

DECISIONS

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Massachusetts Supreme Judicial Court Streamlines Causation Standard Applicable to Medical Malpractice Cases Involving Wrongful Death Claims

On February 26, 2021, the Massachusetts Supreme Judicial Court eliminated the “unnecessarily confusing” alternative substantial contributing standard used by juries in negligence cases involving multiple causes of harm, finding that the but-for standard is most appropriate in these types of cases. *Seth Doull & Others v. Anna C. Foster, N.P. & Another*, 163 N.E.3d 976 (Mass. 2021). The case at issue involves a medical malpractice claim against two medical providers for alleged negligent treatment of the plaintiffs’ decedent with hormone-replacement drugs that caused her to develop pulmonary embolisms that led to her premature death. At trial, the jury found both defendants separately and individually negligent, but did not find said negligence the “sole/but-for” cause of the harm. At issue before the Court was whether the trial court erred in giving jury instructions on the element of causation, using a “but-for” standard for factual causation. Plaintiffs’ contended that the trial judge erred because a substantial contributing factor standard should be used when, as in this suit, there are multiple alleged causes of harm. The Court found that the but-for standard was appropriately instructed to the jury in this case and that it should be the causation standard in other cases involving multiple causes. The Court stated that the but-for standard “serves to separate the necessary causes from conduct that may have been negligent, but may not have had any impact on the harm caused.” The Court explained that the substantial contributing factor has the potential for confusion as most cases involve multiple causes of harm, including a potential defense that the harm was caused by the plaintiff, another defendant, or an unnamed party. Further expounding, the Court found, “[i]f a substantial factor instruction is required whenever there is more than one potential cause, then the substantial factor standard could supplant the but-for standard as the primary standard for factual causation. What originated as an exception to but-for causation would swallow the rule.” The Court

also recognized the difficult position trial judges would be in when faced with different causation standards and that a decision on which instruction would be most appropriate in instructing the jury “is a task rife with difficulty and potential error.” Instead the but-for standard should bring into focus whether in the absence of a defendant’s conduct, the harm would have still occurred. The Court explained that the “purpose of the but-for standard is to separate the conduct that had no im-

The Court also ruled that in cases where the but-for standard fails, the jury should receive additional instructions on factual causation such as that in Sections 26 and 27 of the Restatement (Third) of Torts (2005). However, the Court refused to extend its ruling to asbestos and other toxic tort cases, explaining that the substantial contributing factor instruction would remain undisturbed for now as these cases involve “unique features” where it may be clear which toxic substance or defendant caused the harm, but less clear as to which exposure(s) were necessary to cause the harm. The Court’s position to not extend its ruling to asbestos and toxic tort cases was fueled by a finding that the “but for” standard is inadequate in establishing liability. The Court explained, “[i]t may be clear that a toxic substance or asbestos caused the harm, and that the defendants exposed the plaintiffs to the toxic substance or the asbestos, but it may not be possible to determine which exposures were necessary to cause the harm. In this situation, as in multiple sufficient cause cases, the but-for standard is inadequate, as it could allow all defendants to avoid liability as it may not be possible to prove which exposures were necessary to bring about the harm and which were not.” The Court further added that in these cases, the substantial factor test “fixes this problem by relaxing the causal requirement and permitting liability in these circumstances.” Despite its restraint in applying its holding in *Doull* to asbestos and toxic tort cases, the Court revealed that it may eliminate the substantial contributing factor instruction in these types of suits as well if presented with an appropriate case.



part on the harm from the conduct that caused the harm.” In applying the but-for standard to the case at hand, the Court concluded that the but-for instruction assisted the jury in determining who or what caused the harm. The Court stated that the but-for standard worked well because here, “...the jury concluded that no such connection existed between the defendant’s conduct and Doull’s harm and death. This shows how, even in a case involving multiple causes in which the plaintiffs argue it was error not to use the substantial contributing factor test, the but-for standard did what it is supposed to do and prevented the defendants from being held liable where the jury concluded that they did not cause the harm.”

