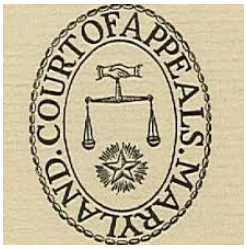
DECISIONS

INSIDE THIS ISSUE:

Maryland High Court Adopts Federal *Daubert* Standard for Expert Testimony; Maryland Court of Special Appeals Voids Jury's $911K Malpractice Verdict Citing Failure to Satisfy Expert 20 Percent Rule

Maryland High Court Adopts *Daubert* Standard For Expert Testimony. In a decision issued on August 28, 2020, the Maryland Court of Appeals followed other states in implementing the *Daubert* standard to evaluate all expert testimony, overturning its long-standing use of the *Frye-Reed* test. *Rochkind v. Stevenson*, 236 A.3d 630 (Md. 2020). In a post-trial motion, a defendant-landlord filed a motion for a new trial, judgment notwithstanding the verdict, and remittitur. The circuit court denied the motion for a new trial and judgment notwithstanding the verdict, but reduced damages pursuant to the statutory cap. The plaintiff filed a petition for writ of certiorari to the Court of Appeals and the defendant-cross appealed. The Court granted the petitions to answer, in part, whether the Court should adopt the standard of admitting expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court of Appeals noted that despite decades of jurisprudence on the topic, the *Frye-Reed* standard adopted in the 1970s -- and its relationship to Maryland Rule 5-702 -- held a confusing grip on Maryland bench and bar, and what was originally set out as a simple test for admissibility had become increasingly complex with the development of *Daubert* case law. Rule 5-702, adopted a year after the United States Supreme Court issued the opinion in *Daubert*, acted as a counterpart to Federal Rule of Evidence 702, and the Committee Note stated that the rule was not intended to overrule *Reed* or other cases adopting the *Frye* standard, and that the required scientific foundation for the admission of novel scientific techniques or principles is left to development throughout the law. After conducting a historical analysis of Maryland's jurisprudence under *Frye-Reed* and Rule 5-702, the Maryland high court adopted *Daubert*, noting that instead of perpetuating a process wherein expert testimony must pass through both *Frye-Reed* and Rule 5-702, the single standard provided by *Daubert* represents a standard generally accepted by a supermajority of jurisdictions and which has been implicitly embraced, in part, by the Court's jurisprudence. The Court held that the impetus behind its decision to change course was its desire to refine the analytical focus when a court is faced with admitting or excluding expert testimony, which has become especially important in modern society when confronting emerging technologies. Such emerging technologies challenged the efficacy of the *Frye* test, which centered on whether scientific principles or discoveries were generally accepted in a relevant scientific community, not whether based on "good science." *Daubert*, on the other hand, although not fully removing acceptance from the calculus, would refocus attention on the reliability of the methodology used to reach a particular result. In addition, applying the *Daubert* factors to Rule 5-702 provided a simpler, more straightforward analysis, doing away with the need to distinguish new and novel techniques to determine if testimony embraces a "scientific technique." Finally, the Court recognized that this shift in jurisprudence may mean that some scientific and technical evidentiary matters long considered settled may need revisiting.



Maryland Special Court of Appeals Bars Expert Testimony Not Satisfying Expert Twenty-Percent Rule. In a decision issued on October 2, 2020, the Maryland Special Court of Appeals held that plaintiff's expert witness was not in compliance with a "twenty-percent rule" which generally precludes testimony in medical malpractice cases by experts who spend more than twenty percent of their time acting as expert witnesses. *Brown v. Falik & Karim P.A.*, No. 3377, 2020 WL 5870530 (Md. Spec. Ct. App. Oct. 2, 2020). The plaintiff was required in cases of medical malpractice to file a certificate of a qualified expert which included a certification that no more than twenty-percent of the expert's annual activities were related to testifying as an expert witness. During discovery, the defendant-doctor sought information regarding the expert's income and activities in an effort to determine his compliance with the twenty-percent rule. The expert failed to produce responsive documents and later testified that he did not keep specific documentation relevant to his compliance. The trial court denied a pre-trial motion to preclude the expert's testimony, and the expert again attested to compliance with the rule and provided some tax returns and other documents. The trial court permitted the expert's testimony despite objection from the defendant and despite a failure to produce relevant documents. After trial, and on defendant's memorandum renewing his motion for judgment based on the twenty-percent rule, the trial court reconsidered its decision to allow the testimony and found it had erred in allowing the testimony. On appeal, the reviewing court held that although an exhaustive accounting of an expert's timesheets is not required, it needed sufficient information from which to make an accurate calculation of the expert's time spent testifying. Further, the expert's testified in his deposition and at trial that 70-88% of his income was derived from expert testimony and that he had discarded certain tax forms that would have provided a clear picture of his income and activities, without which not even he could determine the income he had earned from serving as an expert witness. As such, it was within the trial court's discretion to bar the testimony, and plaintiff's only evidence, and grant defendant's judgment notwithstanding the verdict.

