that prior to HIPAA and state legislation, it was common practice in Tennessee for defense counsel to conduct these ex parte interviews. In a series of subsequent decisions, however, the Court concluded that neither the law nor public policy required the plaintiff to bear the risk of disclosure of irrelevant confidential medical information and barred ex parte communications between non-party treating physicians and defendants in the state. The General Assembly responded by abrogating these holdings with the enactment of Section 29-26-121(f) in 2012. The Court recognized its duty to uphold the constitutionality of a statute wherever possible. But it also recognized that both the state’s constitution and the legislature granted it the power to pre-

scribe by general rule the practice and procedure in all of the courts of the state in all civil and criminal suits. Analyzing the statute and adopting a substantive versus procedural analysis used by sister jurisdictions, the Court determined that subsection 121 was not purely procedural because, if the legislature has the authority to create a privilege, it also has the authority to determine if the privilege does not exist, as here. Therefore, the Court held, the overriding purpose of the statute was within the authority of the legislature, or at least something to which the judiciary should yield if reasonably possible. The specific “shall” language of subsection (f)(1), however, effectively stripped the trial courts of their discretion in discovery, impermissibly intruding on the authority of the judiciary over procedural matters. Seeking only to elide the unconstitutional portion of the statute, the Court severed the unconstitutional language from the remainder of the statute, allowing defendants to petition the court for qualified protective orders but leaving the manner of disposition to the trial court.

## Mississippi Supreme Court Applies Two-Year Professional Malpractice Statute of Limitations to Pharmacy Mis-filled Prescription Claim

In a decision issued on March 5, 2020, the Mississippi Supreme Court held that the two-year professional-malpractice statute of limitations applied to a claim against a pharmacy for the alleged mis-filling of a prescription. *Wolfe v. Delta Discount Drugs, Inc.*, --- So.3d ---, 2020 WL 1060468 (Miss. Mar. 5, 2020). A patient brought an action against a pharmacy asserting claims for negligence arising from allegations that a pharmacy employee mis-filled his prescription for blood pressure medication, which caused the patient to black out while driving on June 15, 2015. The pharmacy moved to dismiss the claim as time barred under Mississippi’s professional-malpractice statute of limitations which has an applicable two-year limitations period. On November 4, 2016, the plaintiff sent the pharmacy a notice of claim letter indicating that he intended to file suit, but failed to do so for an additional



two years and ten months, until May 1, 2018. The pharmacy contended that more than two years had passed since the negligent act on June 19, 2015, when the admitting physician discovered and explained to the plaintiff that he was prescribed the wrong medication. The trial court granted the pharmacy’s motion to dismiss, reasoning that the heart of the complaint goes to the services performed by the pharmacist, who is a professional. The plaintiff appealed, arguing that (1) the trial court exceeded its

judicial authority by expanding the coverage of the professional-malpractice statute to include a pharmacy, (2) the act the plaintiff complained of constituted general negligence subject to the catch-all three-year statute of limitations, and (3) the complaint alleges negligent acts of the pharmacy, not the pharmacist. The Supreme Court affirmed the trial court’s decision, holding that the plaintiff’s injuries arose out of the course of professional services that may be performed only by or through a licensed pharmacist, and that it has repeatedly prohibited the misbranding of a claim in order to escape a shorter statute of limitations. The Court further held that the plaintiff’s *respondeat superior* claims were also subject to the two-year limitations period, as a statute that bars a claim against an agent equally protects those in whose behalf he acted as agent.

## Pennsylvania Court Upholds Defense Verdict, Affirming Scope of Informed Consent and Trial Court's Denial of Plaintiff's Proposed Jury Instructions

In a decision issued on March 27, 2020, the Superior Court of Pennsylvania held that the trial court did not err in an informed consent case when it limited material “facts” of which the patient must be informed to material “risks,” and did not err when it refused to instruct the jury that a patient must be correctly advised of the professional credentials, training and experience of the primary surgeon. *Cunningham v. Picardo*, 2020 WL 1490841 (Penn. Super. Ct. Mar. 27, 2020). The plaintiff filed a complaint against an obstetrics and gynecology doctor alleging that she performed surgery on her without her consent, informed or otherwise. The case proceeded to a two-day jury trial in which the defendant doctor testified that the plaintiff had repeated problems with her Bartholin's gland, recommended an excision, and told the patient that she had never removed a Bartholin's gland herself, and that she was not comfortable doing the procedure. She recommended a specialist in another city but the patient expressed she wanted to remain local if there was someone who could do the procedure. The defendant enlisted the help of another doctor who had

