DECISIONS

INSIDE THIS ISSUE:

New Jersey Appellate Court Rules Successive Tortfeasor Medical Malpractice Defendants Not Entitled to Pro Tanto Offset for Settlement with Original Tortfeasor

In a decision issued on December 3, 2020, the Superior Court of New Jersey Appellate Division held, in a case where the plaintiff-decedent had previously settled with the original independent tortfeasor for injuries she sustained as a result of a fall at a restaurant, that successive medical professional tortfeasors were not entitled to a pro tanto settlement credit according to New Jersey jurisprudence. *Glassman v. Friedel,* --- A.3d ----, 2020 WL 7062290 (N.Y. App. Div. Dec. 3, 2020). Executor of the estate of his deceased wife sued a restaurant and property owner of the site where his wife fell and fractured her left ankle. She received medical treatment for the injury, ultimately coming under the care of hospital, physician, and nurse defendants. She suffered complications from the surgery and ultimately died of a pulmonary embolism a month later. The executor contended that the medical defendants' negligent treatment resulted in injury to the decedent's right leg, increasing her immobility, and that they failed to provide appropriate anticoagulation medications, resulting in the fatal embolism. After the executor settled with the restaurant for $1.15 million, the medical defendants filed motions seeking a declaration that they would be entitled to a pro tanto credit against any potential damage award based on the formula explained in *Ciluffo v. Middlesex General Hospital.* That case stood for the proposition that where a plaintiff has settled with the first tortfeasor and claims that she was not paid for all of her injuries, she is entitled to have the injuries caused by the successive independent tortfeasors assessed and compared with the damages recoverable for all of her injuries. In other words, the plaintiff was entitled to have the factfinder apportion the damages caused by the two events, and the second, successive tortfeasor was potentially entitled to a pro tanto credit against any award based on the plaintiff's prior settlement with the owner of the premises. The Appellate Division disagreed with the medical defendants, and the holding in *Ciluffo*, noting that it did not address the continued viability of a settlement credit after the enactment of New Jersey's Comparative Negligence Act ("CNA"), N.J.S.A. 2A:15-5.1, *et seq*., or where the initial tortfeasor's ultimate fault was not adjudicated. The Court held that the CNA applies to situations involving successive tortfeasors, explaining that in the context of successive torts, the CNA helps to achieve the legislative objective of comparative responsibility by requiring juries to apportion damages between successive events and to apportion fault among the parties responsible for each event. But the

Court noted that unlike the situation in which multiple defendants may be liable for the same injury, a successive tortfeasor is liable only for damages proximately caused by the independent tortious conduct succeeding the original event. In other words, it is not an issue of comparative fault as between the initial and successive tortfeasor, but rather, it is an apportionment of damages between those injuries proximately caused by the initial tort and those proximately caused by the successive tort that matters. Ultimately, the Court held that it found no support for the medical defendants' general proposition that the CNA has no relevance to actions brought against successive tortfeasors because, by its express terms, the CNA applies to all negligence actions and strict liability actions in which the question of liability is in dispute. In addition, where the only defendants remaining are those alleged to have caused the subsequent injuries, the jury is obligated under the CNA to apportion the total amount of damages between those caused by the initial injuries and those caused by the medical defendants' negligence. As such, the remaining defendants are not obligated to pay for injuries that they did not proximately cause. At trial, however, a non-settling successive tortfeasor may dispute its negligence and the quantum of damages it proximately caused, and also adduce proof as to the negligence of the settling tortfeasor, including as to whether the initial tortfeasor's negligence was the proximate cause of the second causative event. The burden of proof is on the non-settling defendant. The Court also held that the only real issue in the case was whether the plaintiff or the medical defendants should benefit from the jury's assessment of the damages related solely to the fractured ankle when compared to the $1.15 million settlement that the plaintiff reached with the restaurant. With a possible pro tanto credit, if the settlement is less than the jury's assessment, plaintiff reaps the result of a potentially bad bargain, while the medical defendants are only responsible for the damages attributed to them. If the settlement is more than the jury's assessment, plaintiff receives a benefit while the medical defendants are still responsible for only what the jury has determined is the full measure of the damages attributed to their negligence. That result, it held, was wholly consonant with the developments in New Jersey jurisprudence since *Ciluffo* was decided, and therefore specifically disapproved of the holding in *Ciluffo* regarding the award of a potential pro tanto credit based on the circumstances before the Court.