SPECIAL POINTS OF INTEREST:

- *Maryland Court of Appeals Adopts Daubert Standard for All Expert Testimony*
- *Maryland Special Court of Appeals Rejects Expert Testimony Violating 20-Percent Rule*
- *Georgia Overrules Respondeat Superior Rule as Inconsistent with Apportionment of Damages*
- *Ninth Circuit Rules That Insurer Had No Duty to Defend After Physician Pled Guilty*

New York Appellate Division Reversed Denial of Wins to Three Doctors Accused of Causing Paralysis, Finding Experts Engaged in Speculation

In a decision issued on October 14, 2020, a New York appellate division court held that in an action to recover damages for medical malpractice, defendant-physicians and hospitals met their prima facie burden on summary judgment and plaintiff's experts engaged in speculation without evidentiary basis as to deviation from standard of care and proximate cause. *Longhi v. Lewit*, Index No. 58508/13, 2020 WL 6051520 (N.Y. App. Div. Oct. 14, 2020). A patient went to the defendant-hospital with complaints of severe back pain, and he was instructed to go to the emergency room due to concerns of possible aneurysm and tracheal deviation. In the emergency room, he was treated by a defendant-physician who ruled out both potential causes and discharged the patient. Two days later, the patient returned to the defendant-hospital where he was examined by a second defendant-physician who instructed the patient to undergo an MRI to rule out an epidural abscess. The MRI images were interpreted by a third defendant-physician and after receiving the results, the second defendant-physician suspected an epidural abscess and instructed the patient to go to the emergency room. In the emergency room, a second MRI was performed and his epidural abscess was confirmed, after which defendant-physicians scheduled surgery for the next morning. By around 1:00 a.m., the patient was found to be paralyzed below the neck and emergency surgery was performed three hours later. The patient ultimately died from respiratory failure related to quadriplegia. The trial court found that several defendants were entitled to summary judgment dismissing claims against them alleging malpractice by nonphysician

staff, but not summary judgment against medical residents and that several other defendant-physicians were not entitled to summary judgment. On re-argument the trial court vacated so much of the determination that it dismissed the complaint as asserted against the third defendant-physician. On appeal, the Court noted that a defendant seeking summary judgment must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff's injuries and disagreed with the trial court that certain defendants were not entitled to summary judgment as they established their prima facie burden and the plaintiff failed to raise a triable issue as to whether any alleged departures were the proximate cause of the patient's paralysis and ultimate death. The plaintiff's experts engaged in speculation without any evidentiary basis, presuming that if not for the alleged departures by certain defendant-physicians, the operating defendant-physician would have made the decision to operate prior to the onset of the patient's paralysis, or provided any different treatment. As to the operating defendant-physician, the plaintiff's expert engaged in speculation by presuming without evidence that he had sufficient time after he was first notified of the patient's condition to adequately prepare for and perform surgery prior to the onset of decedent's paralysis. Finally, the Court found that one defendant-hospital failed to meet a portion of its burden for negligent failure by its nonphysician staff regarding the treatment of the patient's bed sores. Accordingly, the trial court should have denied the defendant-hospital's branch of its summary judgment motion without regard to plaintiff's opposition.

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. Almost all legislation or executive orders enacted 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 (HHS) to do the same. The HHS office of General Counsel recently issued non-binding advisory opinions interpreting the scope of liability immunity under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures against COVID-19 (PREP Act). The Michigan Supreme Court recently held in a series of decisions that the Governor did not possess the authority under the Emergency Powers of the Governor Act to issue executive orders under a state of emergency, ruling such orders, including those related to liability immunity, were an unconstitutional exercise of legislative authority. *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/35GtFHy.

