DECISIONS

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Hawai'i Supreme Court Holds Factfinder in Med Mal Case Involving Death of Patient Can Consider "Loss of Chance" in Determining Legal Causation for Negligence, But It Is Not An Independent Injury

In a decision issued on May 5, 2020, the Supreme Court of Hawai'i held, as a matter of first impression, that a loss of chance is not a separate compensable injury in a medical malpractice case involving the death of a patient, but that a factfinder may consider a loss of chance theory in determining legal causation for traditional negligence. *Estate of Robert Frey v. Mastroianni*, 146 Hawai'i 540 (2020). An estate and several family members of a patient alleged that the patient died as a result of the negligence of his treating physician and that the physician's conduct fell below the applicable standard of care. In their complaint, plaintiffs alleged one count of negligence (medical malpractice) and one count of wrongful death. As to the count for wrongful death, the plaintiffs claimed that the doctor's negligent actions were a substantial factor in causing the patient's death or, in the alternative, that the doctor's negligent treatment deprived the patient of a significant improvement in his change of recovery, which loss of chance is compensable in and of itself. At trial, the Estate presented three medical expert witnesses to testify that based on the totality of the clinical picture, the factors leading up to the patient's hospitalization, the patient's medical records, vitals, and inappropriate diagnosis, as well as the patient's premature discharge, that the treating physician was negligent in his standard of care. After presentation of the expert evidence, the treating doctor moved for a judgment as a matter of law on the grounds that the Estate had failed to establish with reasonable medical probability that the treating doctor's care and treatment was the cause of the patient's death. The treating physician further argued that the Estate was not permitted to pursue "a claim for lost chance of survival under the loss of chance doctrine" because such claim (1) was never presented during the medical claim conciliation panel ("MCCP") proceeding which preceded the complaint, thereby depriving the court of jurisdiction to hear the claims (2) was not pleaded in the complaint itself; and (3) is not a recognized cause of action in the jurisdiction. The Estate argued that there was sufficient evidence of negligence to overcome the motion for judgment as a matter of law and that Hawai'i had effectively adopted the loss of chance doctrine, not as a separate cause of action, but as a theory of causation that may result in an apportionment of damages. Alternatively, the Estate argued that the treating physician's negligence was a substantial factor leading to the patient's death and that its failure to plead a damages theory at the MCCP is not a jurisdictional bar. The circuit court granted the treating physician's motion for judgment as a matter of law, stating that it considered the Estate's claim for loss of chance as separate from the wrongful death claim, and found that, irrespective of whether the claim is recognized as valid under Hawai'i law, it lacked subject matter jurisdiction because the Estate failed to raise the claim before the MCCP. As to the wrongful death claim, the court found that none of the Estate's experts opined to a reasonable degree of medical probability as to whether the patient would have survived had he not been discharged. The Estate appealed to the Intermediary Court of Appeals, which concluded that in medical malpractice actions in which a patient dies, the loss of chance doctrine is consistent with Hawai'i law and should be recognized as a separate compensable injury. It held, however, that the Estate did not assert a loss of chance claim to the MCCP and that was a procedural misstep warranting affirmation of the circuit court's dismissal on subject matter jurisdiction grounds. It also held that the expert medical testimony fell short of providing a causal nexus between the treating physician's alleged negligence and the patient's death and the circuit court did not err in granting the motion for judgment as a matter of law. The Estate appealed. The Hawai'i Supreme Court, in a case of first impression, determined after looking at various other states' treatment of "loss of chance," that loss of chance is not an independent cause of action under Hawai'i law, but may be considered in determining legal causation. Under Hawai'i's prima facie test of negligence, which extends to medical professionals, a defendant's conduct is a legal harm if (a) the actor's conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability. According to the Court, in adopting a substantial factor test for negligence, Hawai'i need not create a new cause of action for loss of chance because the negligence rules are already flexible enough to address the problem. Some states have adopted a "substantial chance" approach to the loss of chance doctrine, which requires the plaintiff to present evidence that a substantial or significant chance of survival or better recovery was lost. The Hawai'i Supreme Court found this approach to be consistent with its test for negligence and thus, the loss of chance would become a relevant consideration in determining whether a defendant's negligence was a substantial factor in causing plaintiff's injury. The Court further held that because loss of chance is not a distinct cause of action, but a factor that may be relevant in determining whether a defendant's negligence was a substantial factor in causing a plaintiff's harm, the Estate was not required to specifically raise loss of chance, or any other legal theory, before the MCCP in order to later file suit. The Court overruled the circuit court's grant of the motion for judgment as a matter of law, holding there was ample evidence to support a jury finding in favor of the Estate and remanded for a new trial.