SPECIAL POINTS OF INTEREST:

- *New Jersey Appellate Court Declines to Allow Successive Tortfeasors Offset of Original Tortfeasor Settlement*
- *Fifth Circuit Affirms Excess Insurer's Right to $7 Million from Primary Insurer for Failure to Settle*
- *Illinois Appellate Court Holds Independent Contractor Physician Not Agent of Hospital Defendant*
- *North Carolina Supreme Court Declines to Adopt Loss of Chance Doctrine, Citing Legislature's Purview*

Fifth Circuit Affirmed Decision Requiring Primary Insurer to Reimburse Excess Carrier for Its $7 Million Share of Settlement Over Deadly Crash

In a decision issued on December 21, 2020, the US Court of Appeals for the Fifth Circuit held that an excess liability insurer who brought an action contending that a primary liability insurer improperly rejected a settlement offer within limits of the primary carrier's coverage was liable for the excess carrier's $7 million share of a settlement. *American Guarantee and Liability Insurance Company v. ACE American Insurance Company*, 983 F.3d 203 (5th Cir. 2020). A claimant died after his bike collided with a stopped truck. His survivors sued the truck's owner. The truck's owner's primary insurer rejected three settlement offers before and during trial, and the jury awarded nearly $28 million. The plaintiffs eventually settled for nearly $10 million, of which the excess carrier paid nearly $8 million. The excess carrier sued the primary insurer, arguing that because the primary carrier violated its duty to accept one of the three settlement offers for the primary policy limits, the primary carrier was obligated to cover the excess carrier's settlement contribution. The district court agreed on both counts. Under Texas law, there is a duty that requires an insurer to exercise ordinary care in the settlement of claims to protect its insureds against judgments in excess of policy limits. The duty is not activated by a settlement demand unless (1) the claim against the insured is within the scope of coverage, (2) there is a demand within policy limits, and (3) the terms of the demand are such that an ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. Further, the duty applies only when the settlement's terms are clear and undisputed. As such, the Fifth Circuit held that in order for the duty to apply in this case, the offers must have been clearly stated, a sum certain, and unconditional. The Fifth Circuit affirmed the district court's decision on the grounds that the primary carrier's duty was triggered by the third offer, and that the primary carrier violated its duty. The third settlement offer covered offers for all of the claimants, but did not specify which plaintiff would get what percentage of the $2 million demand. The Court noted that the primary insurer advanced an argument that because the mother asserted claims alongside her minor children, whom she represented as next friend, it generated an adverse interest and mandated at least court and perhaps guardian ad litem approval of any settlement. Because no Texas court had ruled on this issue, the Texas duty could not be applied. The Court disagreed, holding that although the mother asserted her own distinct claims along side her children's, there is no evidence that the settlement offer was more favorable to the mother than her children or that she was operating with interests adverse to those of her children. The primary insurer offered nothing in the record suggesting that, had the third settlement offer been accepted, that the mother would have placed maximizing compensation for her own injuries. Considering all of the trial circumstances, an ordinarily prudent insurer in the primary carrier's position would have realized that the likelihood and degree of potential exposure to an excess judgment had materially worsened since the trial's inception. When presented with the third offer, an ordinary, prudent insurer would have accepted it. The evidence placed before the district court was sufficient to support that the primary insurer violated its duty by failing to reevaluate the settlement value and accept the reasonable offer.

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 survey summarizing the evolving legislation and executive actions, available here:* https://bit.ly/3c4Mwzw

North Carolina Supreme Court Declines to Adopt Loss of Chance Doctrine in Medical Malpractice Case Failing to Timely Diagnose A Woman's Stroke, Noting Such Policy Judgments Should Be Left to Legislature

In a decision issued on December 18, 2020, the North Carolina Supreme Court held in a medical malpractice case that it would refuse to change its jurisprudence and adopt the "loss of chance" doctrine in a suit accusing a doctor of failing to timely diagnose a stroke and depriving her of a chance to a better medical outcome, explaining such significant changes are better left to the legislative branch. *Parkes v. Hermann*, --- S.E.2d ----, 2020 WL 7414986 (N.C. Dec. 18, 2020). The plaintiff alleged that she suffered a stroke, after which her family rushed her to a nearby hospital and the hospital erroneously communicated that she had no neurological deficits. Her same symptoms continued for several additional hours before she was ordered a neurological consult and admitted to the hospital. The neurologist advised that plaintiff's opportunity to benefit from certain time-sensitive treatment, such as alteplase, a tissue plasminogen activator, had passed. In her complaint, the plaintiff alleged that due to the delay in diagnosis, she suffered additional harms, damages and losses, including permanent injuries from defendant's negligence. She also brought secondary claims alleging she lost an increased opportunity for an improved neurological outcome by defendant's failure to timely administer alteplase, referred to as a loss-of-chance claim. The defendant hospital moved for summary judgment arguing that the stroke caused