Ninth Circuit Upholds Ruling That Insurer Has No Duty to Defend or Indemnify Doctor Under Willful Acts Exclusion After He Pled Guilty in Connection With Administration of Fentanyl to Patient Who Died

The Ninth Circuit, in a decision issued on October 21, 2020, held that an insurer had no duty to defend or indemnify a doctor who pled guilty in connection with providing fentanyl to a patient under a willful violations of law exclusion. *National Fire & Marine Insurance Co. v. Hampton*, 2020 WL 6158314 (9th Cir. Oct. 21, 2020). A representative of the estate of a patient who was given fentanyl and died appealed the decision of a Nevada district court to grant an insurer's motion for summary judgment on the grounds it had no duty to defend or indemnify the administering doctor. The Ninth Circuit, citing Nevada law, held that for an insurer to avoid coverage under a policy exclusion, it must write the exclusion in obvious and unambiguous language, establish that the interpretation excluding coverage under the exclusion is the only interpretation that could fairly be made, and establish that the exclusion clearly applies to the particular case. Applying these elements, the Court held that the district court properly granted summary judgment because the language of the professional liability policy obviously and unambiguously excluded coverage for any loss arising from or in connection with any event, health care event, or managed health care event when intertwined with, or inseparable from any willful violation of any law statute, or regulation. The complaint alleged, and the doctor's plea agreement supported, that the doctor willfully violated federal controlled substances laws and that the violation resulted in the death of his patient. The estate had failed to adduce evidence to the contrary that would create a genuine issue of material fact and thus, coverage under the policy was excluded. Because coverage was clearly precluded, the Ninth Circuit also held that the district court properly relieved the insurer of its duty to defend and indemnify the doctor in its wrongful death action because there was no potential for coverage. The district court also did not abuse its discretion by denying the Estate leave to conduct further discovery under Rule 56(d). Under the Federal Rules of Civil Procedure, when a litigant shows by affidavit or declaration that it cannot present facts essential to justify its opposition to summary judgment, the district court may defer considering the motion or deny it; allow time to obtain affidavits or declarations or to take discovery; or issue any other appropriate order. The estate was obligated to proffer sufficient facts to show that the evidence sought existed and that it would prevent summary judgment. The affidavit submitted by the estate in support of its request for discovery related only to the doctor-patient relationship and the cause of the patient's death. It did not seek any information necessary to accurately interpret the terms of the doctor's professional liability policy such that discovery would preclude summary judgment. The Court found no merit in the estate's public policy argument, citing the Nevada Supreme Court's holding that public policy does not disfavor the enforcement of intentional or criminal acts exclusions in professional liability policies.

Georgia Appellate Court Follows Statute, Requires Clear and Convincing Evidence to Prove Gross Negligence of Obstetrical Unit Birth-Related Injury

In a decision issued on October 23, 2020, the Georgia Court of Appeals held that plaintiffs must prove gross negligence by clear and convincing evidence in cases involving medical emergencies arising in the obstetrical unit. *Ob-Gyn Associates, P.A. v. Brown*, No. A20A1447, 2020 WL 6253453 (Ga. Ct. App. Oct. 23, 2020). Parents brought an action on behalf of their minor child against an obstetric practice and nurse midwife alleging medical malpractice during the birth of their child. The trial court denied defendants' motion for partial summary judgment as to the applicable standard of care, finding that the heightened gross negligence standard did not apply because the minor's mother never presented to the hospital's emergency department. Defendants applied for interlocutory appeal, which was granted. On appeal, the defendants argued that the heightened gross negligence standard set forth in OCGA § 51-1-29.5(c) applies to all emergency medical care provided in an obstetrical unit. The relevant portion of the statute provides that in an action involving a health care liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider will be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed gross negligence. Defendants also argued that the trial court erroneously concluded that an issue of material fact precluded summary judgment on the issue of whether the minor child's shoulder dystocia constituted a medical emergency as defined by OCGA § 51-1-29.5(a)(5). The Georgia Court of Appeals held that because the injury took place in an obstetrical unit, the gross negligence heightened standard applies as a matter of law, reversing the trial court. As to whether the resolution of a shoulder dystocia constituted "emergency medical care," the Court again disagreed with the trial court, holding that the condition met the definition of "emergency medical care" when analyzed on an objective standard. The patient's actual medical or traumatic condition was determinative - but only as that condition was revealed by the patient's symptoms. The factfinder must consider the evidence regarding the symptoms the patient presented and determine whether those symptoms were acute and sufficiently severe to reasonably be expected to seriously impair health if not attended to immediately. The Court left open the question of whether gross negligence could be established.