SPECIAL POINTS OF INTEREST:

- *Illinois Appellate Court Finds Duty to Defend Even Absent Claim for Compensatory Damages*
- *New York Appellate Court Rejects “Continuous Treatment” Argument to Toll Statute of Limitations*
- *Tennessee Supreme Court Clarifies Burden to Identify All Necessary Parties in Malpractice Actions*
- *New Mexico Supreme Court Upholds Damages Cap In Medical Malpractice Cases*

Illinois Appellate Court Finds Duty to Defend Regardless of Whether Underlying Suit Seeks Monetary Compensation

The First District of the Illinois Appellate Court has held that a professional liability insurer had a duty to defend regardless of whether the underlying suit sought monetary compensation. The Court also found that the insurer could not rely on its contractual liability exclusion to deny coverage. In *MHM Correctional Servs., Inc. v. Evanston Ins. Co.*, 2021 WL 689525 (Ill. Ct. App. Feb. 23, 2021), Evanston Insurance Company (“Evanston”) issued professional liability policies to prison healthcare providers that contracted to provide medical services to inmates in Alabama and Massachusetts. The service contracts between the prison healthcare providers and the Alabama and Massachusetts Departments of Correction (collectively “correctional departments”) required that the prison healthcare providers name the correctional departments as additional insureds and to indemnify them for liability arising out of performance of the contracts. The underlying lawsuits involved three class actions brought by inmates seeking injunctive relief to effectuate changes to the medical and/or mental health services they receive while imprisoned. The class actions named the correctional departments and/or their prison healthcare providers as defendants. None of the suits expressly requested any form of monetary damages.

Evanston argued that it was not required to defend the underlying lawsuits because its duty to defend only extends to claims for which it must potentially pay monetary compensation and that the underlying lawsuits sought only declaratory and injunctive



relief. The Evanston policies stated in relevant part that, “Upon exhaustion and payment of the Self-Insured Retention, [Evanston] shall have the right and duty to defend and investigate any Claim..” The policy defined “Claim” as “[a] demand for monetary damages or services involving Professional Healthcare Services...” The Court found that Evanston had a duty to defend the class actions because to hold otherwise would improperly negate the “services” part of the “Claim” definition. The Court explained that by seeking an injunction that would compel the defendants

to provide sufficient mental health or medical services within their facilities constituted a “ ‘demand for services involving Professional Healthcare Services’ as well as a ‘suit involving Professional Healthcare Services.’” The Court also expounded that the term “coverage” encompasses a broader duty to defend and not just a duty to indemnify. The Court additionally found that Evanston’s contractual liability exclusion did not dismiss Evanston from defending the correctional departments when the contract agreements between the insured prison healthcare providers and the correctional departments were in Evanston’s file and when the policies included an additional insured endorsement that defined “additional insured” to mean, “Any person or organization to whom or to which the Named Insured is obligated by virtue of a valid written contract to provide insurance or indemnity such as is afforded by the policy, but only for claims made against the Additional Insured with respect to professional services rendered by the Named Insured...” The Court determined that to permit Evanston to rely on its contractual liability exclusion would effectively render the additional insured endorsements “illusory”.

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

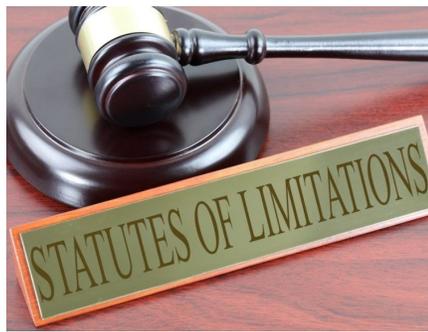
issued various executive orders and legislation to protect health care providers from malpractice liability. For example, the federal Coronavirus Aid, Relief and Economic Security Act (CARES Act), protects volunteer healthcare professionals from civil liability for injury or death if they provide care 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>*

New York Appellate Court Rules that the Statute of Limitations is Not Tolled Because Plaintiff's Two ER Visits at Two and Half Years Apart Did Not Constitute "Continuous Treatment"

A New York State Appellate opinion concluded that the continuous treatment doctrine did not apply when there is a resumption of medical treatment, rather than a continuation of the treatment. In *Estrella v. Montefiore Medical Center, et al.*, 190 A.D.3d 638 (N.Y. App. Div. Jan. 28, 2021), the New York Appellate Division, First Department affirmed the March 2020 decision issued by Bronx County Supreme Court that dismissed Plaintiff Jennifer Estrella's medical malpractice lawsuit against Montefiore Medical Center as being time-barred under the two and a half year applicable statute of limitations. The plaintiff argued that her lawsuit was timely filed because the treatment at issue was continuous. The continuous treatment doctrine is codified at NY CPLR 214-A, which provides, in pertinent part, that "[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission

or failure." The continuous treatment doctrine requires the existence of a relationship of continuing trust and confidence between the patient and physician. In rejecting the plaintiff's arguments, the Court reasoned that the plaintiff could not use the continuous treatment doctrine to toll the statute of limitations when her visits to the defendant



hospital's emergency room occurred about two and a half years apart. The Court determined that this gap in treatment "did not constitute a course of treatment" required under the doctrine. In *Estrella*, the plaintiff's initial emergency room visit at Montefiore