plaintiff's injuries, not defendant's failure to administer alteplase and that the loss of chance doctrine was not recognized in North Carolina. The trial court agreed, and the appellate panel affirmed on the grounds there was only a 40% chance that plaintiff's condition would have improved if she had been properly diagnosed and administered alteplase, which did not meet the "more likely than not" threshold for proximate cause in a traditional medical malpractice claim. Plaintiff argued that lowering the proximate cause standard for cases where there was a loss of chance for an improved outcome to 30% to 35% total chance, or the total 40% total chance of an improved neurological outcome, represents a compensable injury separate from a traditional medical malpractice claim. The Court, looking to its jurisprudence, held that a loss of chance was not a compensable injury that could support a negligence claim, and that even if it had not previously rejected what is today called a loss-of-chance claim, it had previously firmly framed medical malpractice claims within the confines of traditional proximate cause, which allows a negligence claim to proceed when the evidence shows that the negligent act more likely than not caused the injury. Here, the Court noted, the evidence showed that plaintiff's expert's opinion relied on the assumption that administration of alteplase would have improved the plaintiff's condition and to reach the desired result would depart from common law.

Mississippi Supreme Court Overturns Medical Malpractice Verdict for Failure to Provide Intervening/Superseding Cause Instruction

In a decision issued on November 19, 2020, the Mississippi Supreme Court held that the failure to provide an intervening/superseding-cause instruction to the jury on behalf of a surgeon was reversible error warranting a new trial. *Ilercil v. Williams*, --- So.3d ----, 2020 WL 6791500 (Miss. Nov. 19, 2020). A doctor performed a back surgery under which no complications were reported during surgery. In post-operative notices, the doctor asked to be notified if the patient showed any signs of shortness of breath, difficulty swallowing, or excessive swelling. Swelling was brought to the doctor's attention shortly after the surgery, but he did not note anything out of the ordinary. The night after the procedure, a nurse noticed that the patient's speech was muffled and she documented the change, but did not notify the doctor. The patient was later taken to get a CT scan. He coded shortly thereafter. It was determined that he coded due to a large blood clot that had developed and cut off his airway. Medical personnel were able to resuscitate him, but he suffered a brain injury that rendered him completely disabled. The patient's wife and estate sued for medical malpractice, with the patient dying three years after surgery while litigation was pending. The hospital settled for $2.5 million, plus another $500,000 contingent on the outcome of the litigation against the surgeon. The jury apportioned 15% fault to the surgeon, who appealed. The Mississippi Supreme Court found that the surgeon had presented evidence to the jury that the acts or the failures to act of the staff at the hospital, including the nurse's failure to provide the surgeon with an update on the patient's condition, caused the patient's injuries and subsequent death. The nurse, it held, made an ill-advised conscious decision not to follow the surgeon's written orders and that it was without dispute that the surgeon was not notified of the patient's deteriorating condition until after he coded, depriving the surgeon of the opportunity to prevent the blood clot. Because the trial court committed reversible error by denying the requested jury instruction, the Court reversed the judgment of the circuit court and remanded the case for a new trial. A dissenting opinion stated that if the doctor's orders were insufficient to inform a nurse adequately at the beginning, that the nurse's actions or inactions would not be a new and independent cause, but rather an integral part of a continuous succession of events that led to the improper medical care. Therefore, the nurse's negligence was not independent of the surgeon's negligence in failing at the outset to provide a sufficient order to inform and instruct the nursing staff.