Colorado Appellate Court Applied Corporate Practice of Medicine Doctrine to Overturn $14.9 Million Medical Malpractice Verdict

In a decision issued on October 15, 2020, the Colorado Appellate Court vacated a $14,905,000 medical malpractice verdict that had been reduced to $6,974,692.27 pursuant to Colorado's Health Care Availability Act ("HCAA"), concluding that the trial court should have dismissed the corporate negligence and uninformed consent claims as a matter of law because under the corporate practice of medicine doctrine, the medical facility was not vicariously liable for any malpractice by its doctor, nor did it owe a duty to the plaintiff to assume any medical responsibilities that the doctor failed to fulfill. *Smith v. Surgery Center,* No. 19CA0186, 2020 WL 6066273 (Co. Ct. App. 2020). The plaintiff, undergoing a series of injections to treat back pain, lost all feeling in her lower extremities and was eventually diagnosed with bilateral lower extremity paraplegia secondary with permanent paralysis below the waist. The plaintiff settled her claim against the doctor and maintained claims of corporate negligence, uninformed consent, and negligence per se against the medical facility. The facility did not tell its physicians how it could use the injectable steroid or any other drug that it stocked. The evidence was undisputed that the steroid had a wide variety of uses consistent with its labeling. It was also undisputed that the doctor did not inform the plaintiff that he intended to use the steroid during their procedure or that he intended to use it in a manner inconsistent with the manufacturer's label. Further, at trial, the evidence showed that no one explained to the plaintiff that the steroid would be used off-label and the forms that the plaintiff signed did not disclose that information. Under the corporate practice of medicine doctrine, a corporation that employs a physician is prohibited from interfering in the physician's medical judgment. The trial court ruled that the evidence showed the facility itself practiced medicine notwithstanding its corporate status, concluding that when the facility overtook the policy of controlling the formulary and providing informed consent to patients, it danced on, and over, the line of practicing medicine. The Appellate Court disagreed, holding that because a hospital may not dictate to a physician how he or she may practice medicine, it likewise may not be held liable for lapses in a physician's professional judgment. The only exception, they held, was in the form of a negligent credentialing claim. Therefore, the Court held that the decision to administer a certain medication to a patient in a certain situation is, without question, a medical decision made by a physician alone. Because the facility could not dictate to the physician how he could use the steroid, the facility could not be held vicariously liable for the physician's negligent administration of drugs. Although the plaintiffs contended that once the facility placed the drug on its formulary, it assumed the responsibility of ensuring that the drug would be used safely, it rejected the position because it was flatly inconsistent with the corporate practice of medicine doctrine and was in direct contravention of a statute prohibiting health care facilities from limiting or otherwise exercising control over a physician's independent medical judgment. The Court further held that the plaintiffs did not provide evidence that the facility was negligent for allowing the physician to continue to perform procedures at the facility.

Georgia Supreme Court Overrules State's *Respondeat Superior* Rule as Inconsistent With Apportionment of Damages Statute

In an decision issued on November 2, 2020, the Georgia Supreme Court held that an apportionment statute mandated that the jury be allowed to consider the fault of all persons who contributed to the alleged injury or damages, including an employer, abrogating the state's common law *respondeat superior* rule. *Quynn v. Husley*, 2020 WL 6385781 (Ga. 2020). Georgia's Respondeat Superior Rule provides that if a defendant employer concedes that it will be vicariously liable under the doctrine of *respondeat superior* if its employee is found negligent, the employer is entitled to summary judgment on the plaintiff's claim for negligent entrustment, hiring, training, supervision, and retention, unless the plaintiff has also brought a valid claim for punitive damages against the employer for its own independent negligence. The basis for the rule was that because the employer would be liable for the employee's negligence under *respondeat superior*, allowing claims for negligent entrustment, hiring, training and retention would not entitle the plaintiff to a greater recovery, but would merely serve to prejudice the employer. In a wrongful death case, the Georgia Supreme Court considered whether the Court of Appeals erred by holding that an employer of a driver whose truck struck and killed the decedent was entitled to summary judgment on the estate's claims of negligent entrustment, hiring, training, and supervision because the employer admitted the applicability of *respondeat superior* and the estate was not entitled to punitive damages. The trial court granted partial summary judgment to the employer on punitive damages and the negligence claims. Under OCGA § 51-12-33(g), a plaintiff is not entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed. The claims encompassed by the Respondeat Superior Rule are claims that the employer is at "fault" within the meaning of the apportionment statute and therefore, adherence to the Respondeat Superior Rule would preclude the jury from apportioning fault to the employer for negligent entrustment, hiring, training, supervision, and retention. The Georgia Supreme Court held that the Respondeat Superior Rule is inconsistent with the plain language of the apportionment statute, noting that evidence tending to establish the employer's fault would be of consequence to the determination of the action as the jury is required to consider fault of "the persons who are liable" and "all persons or entities who contributed to the alleged injury or damages." The Court further held that even accepting the claims against the employer are derivative of an employee's tortious conduct, it does not relieve the jury from apportioning fault under the plain language of OCGA § 51-12-33(g) as such claims are allegations of fault within the meaning of the statute.