Medical Center was on October 4, 2012, during which a lesion on her liver was detected during a CT scan. However, plaintiff did not return again to the Montefiore emergency room until February 24, 2015. During the latter visit, plaintiff was diagnosed with hepatocellular carcinoma. The Court found that the continuous treatment doctrine did not operate to toll the statute of limitations because plaintiff's return to defendant's emergency room, two and half years later did not constitute a "course of treatment." The Court further explained that "Plaintiff never returned to Montefiore between these two emergency room visits in 2012 and 2015 to seek further treatment for her abdominal pain, nor did she provide evidence of an "ongoing relationship of trust and confidence" with Montefiore. The Court therefore, found that plaintiff's return to Montefiore in 2015 "constituted a resumption of treatment rather than a continuation thereof". As such, the return two and half years later to defendant's emergency room was insufficient to toll the statute of limitations.

Tennessee Supreme Court Finds That A Claimant is Not Solely Responsible to Identify Potential Defendants

The Tennessee Supreme Court recently concluded that claimants are no longer solely responsible to identify all necessary parties to a medical malpractice liability action. *Bidwell ex rel Bidwell v. Strait et al.*, 2021 WL 260475 (Tenn. Jan. 26, 2021). In *Bidwell*, Plaintiff James Bidwell filed a medical malpractice action on behalf of his deceased wife against Drs. Strait and Colburn (the "physician defendants") and the entities he believed to be their employers. Mr. Bidwell did not serve defendants' employer, Erlanger, with pre-suit notice, nor did he name Erlanger as a defendant. Pursuant to Tenn. Code Ann. § 29-26-121(a)(5), the physician defendants failed to provide written notice of Erlanger as their correct employer within thirty days of receiving Mr. Bidwell's timely pre-suit notice. However, Dr. Strait answered the complaint and identified Erlanger as his employer. Dr. Colburn similarly answered

and identified his employers. Mr. Bidwell moved to amend his complaint to add Erlanger as a defendant within ninety days of the answers to the complaint. Mr. Bidwell also argued that the physician defendants were required to notify him of Erlanger within thirty days of receiving pre-suit notice and that their failure constituted "extraordinary cause" thereby, excusing Bidwell from providing Erlanger with pre-suit notice. The physician defendants moved for summary judgment on the grounds that Mr. Bidwell had failed to name as a defendant their employer, Erlanger, as required by Tenn. Code Ann. § 29-20-310(b). The trial court granted the physician defendants' motion for summary judgment. On appeal, the Tennessee Supreme Court affirmed summary judgment in part, but reversed on finding that Mr. Bidwell was required to provide Erlanger with pre-suit notice. The Court reasoned

that although the physician defendants failed to comply with § 29-26-121(a)(5), the statute provided no remedy for non-compliance, and therefore, extraordinary cause could not be found to excuse Mr. Bidwell's failure to serve Erlanger with pre-suit notice. The Court further found that Mr. Bidwell had notice of Erlanger being an employer defendant via the answers to complaint. Section 20-1-119 permitted Mr. Bidwell to amend his complaint to name Erlanger as a defendant within ninety days of Dr. Strait's answer and because § 20-1-119 applied, Mr. Bidwell was not required to provide Erlanger with pre-suit notice. Still, the Court determined that because the record on appeal reflected that Mr. Bidwell failed to actually file an amended complaint and cause process to issue, he was not entitled to add Erlanger as a defendant.

Arkansas Appellate Court Affirms Summary Judgment in Malpractice Suit Alleging Vicarious Liability Following Dismissal of Employee Physician