done the procedure before and articulated that to the patient, but did not indicate which doctor would be performing the surgery. The defendant also articulated the risks,



alternatives, and description of the procedure, and patient signed a written consent. The defendant further testified that during surgery she made the incision, dissected the tissue, removed the gland, and placed the sutures. The other doctor's involvement was limited to cutting sutures, suctioning and sponging blood, and protracting tissue. The plaintiff testified that she understood the other doctor would be performing the surgery and expected the defendant to be there only to assist. She testified that post-surgery she was in a lot of pain and it was the other doctor who told her that the defendant had done a good job, suggesting to the plaintiff that the defendant was the lead surgeon,

which upset her. Following trial, the jury returned a verdict in favor of the defendant, determining that she proceeded with the surgical procedure with proper informed consent. Plaintiff's post-trial motion was denied and on appeal, plaintiff argued that the trial court erred in failing to instruct the jury that a doctor must inform a patient of all material “facts” to constitute informed consent, including the name of her lead surgeon, instead limiting the required information to material “risks.” The Superior Court found no abuse of discretion of the trial court, finding no evidence that a “lead” or “primary” surgeon exists such that the name would be required to be disclosed for informed consent. The Superior Court further found no abuse of discretion in the denial of plaintiff's proposed jury instruction on informed consent and the alleged misrepresentation of the credentials, training, or experience of the defendant, holding there was no evidence of such misrepresentation. Assuming that plaintiff sought to argue the identity of the surgeon should be disclosed as part of the credentials, training, or experience, the jury instruction was not proper.

## Missouri Supreme Court En Banc Vacates Previous Ruling and Remands Plaintiff's Med Mal Negligent Credentialing Claim for New Trial

In an en banc decision issued on December 10, 2019, the Missouri Supreme Court overturned a circuit court's \$2.3 million verdict against a hospital center, but granted a new trial after the plaintiffs claimed they had new evidence. *Tharp v. St. Luke's Surgicenter-Lee's Summit*, No. SC96528 (Dec. 10, 2019). A jury awarded plaintiffs \$2.3 million dollars in a case accusing a defendant hospital center of negligent credentialing in granting a surgeon staff privileges at the hospital despite the fact that the surgeon had allegedly failed to disclose the number of medical malpractice lawsuits he had defended in applying for privileges. Plaintiffs' claims stemmed from a botched gallbladder removal conducted by the surgeon which caused bile leakage, inflammation, and liver damage. Plaintiffs had previously settled with the surgeon, who was not part of the instant case. After the jury verdict, the hospital center filed a judgment notwithstanding the verdict, contending that there was insuffi-

cient evidence to prove that it breached any duty owed to the patient, and that plaintiffs had failed to make a submissible case of negligent credentialing. In an opinion dated February 26, 2019, the Missouri Supreme Court held that the plaintiffs failed to make a submissible claim of negligent credentialing and entered judgment in favor of the hospital center on the grounds that there



was no evidence that the hospital center had breached its duty to the plaintiffs to credential competent and careful physicians. In a subsequent December 10, 2019 decision, the

Missouri Supreme Court vacated its prior decision, recognizing that it was not until the instant case that the Court had recognized negligent credentialing as a cause of action, set out elements of the cause of action, and explained the evidence necessary to support the claim. As such, the plaintiffs should not be punished for failing to introduce evidence when they did not have the benefit of the Court's guidance as to the necessary evidence and their failure to introduce such evidence was justifiable. Because the plaintiffs possessed additional, relevant evidence that would allow them to make a submissible case on retrial, and a retrial was in the interest of justice, the Court reversed and remanded, stating that there was no “hard and fast rule” for introduction of evidence at trial, justice precluded outright reversal of a verdict and instead requires remand if the failure to introduce evidence was caused by some extrinsic factor outside the plaintiff's control.



## Jury Verdicts/Settlements

2300 N Street, NW  
Washington, DC  
20037

Phone: 202-457-1600  
Fax: 202-457-1678  
www.jackscamp.com



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Christopher Ferragamo  
(202) 457-5458  
[cferragamo@jackscamp.com](mailto:cferragamo@jackscamp.com)

Marie VanDam  
(202) 457-1622  
[mvandam@jackscamp.com](mailto:mvandam@jackscamp.com)

Peter J. Jenkins  
(202) 457-1605  
[pjenkins@jackscamp.com](mailto:pjenkins@jackscamp.com)

Susan Knell Bumbalo  
(202) 457-1642  
[sbumbalo@jackscamp.com](mailto:sbumbalo@jackscamp.com)

Sathima H. Jones  
(202) 457-1656  
[sjones@jackscamp.com](mailto:sjones@jackscamp.com)

Annette P. Rolain  
(202) 457-4265  
[arolain@jackscamp.com](mailto:arolain@jackscamp.com)

**City of Richmond, VA — April, 2020.** A jury in Richmond, Virginia awarded a 74-year old man \$6.5 million in a medical malpractice case involving a ureter severing that took place during a colectomy being performed to treat low stage colon cancer. The injuries went undetected for over a week and required five days of surgery to repair.