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Jury Verdicts/Settlements

Appellate Court, New Jersey — September, 2020. New Jersey appellate court affirms $20 million jury verdict against doctor found at fault for failing to diagnose fetal distress, which would have resulted in the earlier delivery of the plaintiff's child, even where defendant argued that the trial judge committed reversible error in failing to declare a mistrial after the doctor's attorney became ill during trial and suffered a stroke.

North Carolina — September, 2020. North Carolina Supreme Court affirmed a $6 million medical malpractice verdict for a misdiagnosis and discharge of a patient who later suffered a heart attack and died, noting the plaintiff's expert presented sufficient evidence of pain and suffering and trial court did not err in granting plaintiff's motion for a directed verdict on the defendant's claim of contributory negligence due to the defendant's reckless conduct.

Appellate Court, Texas — October, 2020. An en banc Texas appellate court upheld most of a $14.1 million award in a suit accusing a doctor of botching a woman's care following gastric bypass surgery which caused permanent brain damage, saying the trial court did not err in excluding certain expert testimony or in admitting evidence of a doctor's loss of privileges and alleged extraneous bad acts.

Bucks County, Pennsylvania -- October, 2020. An urgent care and its owner settled vicarious liability claims for $1.5 million with the estate of a deceased 58-year old male who presented to the urgent care with abdominal pain and was erroneously diagnosed with a UTI, discharged with prescriptions for antibiotics and anti-nausea, and who later died of an abdominal aortic aneurysm which the urgent care doctors failed to rule out. Seventy percent of the settlement was allocated towards the wrongful death action and the remaining thirty percent toward the survival action.

Georgia -- September, 2020. The Georgia Supreme Court nixed a new trial request in a $46 million brain damage suit and affirmed the appellate court's decision that the plaintiffs sufficiently pled a claim for vicarious liability against the defendant based on an assessment of the fault of a non-party co-employee, finding that the defendant failed to properly file notice of a non-party's liability.

Notable Defense Verdicts

Appellate Court, New Jersey — September, 2020. A New Jersey appellate court affirmed a medical malpractice defense verdict despite voir dire jury pool being shown a graphic photo of a toddler in a case involving the infant's death allegedly caused by the defendant's medical malpractice.

Appellate Court, New York — October, 2020. A New York appellate panel vacated a defense verdict and remanded it to the trial court for a new trial in a suit accusing two physicians of causing a patient's heart attack, finding that the trial judge gave erroneous instructions to the jury regarding "habit," i.e. a physician's usual practice when treating patients, which is ordinarily only permissible when an inference is necessary to fill in evidentiary gaps.

Appellate Court, Kansas — September, 2020. The Kansas Court of Appeals affirmed a defense verdict in a suit accusing two surgeons of botching a man's hernia repair surgery, saying that the patient's lack of informed consent claim was properly dismissed by the trial judge for a failure to establish the essential elements, and thus the denial of plaintiff's motion to amend punitive damages was also appropriate.

Luzerne County, Pennsylvania -- October, 2020. After just 14 minutes of deliberation in a medical malpractice case with a $16 million demand, a Luzerne County, Pennsylvania jury rendered a defense verdict finding that none of the treatment provided by the defendants fell below the standard of care.

Montgomery County, Ohio -- September, 2020. A Montgomery County, Ohio jury returned a defense verdict in favor of a doctor and his employer in a medical malpractice and wrongful death action brought after a 59-year-old male suffered a bowel perforation during surgery which resulted in an intra-abdominal abscess and sepsis/septic shock which required multiple re-operations, including gastrectomy, splendectomy, and colectomy, extreme pain and suffering, significant disfigurement and loss of bodily function, loss of independence, and ultimately death.