SPECIAL POINTS OF INTEREST:

- *Hawai'i Supreme Court Bars Independent Loss of Chance Claim But Allows Consideration in Causation*
- *Gov't and States Continue to Enact COVID-19 Immunity Legislation and Executive Actions*
- *Fourth Circuit Holds That Medicaid False Billing Claims Constitute a "Medical Incident"*
- *D.C. Court of Appeals Applies Consumer Protection Act to Medical Service Providers*

D.C. High Court Rules No Proof of Intentional Misrepresentation Necessary in Medical Service Provider Consumer Protection Act Claim

In a decision issued on February 27, 2020, the D.C. Court of Appeals held under the District of Columbia Consumer Protection Procedures Act, that a plaintiff is not required to allege or prove a defendant's intentional misrepresentation or failure to disclose in order to prevail. *Frankeny v. District Hospital Partners, LP*, 225 A.3d 999 (D.C. 2020). A patient brought an action against hospital operators alleging that they violated the District of Columbia Consumer Protection Procedures Act ("CPPA" or "Act") by making a material misrepresentation of services in failing to inform her that a first-year resident, rather than the board-certified surgeon she selected, would be performing her bilateral tonsillectomy. The CPPA provides remedies to consumers who are victimized by unlawful trade practices and is "construed and applied liberally." Hospital operators filed a motion for summary judgment which the trial court granted, concluding that the patient was required, but failed, to present evidence of an "entrepreneurial motive," *i.e.* that the hospital's misrepresentation was intentional and motivated by business interests or financial gain. The Court of Appeals reversed, concluding that the trial court erred in requiring the patient to provide evidence of an "entrepreneurial motive," to sustain her CPPA claims because, as the Court had previously decided, under other sections of the Act, a plaintiff-consumer is not required to allege or prove intentional misrepresentation or failure to disclose to prevail on a claimed violation of the CPPA. The Court held that the same reasoning extends to a plaintiff-consumer under sections (a) and (d), raised by the patient. Subsection (a)

involves a representation that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have. Subsection (d) involves a representation that goods or services are of a particular standard, quality, grade, style or model, if in fact they are of another. The Court also evaluated whether the CPPA could apply to "learned professions," holding that any limitation of the CPPA with respect to the practice medicine ended in 1991 when the D.C. Council amended the statute to remove "practitioners of the healing arts" from the exclusions. As such, there is no different burden of proof for "general" CPPA claims and those against medical service providers, and a consumer is not required to proffer evidence of an "entrepreneurial motive" or an "entrepreneurial nexus." The Court noted that it did not eliminate all restraints on the CPPA's reach to the medical profession, acknowledging that certain aspects of the practice of medicine, such as those premised on public service or ethical norms, may lend necessary context to evaluating a medical professional's conduct and to determine whether it can support a CPPA claim. The Court found no such limitation warranting evaluation in that case. Consequently, the Court held that the patient presented sufficient evidence to survive summary judgment on her CPPA misrepresentation claims, and to proceed to trial. The evidence, viewed in the light most favorable to the patient, also supported and would permit a jury to find that the misrepresentation or failure to disclose information was material and that a reasonable person could attach importance to the difference the doctors' experience. The Court also held there was no blurred lines between the CPPA claims and traditional medical malpractice.

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 continued 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 issued 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 treatment 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/2CMkCZy.*

New Jersey Supreme Court Refuses Applicability of Common Knowledge Exception to Affidavit of Merit Statute Requiring Expert Affidavit in Medical Malpractice Case

