DECISIONS

INSIDE THIS ISSUE:

Kansas Supreme Court Upholds Constitutional Validity of State Statute that Abolishes Wrongful Birth Causes of Action

On April 30, 2021, the Supreme Court of Kansas affirmed a district court's decision upholding the constitutional validity of a state statute that abolished medical malpractice claims commonly known "wrongful birth" actions. See K.S.A. 2020 Supp. 60-1906(a) and (d). In *Tillman et al, v. Goodpasture*, the court was presented with a unique question on whether the state legislature can abolish a cause of action that Kansas courts had previously recognized. 2021 WL 1705039 (Kan. April 30, 2021). Thirty years earlier in *Arche v. United States*, 247 Kan. 276, 798 P.2d 477 (1990)., Kansas joined the majority of other states that recognized wrongful death actions. However, twenty three years later the Kansas legislature enacted K.S.A. 2013 Supp. 60-1906 which stated, ""No civil action may be commenced in any court for a claim of ... wrongful birth, and no damages may be recovered in any civil action for any physical condition of a minor that existed at the time of such minor's birth if the damages sought arise out of a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion." The *Tillman* matter arose from the plaintiff parents' claims that their prenatal doctor negligently failed to disclose fetal abnormalities apparent from an ultrasound that would have led them to terminate the pregnancy had they known. After their child was born with severe and permanent disabilities, plaintiffs brought a wrongful birth action to recover costs of care for the child. The district court dismissed the claim on the grounds that the action was not viable pursuant to K.S.A. 2013 Supp. 60-1906. Plaintiffs appealed arguing that the statute violated their right to trial by jury and right to a remedy guaranteed by the Kansas Constitution. In holding that the statute was constitutional, the Court found that the state constitution's right to jury trial applied to "issues of fact so tried at common law as it existed at the time the Kansas Constitution was adopted, but no further." Thus, wrongful birth actions as recognized by the *Arche* case created a "new" tort instead of being a different application of traditional negligence principles. As such, the Court determined that the legislature's abolishment of wrongful birth actions did not implicate plaintiffs' right to jury trial rights. Likewise, the Court also found that the *Arche* court's creation of a new cause of action foreclosed plaintiffs' claims that the statute violated their right to a remedy as guaranteed by section 18 of the state constitution. The Court stated, "wrongful birth cause of action is not just a different application of the traditional medical malpractice tort, it is a new species of malpractice action first recognized in 1990. Moreover, K.S.A. 2020 Supp. 60-1906 is appropriately applied to the parents because it was enacted before their cause of action accrued under the *Arche* rule."

Indiana Appellate Court Holds That Indemnity Claim is Subject to Medical Malpractice Act Requirements

In a May 4, 2021 decision, the Court of Appeals of Indiana held that an indemnity claim by a healthcare provider against another healthcare provider based upon alleged medical negligence was subject to Indiana's Medical Malpractice Act and its accompanying requirements. *Lake Imaging, LLC v. Franciscan Alliance, Inc.*, Opinion 20A-CT-1490 (Ind. App. May 4, 2021). In the case, a patient-plaintiff filed a medical malpractice lawsuit against a hospital alleging it was responsible for radiologists employed by a separate imaging center who improperly read a CT scan. The plaintiff settled the case with the hospital and the hospital filed a lawsuit seeking indemnification for the settlement from the imaging center. The imaging center moved for summary judgment, arguing, among other things, that the hospital's claim was based on alleged medical negligence, is therefore a claim for medical malpractice, and is barred by the medical-malpractice statute of limitation, which provides such actions generally must be filed "within two (2) years after the date of the alleged act, omission, or neglect." The trial court did not address the SOL issue or grant summary judgment. Instead, it held that it lacked subject matter jurisdiction because the hospital did not present the claim before the Indiana Department of Insurance first, which is required under the Medical Malpractice Act ("MMA"). The hospital appealed. The Appellate Court upheld the trial court's dismissal and ruled that he legislature did not intend to limit the MMA's coverage to the "typical" medical-malpractice action—one brought by an injured patient or the representative of an injured patient. Instead, the Court held that the language of the statutes was broad enough to include an indemnification claim by one healthcare provider against another healthcare provider.