**New Jersey — February, 2020.** A lawsuit brought by the parents of a infant who sustained a severe and permanent brain injury allegedly due to medical malpractice after hernia repair surgery was settled for \$6.5 million. The child, now 7 years old, had been brought to the emergency room because of a recurrent bulge and then underwent surgery to repair an inguinal hernia. The baby suffered a brain injury that resulted in chronic status encephalopathy

and now suffers from several disabilities. Plaintiffs alleged the anesthesiologist negligently intubated the infant and negligently failed to monitor her breathing and oxygen levels. The defendants argued that the infant's brain injury was due to her prematurity and a bacterial infection.

**Nashville, TN — January, 2020.** A federal judge in Tennessee has awarded \$15 million to a 15-year-old boy who suffered a birth-related brain injury at a hospital on the Fort Campbell Army post. At a bench trial, the judge ruled that the hospital failed to inform the mother of her choices of delivery and did not properly monitor the fetus during labor. The judge further held that if the boy would have been delivered by cesarean section earlier during labor, his injuries might have been avoided

**Essex County, MA — February, 2020.** An Essex County jury awarded \$3 million to a man in a case in which a neurosurgeon mistakenly placed a surgical screw into a 71-year-old patient's vertebral artery during spine surgery. The misplaced screw caused bleeding and nerve compression that was not timely treated by the defendant resulting in new deficits the patient did not have before surgery, including severe neck pain, loss of mobility of his arms, and ultimately led to the development of a severe infection

**New York — March, 2020.** The federal government agreed to pay \$5 million to settle a medical malpractice lawsuit brought on behalf of a 6-year old girl who suffered catastrophic brain damage as a baby while being treated at a government-funded hospital in upstate New York.

## Notable Defense Verdicts

**Illinois Supreme Court — April, 2020.** The Illinois Supreme Court upheld the dismissal of a medical malpractice claim against a physician sued for injuries to a baby sustained during child birth. A directed verdict was entered in favor of the physician at trial and the plaintiff failed to file a post-trial motion on the ruling. The Court agreed and upheld the dismissal. The Court, however, remanded the case for re-trial on the informed consent claims.

**Delaware Supreme Court — December, 2019.** The Delaware Supreme Court reversed a trial court ruling and dismissed a medical malpractice lawsuit against a hospital in connection with a woman's death after hip surgery ruling that a legal release for the doctor applied to the hospital as well. The Court held that the language of the release addressing reductions for joint tortfeasors resulted in a complete release of the vicarious liability of his employer.

**Fulton County, VA — April, 2020.** A Fulton County jury entered a defense verdict in favor of a surgeon who severed the common bile duct of a patient during a laparoscopic cholecystectomy. The patient alleged that the surgeon failed to properly identify the ducts during the procedure. The jury disagreed.

**Pinellas County, NJ — March, 2020.** A Florida Court of Appeals reversed a Pinellas County judge's order denying motions to dismiss filed by a physician and his employer in a medical malpractice case in which plaintiff alleged that their malpractice led to the death of a woman after undergoing elective colostomy reversal surgery. The Court ruled that the woman's estate failed to follow the pre-suit requirements of providing an expert opinion with the notice of intent to sue. The statute required such an opinion to allow a pre-suit investigation.

**Chester County, PA — April, 2020.** A Pennsylvania appellate court reversed a \$10 million Chester County jury verdict awarded to the estate of a woman who died during spinal surgery. Although the appellate court did not dismiss the case outright, it held that the amount of the award was "far greater" than those of similar cases and, thus, remanded the case for a new trial. The retrial will focus specifically on the amount of damages to be awarded.

**Court of Appeals, IN — February, 2020.** An Indiana appellate court upheld an Indiana medical malpractice jury's defense verdict in a case where the ER doctor interpreted a patient's chest x-ray as normal and later a radiologist interpreted the same x-ray as showing an enlarged heart. The patient died 24 hours after his ER visit. The Court held that the failure to call the patient with the x-ray results was not a breach of the standard of care.