In a decision issued on May 4, 2020, the New Jersey Supreme Court dismissed a plaintiff's complaint with prejudice, holding that a patient's allegations in a complaint for medical malpractice did not invoke the "common knowledge" exception to the affidavit of merit requirement, which mandates a plaintiff must include with a complaint an affidavit of a medical expert stating the expert's reasonable belief that the defendant's conduct fell below an applicable standard of care. *Cowley v. Virtua Health System*, --- A.3d ----, 2020 WL 2109370 (May 4, 2020). A patient filed suit against registered nurses, the hospital, and health care system, asserting claims for medical malpractice arising out of the nurses' alleged failure to take action to ensure compliance with the physician's order for insertion of a nasogastric tube, after the patient removed the tube and refused to allow it to be reinserted. New Jersey's affidavit of merit statute requires plaintiffs alleging malpractice against a licensed professional to include an affidavit from a medical expert in their filing. The affidavit must provide that there exists a reasonable probability that the standard of care exercised in the alleged malpractice fell outside the acceptable professional or occupational standards. The New Jersey Supreme Court previously created an exception to the requirement for cases in which the conduct or failure to act, if accepted as true, would be reasonably recognizable, by a person of ordinary intelligence, as a failure to exercise the appropriate standard of care. The issue before the Court was whether the failure to act when a patient dislodges her tube and refuses its reinsertion would fall within the jury's common knowledge as a departure from the acceptable standard. The trial court reasoned that a jury could not use common knowledge to determine what standard of care a nurse should use in the situation at hand, and the Appellate Division reversed, concluding such a determination was not necessary because a jury could use common knowledge to determine a nurse should take some action when a tube is dislodged and that no affidavit of merit is needed. The New Jersey Supreme Court, disagreeing with the Appellate Division, held that the common knowledge exception applies in limited cases where a person of reasonable intelligence can use common knowledge to determine that there was a deviation from a standard of care and where an expert is no more qualified to attest to the merit of a plaintiff's malpractice claim than a non-expert. The Court held that where a patient removes a tube herself and refuses replacement, important questions about the procedures, protocols, and duties of a licensed nurse must be explained in order to establish a deviation of the standard of care. Important considerations about patient autonomy also complicates a standard-of-care analysis. It reasoned that the primary purpose of the statute was to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious. As such, the Legislature was not concerned with a plaintiff's ability to prove the allegation contained in his or her complaint, but rather, with whether there is an objective threshold merit to the allegations. The failure to provide an affidavit or legal equivalent is deemed a failure to state a claim.

Fourth Circuit Holds Insurer Had Duty to Defend and Indemnify Medicaid False Claims Act Claims Under "Medical Incident" Provision of Policy

In a decision issued on May 26, 2020, the Fourth Circuit remanded and vacated a North Carolina district court decision dismissing a duty to defend and indemnify an insured for false claims act claims. *Affinity Living Group, LLC v. Starstone Specialty Insurance Co.*, 959 F.3d 634 (4th Cir. 2020). An insured operator of an adult care facilities brought an action seeking declaratory judgment that its insurer had a duty under a professional liability policy to defend and indemnify it in an underlying action alleging under a false claims act that the operators submitted Medicaid reimbursement claims for services that they never provided. The defendant-insurer had denied coverage because the lawsuit's claims did not fall within the policy's coverage for "damages resulting from a claim arising out of a medical incident." The district court agreed, granting judgment on the pleadings against the operator on the declaratory judgment and breach of contract claims. The Fourth Circuit disagreed, finding that under North Carolina law, the underlying complaint fell within the insurance policy's coverage provisions. The underlying claims alleged that the operators' Medicaid claims were false because the operators failed to provide the residents with the claimed personal-care services. "Medical incident" under the policy, was defined as an "act, error or omissions in [insured's] rendering or failure to render medical professional services . . . ." The parties agreed that rendering, or failing to render, personal-care services qualified as a "medical incident." The Court held that even though seeking Medicaid reimbursement is not itself a "medical incident," it "aris[es] out of" a medical incident. Applying the law of North Carolina, "arising out of" in the insurance policy context is interpreted broadly to include a causal connection when used in a provision extending coverage but more narrowly to require proximate causation when used in a provision excluding coverage. Because the term "arising out of" in the policy falls within a provision extending coverage, it must be interpreted broadly to require only a "causal connection." Because false billing for personal-care services "does not arise in a vacuum," a failure to provide such services gave rise to the claim for damages and the "failure to render" is a covered "medical incident."