On January 27, 2021, an Arkansas appellate panel affirmed the dismissal of a medical malpractice suit alleging failure to diagnose. In *Magrans v. Andrada, M.D. et al.*, 2021 Ark. App. 35, 616 S.W.3d 668 (2021), the Arkansas Court of Appeals Division III, determined that a dismissal of a derivative vicarious liability claim against an employer was proper when there is a dismissal with prejudice against an agent. In *Magrans*, plaintiffs' decedent sustained a fall that unknowingly resulted in fractured vertebrae in his spine. Plaintiffs' decedent obtained a CT angiogram of his spine at Radiologists of Russellville, P.A. ("ROR"), where an employee physician, Jeffrey A. Hale, M.D., read the results showing multiple compression fractures. Plaintiffs' allege that Dr. Hale did not make any notations of the CT scan results. Plaintiffs' decedent sought medical treatment from other multiple healthcare providers for his spine injuries and eventually brought a claim of medical malpractice naming ROR, Dr. Hale, and various other healthcare providers on a claim of failure to properly diagnose. The claims specifically asserted against ROR

alleged that ROR "failed to have proper procedures and protocols in place and failed, through its directors, and employee or agent physicians, to provide radiology care and treatment that met the applicable standard of care. Said Defendant failed to assure that abnormal radiology studies ... were reported properly and followed-up timely." In the lower court, Dr. Hale moved for summary judgment arguing that the statute of limitations barred any claim against him. Plaintiffs did not oppose, and summary judgment was granted to Dr. Hale with prejudice. In response, ROR also moved for summary judgment arguing that any claim of vicarious liability against it was precluded since its employee, Dr. Hale, had been dismissed from the suit. The lower court granted summary judgment in favor of ROR. An appeal followed, in which plaintiffs argued that Dr. Hale's dismissal of the claim on a statute of limitations bar did not extinguish ROR's various liability. The appellate court affirmed the lower court's decision and relied on precedent established in *Stephen v. Petrino*, 250 Ark. 268 (2002), in which the Arkansas Supreme Court rejected an appeal

contending that the timeliness of claim against an employee has no impact on a claim of vicarious liability against an employer. The Court found that regardless of the timing involved in the claims against ROR and its employee, Dr. Hale, "...the basic rule of agency law applies and that dismissal with prejudice to the agent results in dismissal of the of the derivative vicarious liability claim." The Court reasoned that the, basis for vicarious liability is "the master is liable only for the act of his servant, and not for anything he himself did, therefore, when the servant is not liable, the master for whom he was acting at the time should not be liable." The Arkansas Court of Appeals commented that: "appellants made the decision to add Dr. Hale as a party after the statute of limitations had run and therefore have to deal with the consequences of doing so, regardless of how harsh of a result it yields. Where the agent has no liability, the principal cannot be liable. ROR, therefore, is entitled to judgment as a matter of law, and the circuit court's order granting summary judgment is affirmed."

New Mexico Supreme Court Rules That Damages Cap in Medical Malpractice Lawsuits Is Constitutional

The New Mexico Supreme Court ruled that the state's cap on certain types of damages for medical malpractice injuries does not violate the constitutional right to a jury trial. New Mexico's Medical Malpractice Act (MMA) caps all nonmedical and nonpunitive damages awards at \$600,000. These include damages for pain and suffering and loss of future earnings. In *Siebert v. Okun*, 2021 WL 959248 (N.M. Mar. 15, 2021), the Court overturned a ruling in the lower court that found the MMA damages cap violated the plaintiff's right to a jury trial. The lower court ruled against a request by physician, Dr. Rebecca Okun, and her employer, Women's Specialists of New Mexico, that the court apply the damages cap to the \$2.6 million award against them for injuries sustained by the plaintiff during a gynecological procedure in 2011. The lower court left the award verdict intact, refusing to cap the nonmedical damages to \$600,000, which if applied would have reduced the verdict award to \$1.54 million. The healthcare de-

fendants appealed arguing that plaintiff's constitutional right to a jury trial would not be violated by a MMA cap on damages because the MMA is statutory cause of action that did not exist at the time the New Mexico Constitution came into effect and the damages cap does not violate the right to a jury trial. The defendants argued that the cap, instead, limits the scope of a plaintiff's available legal remedy. The Court reversed the lower court's ruling, concluding that the MMA nonmedical, nonpunitive damages cap does not violate the right to trial by jury. The Court held that causes of action under the MMA can be more "generally described as causes of action in medical negligence," and therefore, the constitutional right to trial by jury attaches. However, the MMA damages cap does not violate the right to jury trial because "the cap merely 'restricts the scope' of the remedy available to the plaintiff." The Court reviewed the language of The New Mexico Constitution – Article II, Section 12 – which guarantees the "right of

trial by jury as it has heretofore existed shall be secured to all and remain inviolate." The Court found that an "inviolate right is not beyond the reach of regulation, so long as that regulation does not substantially impair the core essence of the right." After conducting a historical analysis of the right to jury trial, the Court explained, "...the right to trial by jury is satisfied when evidence is presented to a jury, which then deliberates and returns a verdict based on its factual findings. The legal consequence of that verdict is a matter of law, which the Legislature has the authority to shape." In finding that the MMA damages cap was constitutional, the Court reasoned that the Legislature took permissible action in restricting, "... the scope of the available legal remedy for injury resulting from the medical malpractice of a qualified health care provider" and that nothing "abridges plaintiff's right to present evidence before a jury for 'a fair and equitable resolution' of the facts of the case."