Illinois Appellate Court Affirms Summary Judgment of Hospital in Medical Malpractice Case on Basis Contractor Physician Was Not Agent

In a decision issued on June 11, 2020, the Appellate Court of Illinois held that a physician who delivered the patient was not an apparent agent of the hospital and that the hospital had clearly informed the patient that the physician was an independent contractor. *Prutton v. Baumgart*, 2020 IL App (2d) (June 11, 2020). A plaintiff mother of a minor patient brought medical malpractice action against a hospital, physician who delivered the minor patient, and prenatal care practice for which the physician worked as an independent contractor, alleging that the physician was an apparent agent of the hospital, and was thus vicariously liable for the patient's shoulder dystocia that resulted in a brachial plexus injury causing severe nerve damage that affected the use of the patient's right arm. The trial court granted summary judgment in favor of the hospital, and the appellate court affirmed. In concluding that the hospital was not vicariously liable for the physician's negligence, the Court analyzed the patient's authorization records and consent forms, which she agreed to and signed, which contained sections identifying the physicians providing care as independent contractors, not employees or agents of the hospital. Plaintiff testified at her deposition that the physician wore hospital scrubs marked with the name of the hospital. The hospital made a series of admissions that it had not specified that the physician was an independent contractor when it displayed information about that physician on the hospital's website, in print advertisements, and in press releases. But the hospital argued that the plaintiff failed to demonstrate that it acted in a manner that would lead a reasonable person to conclude that the physician was its agent. On apparent agency, the plaintiff argued that the advertising created a genuine issue of material fact about whether the hospital held out the physician as an employee, and that the consent forms were not dispositive because she signed the forms while she was in labor and they were ambiguous and confusing. The Court outlined the doctrine of apparent authority, as previously addressed by the Illinois Supreme Court, which provides that a hospital can be held vicariously liable for the negligent acts of a physician providing care at the hospital, regardless of whether the physician is an independent contractor, unless the patient knows, or should have known, that the physician was an independent contractor. A plaintiff must therefore show that the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital, where the acts of the agent create the appearance of authority, that the hospital had knowledge of and acquiesced in them, and the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence. The Court concluded that the trial court correctly granted summary judgment for the hospital. In addressing whether the hospital's advertisements "held out" the physician as an employee, it noted that the hospital's advertisements, in isolation, could create a question of material fact as to whether there was an employer-employee relationship, but that the consent forms signed by the patient were neither ambiguous nor confusing in informing the patient. Accordingly, the Court held it need not discuss any justifiable reliance argument.

Indiana Appellate Court Reverses Summary Judgment of Hospital in Medical Malpractice Case on Basis Hospital Held Out Physician as Employee

In an decision issued on September 28, 2020, the Court of Appeals of Indiana reversed a trial court's award of summary judgment to a defendant hospital on the grounds there was a genuine issue of material fact as to whether the delivery of a business card to a patient at the time of the patient's admission to the hospital for surgery was a meaningful written notice that the anesthesiologist was an independent contractor. *Jernagan v. Indiana University Health*, 156 N.E.3d 734 (Ind. Ct. App. 2020). The plaintiff presented to the hospital on the day of his spine surgery and was handed the anesthesiologist's business card, which stated his name, employer, and contact information, and was identified by guest services as assisting the surgeon with the surgical procedure. The patient met the anesthesiologist briefly before the surgery and the procedure was explained. During surgery, the plaintiff experienced a drop in blood pressure from excessive blood loss, causing cardiac arrest and was admitted to intensive care post-surgery. Plaintiff's family contacted the anesthesiologist in the weeks post-surgery to inquire about prognosis and what went wrong in surgery. A medical review panel issued an opinion favoring the surgeon and the hospital, concluding they complied with the appropriate standard of care. The panel did not address the conduct of the anesthesiologist. Plaintiff filed a malpractice claim, and after significant discovery, the hospital filed a motion for summary judgment on the basis the hospital was not liable for the anesthesiologist's conduct. Indiana has long recognized the general rule that hospitals cannot be held liable for the negligent acts of medical care providers acting as independent contractors. The Court, overturning the trial court's grant of summary judgment to the hospital, held that there was a genuine issue of material fact whether the business card can be considered as a meaningful written notice to the patient, acknowledged at the time of admission, that the anesthesiologist was an independent contractor. The hospital raised the issue that the plaintiff did not include the anesthesiologist in his proposed complaint brought before the medical review panel, and therefore the plaintiff is using the vicarious liability process to cure a failure to properly name the anesthesiologist as a defendant. The Court held that, according to the Indiana Supreme Court's decision in *Sword v. NKC Hospitals, Inc.,* 714 N.E.2d 142 (Ind. 1999), vicarious liability claims do not fall within the purview of the medical review panel or the Medical Malpractice Act, and accordingly, the plaintiff did not need to file a proposed complaint with respect to the anesthesiologist to the medical review panel before commencing a vicarious liability action against the hospital. Therefore, there was a genuine issue of material fact whether the hospital could be held vicariously liable pursuant to the *Sword* doctrine.