Iowa Supreme Court Applies Contradictory Affidavit Rule to Expert Testimony and Report to Deny Medical Malpractice Claim

In a decision issued on March 12, 2020, the Iowa Supreme Court held, pursuant to Iowa's summary judgment contradictory affidavit rule, that a plaintiff's medical expert failed to establish a causal link between a physician assistant's failure to diagnose a patient's necrotizing fasciitis and prompt administration of antibiotics with the amputation of patient's right arm and eight of her toes. The Court further held that the patient was not entitled to recover damages for lost chance of survival. *Susie v. Family Health Care of Siouxland PLC*, 942 N.W.2d 333 (Iowa 2020). The patient and her husband filed a negligence action against the defendant hospital and doctor seeking damages for amputation of her right arm and other related injuries. The plaintiffs provided the expert report on causation of a doctor and then submitted him for a deposition. Following the deposition, the defendants filed a summary judgment motion arguing that plaintiffs lacked evidence on causation and that the expert could provide only speculation as to the effect of antibiotic administration for the patient's infection which resulted in her amputations. The plaintiffs countered that a prima facie case of causation was made based on the doctor's report, his deposition testimony, and the supporting evidence from multiple medical experts. The district court granted the defendants' motion and plaintiffs appealed. The court of appeals reversed, concluding summary judgment was improper based on all of the evidence taken together. The Iowa Supreme Court, agreeing with the defendants and the district court, held that the medical expert's testimony failed to establish the causation element because it did not rise above the level of speculation; the medical expert was not an expert in necrotizing fasciitis and was noncommittal about whether antibiotics would have been effective. Plaintiffs attempted to rely on the medical expert's report, but under the contradictory affidavit rule, the Supreme Court rejects an affidavit that directly contradicts prior testimony unless the affiant provides a reasonable explanation for the apparent contradiction. Assuming the report was part of the summary judgment record, and in consideration of the timing of the report and testimony order being inconsequential, the Court held that the report, which was contradicted by the deposition, was insufficient to generate a genuine issue of fact. According to the Court, the plaintiffs' other witness testimony contending that the sooner a patient with an infectious condition is seen and the start of antibiotics, the better, also did not create a genuine issue precluding judgment. Plaintiffs also failed to raise a prima facie case of lost chance of survival of keeping the patient's arm and toes. Plaintiffs presented no expert testimony about the chance of keeping her arm and toes, if any, had antibiotics been administered and presented no testimony from which a jury could decide what the reduction in plaintiffs' chance of survival was; the jury could not be left to speculate.

Virginia Supreme Court Revives Medical Malpractice Lawsuit Initially Dismissed on Double Recovery Grounds

In an decision issued on June 4, 2020, the Virginia Supreme Court held that a plaintiff could revive his wrongful death action even though he had recovered for personal injuries in a different jurisdiction. *Green v. Diagnostic Imaging Associates, P.C.*, 2020 WL 2974193 (Va. June 4, 2020). Plaintiff and personal representative of his wife's estate, filed a wrongful death and personal injury action in a Virginia circuit court and a Kentucky circuit court alleging that his wife died as the result of medical professionals in both states failing to identify and treat his wife's mesenteric ischemia when her ischemic bowel was salvageable. In Kentucky, the complaint alleged that the Kentucky defendants were negligent and deviated from the appropriate standard of care and that their failure to identify and treat the patient's mesenteric ischemia was the proximate cause of her death. The Kentucky circuit court entered an order granting the plaintiff's partial motion to dismiss certain defendants and plaintiff settled with the sole remaining Kentucky defendant for an undisclosed amount. In Virginia, plaintiff filed a complaint and then an amended complaint which included a sole cause of action for wrongful death. The Virginia defendants filed motions to dismiss, arguing that the injuries asserted in both Kentucky and Virginia were the same and that recovery for wrongful death in Virginia is barred by statute because the plaintiff had already elected his remedy when he recovered for personal injury to his wife in Kentucky. The defendants further argued that the prohibition against claim-splitting and double-recovery barred the plaintiff from splitting a single cause of action into two separate claims and recovering under both, so such claims were barred by judicial estoppel. The circuit court granted the Virginia defendants' motions with prejudice pursuant to the plaintiff's recovery in Kentucky, holding that a Virginia statute allows only personal injury recovery or wrongful death recovery, but not both. The Virginia Supreme Court considered the plain language and legislative intent of the statute, finding that it plainly states that if the injured individual's death resulted from the injury, the action for that injury must be pursued in a wrongful death suit and a personal representative does not have an option to maintain a personal injury action for a decedent's injury if that injury resulted in the decedent's death. Unlike the circuit court's contention, the statute did not operate as an election of remedy statute. Because the plaintiff alleged in the amended complaint that the patient died as a result of the injury she suffered, in Virginia, the plaintiff's claim could only proceed as a wrongful death action. The Court left open the possibility that the Virginia circuit court could reduce any judgment received in Virginia by amounts already compensated in the Kentucky settlement to the extent it may be found to constitute double recovery.