Jury Verdicts/Settlements

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Federal Court, New York — December, 2020. A New York federal judge ruled against the United States and in favor of a 76-year-old former Marine who had served in Vietnam in his medical malpractice lawsuit that alleged that a CT scan of his neck performed at the Buffalo VA Medical Center in September 2013 was misread as normal and the radiologist failed to note the mass in his neck that he complained about to his primary care doctor. The Court awarded \$1.95 million in damages.

Hinds County, Mississippi — January, 2021. A Hinds County judge ordered a physician and clinic to pay an arbitrator's award to a medical malpractice victim that was in excess of \$6.1 million because the doctor and clinic had failed to obtain the patient's informed consent regarding a

medical procedure known as an endoscopic retrograde cholangiopancreatography, after which the patient suffered life-altering complications

Supreme Court, Missouri -- March, 2021. The Missouri Supreme Court affirmed an \$870,000 verdict, including \$300,000 in punitive damages, in a lawsuit accusing health care providers of causing a patient's death, saying there was sufficient evidence that the health care providers exhibited a reckless indifference or conscious disregard of the patient's well-being.

Appellate Court, Pennsylvania -- February, 2021. A Pennsylvania Appellate Court upheld part of a \$6.3 million verdict in a medical malpractice case. The Court affirmed the wrongful death portion of the damages award but vacat-

ed the survival claim damages awarded by the jury, holding "it is clear from the verdict that the jury awarded Plaintiff a high amount of pain and suffering damages, even though the evidence showed that Decedent was conscious for only approximately three minutes. Damages for pain and suffering cannot be awarded for periods that Decedent was unconscious."

Appellate Court, Maryland - - March, 2021. A Maryland Appellate Court upheld a \$1.8 million award in a suit accusing a doctor of malpractice in connection with the performance of a woman's spinal surgery, which caused permanent disabilities, saying defense counsel's attempt to attack the credibility of a key medical expert witness was properly rejected by the trial judge.

Notable Defense Verdicts

Appellate Court, Arkansas — January, 2021. An Arkansas appellate panel affirmed the dismissal of a suit accusing health care providers of failing to timely diagnose a man's spinal fractures which ultimately rendered him a paraplegic, saying the patient's medical expert offered a speculative opinion as to how the alleged negligence caused the injuries.

Appellate Court, California— January, 2021. A California state appeals panel has affirmed a jury's decision to clear a surgeon of liability in a suit accusing him of negligently recommending gastric resleeving surgery, saying physicians cannot be sued for bad surgery recommendations unless there is an underlying misdiagnosis of a patient's condition.

Appellate Court, Illinois — January, 2021. An Illinois appellate panel has affirmed a jury's decision to clear a surgeon of liability in a lawsuit accusing him of failing to perform a surgery to repair a bowel obstruction that caused a patient's death, saying certain instructions were properly given to the jury.

Appellate Court, Maryland - - February, 2021. The Maryland Special Court of Appeals overturned a jury's award of \$229,640,000 in a birth injury medical malpractice case. The Court concluded that the evidence presented at trial was not sufficient to support findings of either negligent treatment or breach of informed consent and that the trial court erred by not granting defendant's motions for judgment notwithstanding the verdict. The Court concluded that there was no evidence in the record that the defendant withheld any material information

from plaintiff that violated her right to informed consent, nor was there any evidence that defendant was negligent in providing treatment

Appellate Court, Pennsylvania -- February, 2021. A Pennsylvania appellate court largely affirmed a \$6.3 million jury verdict in a medical malpractice suit accusing a cardiologist of causing a man's fatal heart attack, but said that erroneously admitted expert testimony may have led to an excessive pain-and-suffering award and warranted a limited retrial.

Appellate Court, Texas -- February, 2021. A Texas appeals court upheld the dismissal of a suit seeking to hold a doctor and a hospital liable for the death of a pneumonia patient, saying the plaintiff's expert report failed to properly explain how the alleged negligence caused the patient's death.