SPECIAL POINTS OF INTEREST:

- *Supreme Court of Kansas upholds statute abolishing wrongful birth causes of action*
- *New York Appellate Court rejects an insurer's right to recoup defense costs from the insured*
- *Texas Appellate Court Affirms Summary Judgment on Lack of Proximate Cause Defense*
- *Delaware Superior Court Addresses Peer Review Privilege*

New York Second Appellate Department Splits from Longstanding Law Recognizing An Insurer's Right to Recoup Defense Costs.

In *American Western Home Insurance Company, v. Gjonaj Realty & Management Co., et al.,* the New York Second Appellate Department split from the First Appellate Department in reversing a judgment awarding an insurer recoupment of defense costs. 138 N.Y.S.3d 626 (N.Y. App. Dec. 30, 2020) The First Appellate Department had previously held that an insurer can pursue recoupment of defense costs after a finding that coverage was not owed, based upon a reservation of right to recoup. *See Certain Underwriters at Lloyd's London Subscribing to Policy No. PGIARK01449-05 v. Advance Transit Co., Inc..,* 188 A.D.3d 523 (2020). However, in *Gjonaj* the Second Appellate Department found that American Western Home Insurance Company ("American Western") could not recoup defense costs because to hold otherwise would erode the well-established rule that the duty to defend is broader than the duty to indemnify. The *Gjonaj* lawsuit arose from a personal injury action against the insureds for damages sustained as a result of an accident that occurred in May 2010 when the underlying plaintiff fell from a ladder at the insureds' premises. American Western issued a commercial general liability insurance policy to the insureds which provided for a duty to defend upon timely notice. However, it was undisputed that the insureds failed to provide notice of the underlying action until after a default judgment been entered against the insureds in the underlying suit. Upon learning that the default judgment had been vacated American Home advised the

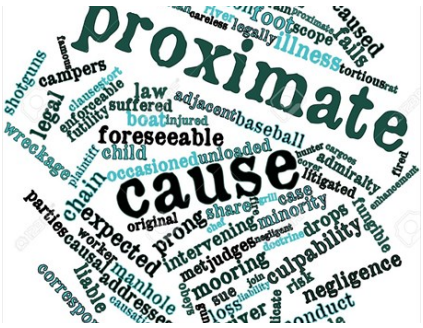
insureds that it would defend and indemnify the underlying personal injury claim on a reservation of rights to deny coverage to the extent that it would be prejudiced in its investigation and defense due to the untimely notice. When default judgment in the underlying suit was reinstated, American Western denied coverage and sought declaratory relief that, among other things, it was entitled to recover the defense costs already expended in the underlying case. The Supreme Court granted American Western's motion for summary judgment, declaring that there was no coverage for the underlying action and holding that American Western was entitled to recoupment of defense costs. On appeal, the Second Appellate Department upheld the lower court's judgment that American Western did not owe a duty to defend or indemnify the insureds, but reversed the part of the judgment awarding recoupment of defense costs. Despite the First Appellate Department's holding in Certain Writers and the *Gjonaj's* court's acknowledgment of longstanding New York law permitting an insurer to recoup defense costs, the Second Appellate Department stated that the *Gjonaj* action presented a "novel issue". In explaining its reversal on the lower court's award of recoupment of defense costs, the Second Appellate Department explained that it is a long held principle that the duty to defend is broader than the duty to indemnify and to allow the "insurance company to recover the costs it incurred in defending the underlying action risks eroding this well established doctrine and effectively would make the duty o defend merely coextensive with the duty to indemnify." The court further explained that the American Western policy did not contain a provision which expressly granted the right to recoup defense costs.

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

Texas Appellate Court Affirms Summary Judgment for Emergency Room Physician in Wrongful Death Action

The Court of Appeals Second Appellate District of Texas at Fort Worth affirmed the trial court's summary judgment in a medical malpractice case involving the death of a seven year old girl who was treated for an asthma attack by defendant. *Eaglin v. Purcell*, 2021 WL 126595 (Tex. App. Jan. 14, 2021). In *Purcell*, the child initially presented to the emergency room on March 28, 2015 at approximately 3 a.m. After receiving treatment she was found to be breathing comfortably and was later discharged around 5:30 a.m. Following the discharge she slept for six hours before heading to the pharmacy to pick up medication prescribed by defendant. On the way to the pharmacy she began to complain of symptoms and became increasingly unresponsive. She died three days later from brain injury after having suffered a cardiopulmonary arrest and acute respiratory failure. The child's mother brought the action alleging that defendant breached the applicable standard of care by prematurely discharging the child. Plaintiff presented expert evidence to establish that defendant's breach proximate caused the child's death. Texas medical malpractice law requires that proximate causation be established by expert evidence that , that (1) the act or omission was a cause in fact of the injury and (2) the injury was foreseeable. The Court explained that, "a cause in fact is established when the act or omission "is



shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred." In explaining the foreseeability element, the Court stated that it must be, "shown through evidence that a person of ordinary intelligence should have anticipated the general danger created by a negligent act or omission." The Court determined that Plaintiff could not establish that the child's death was proximately caused by a premature discharge. Plaintiff's expert opined that the premature discharge and defendant's discharge instructions of "not to take any medication for an extended period of time unsupervised" caused the child death. The expert report concluded that had the child remained admitted in the hospital she could have received additional treatment that could have prevented a second asthma exacerbation. However, the Court found that although Plaintiff's expert attempted to link the premature discharge to the second exacerbation and cardiac arrest, he could not establish a causal link. Summary judgment evidence demonstrated that the child was stable at the time of discharge and during the six hours when she slept before suffering a second asthma attack. The Court found that Plaintiff's expert evidence was based on "likely medical events which led to [the child's] death, which is mere guesswork that cannot raise a genuine issue of material fact"

Delaware Court Examines the Peer Review Privilege in Discovery Dispute

In *Palmer v. Christiana Care Health Servs., Inc.,* No. 2021 WL 673462 (Del. Super. Ct. Feb. 22, 2021), the Delaware Superior Court addressed a discovery dispute in which Plaintiff alleged that defendants' discovery objections pursuant to the peer review privilege were invalid. The case involved a medical malpractice claim, in which Plaintiff's deceased husband underwent two MRI scans the second of which showed a stable meningioma of a smaller size. Defendant physician Dr. Bose incorrectly informed Plaintiff and the decedent that the second MRI showed a growth over the first MRI and that it required surgery.Decedent underwent surgery and suffered a stroke and subsequently died a year later. Plaintiff commenced the lawsuit alleging that the surgery was not necessary, was negligently performed and lacked informed consent. In serving her complaint, Plaintiff included a set of discovery requests to Dr. Bose and Christiana Care Health Services, Inc. ("CCHS"), the facility in which Dr. Bose was affiliated and credentialed. Plaintiff's discovery requests sought information related to peer review meetings on Dr. Bose as well as other information related to the meeting dates, membership, and results of any such peer review meetings. CCHS declined to respond to those requests citing to the peer review privilege. Delaware's Peer Review Privilege stems from 24 Del. C. § 1768(a) which gives members of any group "whose function is the review of medical records, medical care, and physicians' work, with a view to the quality of care and utilization of hospital or nursing home facilities" immunity from liability for any acts done or not done, "or from any recommendation made, so long as the person acted in good faith and without gross or wanton negligence." Section (b) protects any "records and proceedings" from disclosure and allows a witness at a peer review meeting the privilege to refuse to testify about the proceedings in peer review. The Court held, that, "[t]o the extent CCHS conducted a peer review consideration of the outcome of this surgery, the Court will not permit discovery of its content as such a peer committee review is the essence of the peer review privilege." However, it permitted discovery on "(1) The dates and times of any Credentials Committee meetings at which the credentials of Dr. Bose were under consideration, (2) Identification and production of any documents provided to but not produced exclusively for use by the Credentials Committee that were submitted to the Committee for consideration, and (3) Any documents produced by the Credentials Committee that were shared with a different person, group or entity concerning the credentialing of Dr. Bose.

New York Appellate Court Declines to Extend Medical Providers' Duty of Care to Patient's Son.