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JACKSON & CAMPBELL

2300 N Street, NW
Washington, DC
20037

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

Recent Notable Verdicts and Settlements

Christopher Ferragamo
(202) 457-5458
cferragamo@jackscamp.com

Marie VanDam
(202) 457-1622
mvandam@jackscamp.com

Peter J. Jenkins
(202) 457-1605
pjenkins@jackscamp.com

Susan Knell Bumbalo
(202) 457-1642
sbumbalo@jackscamp.com

Jury Verdicts/Settlements

Appellate Court, New York — November, 2020. A New York state appellate court affirmed reduction of a $46.1 million award in a suit accusing an obstetrician-gynecologist of negligently delivering a baby and causing the infant to suffer permanent brain damage and blindness, saying the jury fairly weighed the evidence presented at trial and the damages award, as reduced, did not deviate materially from what would be considered reasonable compensation.

Appellate Court, New Jersey — September, 2020. New Jersey appellate court affirmed a $20 million birth injury medical malpractice verdict even where the defense attorney suffered a stroke during trial and the trial court declined to allow the defendant to supplement the record concerning his trial counsel's impairment.

Iowa — December, 2020. Iowa has agreed to pay $3.7 million to three families to settle medical malpractice claims against University of Iowa Hospitals and Clinics alleging negligent performance of a spinal fusion resulting in significant neurological injuries, and alleging aspiration pneumonia.

Appellate Court, Maryland -- November, 2020. A Maryland appeals court reinstated a $2.6 million jury verdict in a suit accusing a radiologist of failing to timely diagnose a woman's breast cancer that caused her death, saying the trial judge's decision to toss the verdict was erroneous.

Queen's County, New York -- October, 2020. The parties in a medical malpractice and wrongful death action arising out of misdiagnosis of lung cancer and potential falsification and backdating of physician's notes reached a $2.28 million settlement after dismissal of the medical malpractice portion of the action as time-barred, with the physician paying the full settlement amount.

Bucks County, Pennsylvania -- October, 2020. The parties in a medical malpractice and survival action arising out of delayed treatment and discharge resulting in the rupture of an abdominal aneurysm reached a $1.5 million settlement, 70 percent allocated toward the wrongful death action and the remaining 30 percent toward the survival portion of the action.

Notable Defense Verdicts

Appellate Court, North Carolina — October, 2020. North Carolina appellate court affirmed trial court's decision that plaintiff's expert in medical malpractice case failed to establish that any negligent act or omission by the defendants proximately caused plaintiff's injury beyond mere speculation in bilateral chest liposuction in which plaintiff experienced post-operative injuries.

Appellate Court, Colorado — November, 2020. Colorado appellate court vacated a $14.9 million medical malpractice verdict that had been reduced to $6.9 pursuant to Colorado's Health Care Availability Act, concluding the trial court should have dismissed the corporate negligence and uninformed consent claims as a matter of law because the hospital was not vicariously liable for any malpractice caused by the doctor, nor did it owe a duty to the patient to assume medical responsibilities for that doctor.

Appellate Court, Illinois — December, 2020. An Illinois appellate court ordered a new trial in a back surgery patient's claims against a hospital for a post-surgery injury, holding closing arguments were tainted by improper statements by the hospital's lawyer as to the professional reputation of the clinic's nurse being at stake, as to the personal responsibility and financial position of the clinic's nurse, and as to the patient's ability to pay for multiple experts compared to the nurse's ability to pay.

Appellate Court, Massachusetts -- December, 2020. A Massachusetts appellate panel affirmed the dismissal of a suit accusing a doctor, nurse and physician's assistant of causing a patient's hand laceration injuries relating to an infection, rejecting the patient's argument that erroneous trial court rulings caused the patient to be without the requisite medical expert testimony.

Appellate Court, Texas -- December, 2020. A Texas appellate court has affirmed the dismissal of a suit seeking to hold a hospital liable for a patient's nerve damage suffered due to alleged malpractice, rejecting the patient's argument that the treatment should not be considered emergency medical care subject to a higher evidentiary standard.

New York -- November, 2020. An anesthesiologist secured a defense verdict in a case involving an allegation of injury to the long thoracic nerve and serratus anterior muscle of a 65-year old male's hand after a supraclavicular nerve block was administered by the anesthesiologist during surgery to remove a piece of embedded metal in the patient's hand.