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Jury Verdicts/Settlements

Chicago, IL — June, 2020. A Chicago medical center has agreed to pay $7.5 million to resolve claims that medical staff failed to inform a patient of troubling signs of lung cancer that was detected by a radiologist while patient was undergoing a routine CT scan in which a mass on patient's lungs was discovered, and which ultimately proved fatal.

Georgia — June, 2020. The federal government agreed to pay approximately $6.7 million to resolve a suit accusing medical staff at an Army medical center of causing a newborn baby's permanent and severe brain damage after staff doctor left mother alone and in labor for a half hour despite troubling signs of fetal distress, which caused the fetus to be deprived of oxygen, leading to hypoxic ischemic encephalopathy. The deal called for an upfront cash payment of $6 million with the remainder earmarked for an annuity that would provide periodic payments for the child.

Miami, FL — March, 2020. A jury returned a $30 million ($20 million in past and $10 million in future damages) medical malpractice wrongful death verdict to the husband of a decedent after she died of a pulmonary embolism as a result of a failure to receive anticoagulant medication while in a rehab facility post-surgery. The orthopedic doctor prescribed the medication, knew she needed it, and knew she was not receiving it. The rehab orthopedic doctor, after hearing of decedent's severe breathing problems and pneumonia, prescribed Robitussin, and decedent died later that day. The rehab orthopedic doctor also alleged that decedent refused anticoagulant medication.

South Carolina — May, 2020. A hospital and teaching hospital paid $950,000 to a woman after a surgical sponge was left in her colon following a surgical procedure, which stayed there for more than six months.

7th Cir — June, 2020. Seventh Circuit rejected the U.S. Government's request to vacate a $8.3 million award for a 5-year-old boy who suffered a serious shoulder injury when he was born at a federally supported clinic, holding that the trial judge determined reasonable damages.

Los Angeles, CA — March, 2020. A Los Angeles County jury awarded $1.5 million in non-economic wrongful death damages to a patient plaintiff in a lawsuit involving claims that a nurse improperly inserted feeding tubes into her lungs. The award was reduced to $250,000 per a damages cap.

Notable Defense Verdicts

Appellate Division, New York — July, 2020. A New York appellate court vacated a $1.1 million verdict in a suit accusing an ear, nose and throat doctor of negligence during a woman's sinus surgery and causing her to lose her sense of smell, holding that there was a lack of relevant evidence.

Third Circuit — June, 2020. The Third Circuit affirmed the dismissal of a suit accusing a doctor employed by a federally funded health entity of negligence during a woman's delivery and causing her newborn to suffer shoulder injury, holding that the minor was not entitled to equitable tolling of two-year limitations period applicable to Federal Tort Claims Act because minor's counsel failed to timely discover that doctor who performed minor's delivery was employed by an entity deemed a public health service for FTCA purposes, so action was not pursued diligently.

Supreme Court, PA — May, 2020. The Pennsylvania Supreme Court, citing its recent decision which clarified how to address potential bias in civil jury pools, vacated a decision granting a medical malpractice retrial over concerns that two jurors were allowed to hear the case despite admitting animosity toward plaintiffs in malpractice cases.

Appellate Court, PA — April, 2020. A Pennsylvania appellate court affirmed liability in a patient's husband's medical malpractice wrongful death lawsuit but overturned a $10 million jury verdict as excessive, citing the trial court's failure to examine the evidence addressing appellants' challenge of excessiveness of jury award and the award's lack of consistency with other wrongful death verdicts in Pennsylvania, particularly damage awards for loss of society and comfort.

Court of Appeals, CA — June, 2020. A California appeals court affirmed dismissal of a medical negligence suit seeking to hold a hospital liable for an emergency room patient's death eight hours after release from the hospital, holding that the evidence presented by plaintiffs' medical expert were speculative and lacked reasoned explanation and showed that the hospital's nursing staff did not breach the standard of care in failing to review patient's chart and document cardiovascular risk factors.

Queens County, NY — May, 2020. A Queens County jury sided with the defendant in finding an internist had not departed from the standard of care in failing to diagnose a 28-year-old female's breast cancer, which became metastatic, in a pre-operative medical clearance examination for cosmetic breast augmentation surgery.