In an action alleging medical malpractice and wrongful death, Plaintiff as administrator of his son's estate alleged, that his wife's treating mental health counselor and hospitals were negligent in their treatment of his wife who killed their son with a knife. *Cardenas v. Rochester Reg'l Health,* 192 A.D.3d 1543 (N.Y. App. Div. 2021). Plaintiff alleged that wife was hospitalized for several weeks at Rochester General Hospital for mental health reasons. Following her treatment, she attended two sessions at Unity Mental Health ("UMH"). Concerned about her worsening condition, Plaintiff attempted to secure additional treatment for his wife at UMH, however he was advised that his wife should keep her upcoming psychiatric appointment that was scheduled to be held in two weeks later. Prior to the psychiatric appointment, plaintiff's wife killed their son with a knife. Defendants' moved to dismiss the claims against them arguing that they owed no duty to the son as he was not their patient. At issue before the Court was whether defendants owed a duty of care to a nonpatient. The lower court denied defendants' motion and defendants appealed. The Appellate Court reversed finding that to extend liability to nonpatients would create a far reaching effect on the duties owed by medical providers.' Generally courts are reluctant to extend a medical providers' duty of care beyond their patients because to do so "would render such providers liable to a prohibitive number of possible plaintiffs." The court acknowledged that the scope of a medical providers' duty of care has been on occasion expanded to include nonpatients "where the defendants' relationship to the tortfeasor placed them in the best position to protect against the risk of harm, and balancing factors such as the expectations of the parties and society in general, the proliferation of claims, and public policies affecting the duty proposed tilted in favor of establishing a duty running from defendants to plaintiffs under the facts alleged." The Court in the instant matter did not find that that the defendant medical providers were in the position to protect against the risk of harm associated with Plaintiff's wife and the son. Plaintiff's complaint did not allege that the wife sought treatment because she displayed violent tendencies. Being that there was no duty established between defendants and the decedent, the Court stated, "[t]he complaint herein does not allege that plaintiff's wife sought treatment specifically in order to prevent physical injury to decedent or her family, that defendants were aware whether she had threatened or displayed violence towards her family in the past, or that defendants directly put in motion the danger posed by the patient." The Court further acknowledged, "[w]hile the temptation is always great to provide a form of relief to one who has suffered, it is well established that the law cannot provide a remedy for every injury incurred ... Were we to extend defendant[s'] duty to the child herein, there would be a far-reaching effect on physicians who treat patients with children. Physicians should be permitted to limit their treatment to the best interests of the patient and leave to others the responsibility for the nonmedical concerns of third parties who may be affected by that treatment."

Iowa Appellate Court Affirms Holding That Plaintiffs' Failed to Properly Disclose Their Physician Witnesses

On March 3, 2021, the Iowa Appellate Court affirmed the lower court's decision that Plaintiffs failed to disclose the nature of their doctors' expert opinions. In *McGrew v. Otoadese,* 958 N.W.2d 239 (Iowa Ct. App. 2021), Plaintiffs filed their designation of experts naming two doctors that would be testifying on the applicable standard of care. The *McGrew* case stemmed from a medical malpractice claim that defendant, Dr. Otoadese, recommended and performed an unnecessary medical procedure that placed Plaintiff William McGrew at risk for a stroke. In response to Plaintiffs' designation of experts, Dr. Otoadese filed a motion in *limine* to exclude the testimonies of the two doctors, Dr. Bekavac and Dr. Halloran, on the basis that they qualified as expert opinions and Plaintiffs' failed to state the opinions intended to be introduced at trial. The lower court ruled that Dr. Bekavac could only testify about matters relating to his treatment of Mr. McGrew and that Dr. Halloran could not testify at all because he did not provide any direct treatment to Mr. McGrew. On appeal from a defense verdict, the Iowa Appellate Court upheld the lower court's finding. Iowa Rule of Civil Procedure 1.508 is generally limited to physicians retained as experts for purposes of litigation or for trial. Rule 1.508 extends to treating physicians when they begin to assume a role in the litigation analogous to that of a retained expert. In affirming the lower court's decision, the Court found that the opinions of Plaintiffs' physician witnesses did not arise from their treatment of Mr. McGrew as they arrived to their opinions after the surgery had been performed and that their opinions on whether the surgery was warranted did not affect the treatment of Mr. McGrew. The Appellate Court citing to *Hansen v. Central Iowa Hospital Corp.*, 686 N.W.2d 476, 485 (Iowa 2004), explained the distinction: that a treating physician forms his opinion as a "treater" and not as "a retained expert for purposes of issues in pending or anticipated litigation." The Appellate Court further expounded that, "[a] doctor has taken a role analogous to that of a retained expert witness if the 'physician focuses more on the legal issues in pending litigation and less on the medical facts and opinions associated in treating a patient'." In this case, Plaintiffs' doctors were expected to testify on the degree of Mr. McGrew's medical condition and whether Dr. Otoadese was negligent in recommending surgery. The Court found that these opinions were relevant to pending litigation and not from the treatment of Mr. McGrew as the doctors' opinions arose after McGrew was treated by Dr. Otoadese. Therefore, Plaintiffs' expert disclosure should have included: (1) The subject matter on which the witness is expected to present evidence and (2) A summary of the facts and opinions to which the witness is expected to testify.

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Jury Verdicts/Settlements

Federal Court, New York — March 2021. A New York federal judge in March 2021 increased from $2.1 million to $3.9 million a wrongful death verdict in a case alleging that a Buffalo Veterans Affairs hospital was negligent in performing an aortic aneurysm repair and "killed" a man's kidneys. The Judge concluded that the man endured pain and suffering for more than double the amount of days than the court originally found.

Fulton County, Georgia— March 2021. A Fulton County jury awarded plaintiff $3 million in damages in a medical malpractice wrongful death case involving allegations of medical negligence when the surgeon perforated the patient's bowel during laparoscopic surgery. The woman died from peritonitis resulting from a small intestine perforation caused during laparoscopic abdominal surgery

Federal Court, Connecticut -- March 2021. In its Memorandum and Order entered on March 5, 2021, the United States District Court for the District of Connecticut determined that VA doctors negligently injured a patient during mesh hernia surgery and negligently failed to discover the injury during the surgery, awarding $3,270,278.22 in economic damages to the patient; $5,000,000 in noneconomic damages to the patient; and, $1,200,000 in damages for loss of consortium to the patient's wife, for a total award of $9,470,278.22.

Seattle, Washington -- April 2021. A Seattle assisted living facility's insurance company agreed to settle a lawsuit that alleged that the assisted living facility's lax supervision of an employee resulted in the ability of the employee to repeatedly rape and sexually abuse a vulnerable resident. The rapes were reportedly recorded on a video camera that the resident's relatives had hidden in her room after the resident disclosed the rapes to them. The resident, who was in her 50s, suffered from multiple sclerosis. The assisted living facility's employee was charged two years prior with rape and indecent liberties. In the lawsuit, plaintiff alleged that the assisted living facility was negligent in hiring the employee and was also negligent in failing to have a system in place to ensure that the woman's care was monitored and properly supervised

Notable Defense Verdicts

Appellate Court, Ohio— April 2021. An Ohio Appellate Court issued a decision in March 2021 upholding discovery and motions in *limine* rulings in favor of the Cleveland Clinic Foundation in a suit that alleged it failed to prevent a man's fatal heart attack, finding the trial court did not make a mistake by limiting discovery or testimony at trial.

Appellate Court, Pennsylvania— April 2021. A Pennsylvania Appellate Court ruled in an April 2021 decision that the widow of a man who died following a leg amputation was not entitled to a new medical malpractice trial due to alleged juror bias, citing a year-old state high court ruling which clarified how parties should assert such bias claims. Plaintiffs failed to follow the procedures for pursuing jury bias allegations.

Appellate Court, Arizona — April 2021. An Arizona Appellate Court issued a decision upholding a trial court ruling that the plaintiff failed to prove causation in a medical malpractice case involving allegations of negligent post-surgical case. The Court held that plaintiffs failed to present qualified expert testimony or evidence sufficient to demonstrate the defendants' conduct was a substantial factor in causing the patient's death.

Appellate Court, Illinois-- March 2021. In a March 26, 2021 decision, the Illinois Appellate Court First District Sixth Division affirmed a defense verdict in a birth injury medical malpractice case. The Appellate Court, after reviewing the underlying facts, held that there was evidence that, if believed by the jury, would reasonably cause it to conclude that the physician at issue did not apply excessive traction and did not cause the baby's permanent brachial plexus injury.

Appellate Court, Ohio— April 2021. In an April 23, 2021 decision, an Ohio appeals court refused to reverse a defense verdict entered in favor of a physician who was sued by a woman who alleged that he did not inform her that parts of her spinal implant remained in her body after he removed it. The Appellate Court held that the trial court was correct to exclude testimony from one of her doctors.

Appellate Court, Texas -- May 2021. A Texas appeals court upheld the dismissal of a lawsuit accusing a doctor of negligently performing a diagnostic procedure that caused a tear in a patient's stomach requiring emergency surgery, saying the patient's expert report failed to properly explain how the alleged negligence caused her injury.