DECISIONS

INSIDE THIS ISSUE:

Missouri Supreme Court Upholds Non-Economic Damages Cap in Medical Malpractice Cases

On July 22, 2021, the Supreme Court of Missouri issued an opinion affirming that a damages cap in medical malpractice cases did not violate a claimant's right to a jury trial. In *Velazquez v. University Physician Associates et al*., 2021 WL 3119063 (Mo. July 22, 2021), the plaintiff sued multiple physicians and the University Physicians Associates for medical negligence related to a caesarian delivery and postpartum care. The jury awarded her $330,000 in economic damages and $700,000 in non-economic damages. The physician defendants filed motions for remittitur asking that the court implement a cap on plaintiff's non-economic damages pursuant Section 538.210.2. The statute sets a cap on non-economic damages in an action against a health care provider at $400,000, irrespective of the number of defendants. However, the statute also allows for a higher non-economic damages cap set at $700,000 for catastrophic personal injury claims. The lower court applied the statute's higher non-economic damages cap to the plaintiff's case, but declined to conclude that Section 538.210 was unconstitutional. On appeal, the plaintiff argued that Section 538.210 violated her constitutional right to a trial by jury as guaranteed by article I, § 22(a) of the Missouri Constitution, which provides that, "the right of trial by jury as heretofore enjoyed shall remain inviolate[.]" In rejecting plaintiff's argument, the court relied heavily on prior precedent established by *Sanders v. Ahmed,* 364 S.W.3d 195 (Mo. Banc 2012). In *Sanders*, the plaintiff's wife died from irreversible brain

damage caused by medication prescribed to her. The wife's husband brought a wrongful death action and was awarded non-economic damages pursuant to the cap set by Section 538.210. The *Sanders* court determined that the statutory cap did not violate article I, § 22(a) of the constitution because a cause of action alleging wrongful death did not exist in common law, but was a statutorily-created cause of action. The *Sanders* court therefore, concluded that the legislature in creating a cause of action, can also limit the substance and set parameters for the cause of action. Drawing from *Sanders*, the Supreme Court concluded that plaintiff's cause of action for medical negligence was also subject to the parameters established by the legislature. Despite medical negligence actions having its roots in common law, the General Assembly in 2015 amended section 538.310 in 2015 to state in pertinent part: " A statutory cause of action for damages against a health care provider for personal injury or death arising out of the rendering of or failure to render health care services is hereby created, *replacing any such common law cause of action*." The court found it undisputed that the state legislature possessed the authority to abolish common law causes of action and therefore found that medical negligence claims were statutorily-created and subject to any legislative enactment limiting the claim. Accordingly, the court concluded the statute did not violate the right of trial by jury.

Indiana Appellate Court Holds That Claim Relating to Electronic Patient Records is Subject to Medical Malpractice Act Requirements

On June 3, the Court of Appeals of Indiana affirmed that the Medical Malpractice Act ("MMA") applied to a claim alleging that a health care facility's electronic patient records policy was inadequate in allowing a physician to accurately diagnose a patient. In *Rossner v. Take Care Health Sys., LLC,* 2021 WL 2251627 (Ind. Ct. App. June 3, 2021), plaintiff's husband was treated by a *locum tenens* physician that was working temporarily at one of the defendant facilities. At the time, the facility did not allow temporary physicians to independently access its electronic patient records, instead these physicians were required to access records through support staff. Plaintiff's action alleged negligent care and lack of adequate access to medical records. At issue was whether the MMA applied to plaintiff's claims, thus subjecting the action to a two-year statute of limitations and compliance with MMA procedures such as presentation of the claim to an expert panel. Defendants argued that the claim fell under the purview of the MMA and should be dismissed for failure to adhere to the MMA's procedures. The Court set out a test for whether the MMA applied and looked to whether the claim was based on the health provider's practices while acting in a professional capacity. Ultimately. the court affirmed the lower court's finding that the MMA applied since the essence of the claim was based on the *locum tenens* physicians' inability to exercise professional expertise to accurately diagnose the patient due to the facility's electronic records policy. The court determined that the facility's policy was irrelevant to the case because the physician was still able to review the patient's progress notes from prior visits before offering a diagnosis.

SPECIAL POINTS OF INTEREST:

- *Supreme Court of Missouri Upholds Statute Setting Cap on Medical Malpractice Damages*
- *U.S. District Court of New York Finds No Duty to Defend or Indemnify Sexual Misconduct Claim*
- *Indiana Supreme Court Holds that the Medical Malpractice Act Applies To Third Party Negligence Claims*
- *Maryland Court Considers Claims When the Alleged Negligence Did Not Cause Decedent's Death*

U.S. District Court of New York Finds No Duty to Defend or Indemnify Sexual Misconduct Claim

Allstate Ins. Co. v. Vitality Physicians Grp. Prac. P.C., No. 20-CV-4132 (CS), 2021 WL 1750523 (S.D.N.Y. May 4, 2021), involves an underlying action in which patients of Vitality Psychiatry Group ("Vitality") sued Vitality, its principal physician (collectively the "Vitality defendants") and its physician's assistant on the grounds that the physician's assistant subjected them to unwanted sexual advances. Allstate Insurance Company ("Allstate") issued Vitality a Businessowners Policy and an Umbrella Policy ("the policies"). The policies contained substantially the same coverage grants and exclusions. Relevant to the lawsuit was the policies' definition of "insured" to mean, as to Vitality, its executive officers and directors, "but only with respect to their duties as [such]," as well as its employees, "but only for acts within the scope of their employment [by Vitality] or while performing duties related to the conduct of [Vitality's] business.'" The policies included a definition of "occurrence" to mean an accident and also contained an expected or intended exclusion, an abuse or molestation exclusion, and an exclusion for bodily injury arising out of an employee's "providing or failing to provide professional health services." Allstate commenced an insurance coverage lawsuit and then filed a Motion for Judgment on the Pleadings seeking a ruling that it did not owe a duty to defend or indemnity the Vitality defendants for the underlying claims. In addressing coverage, the first court considered whether Allstate owed a duty to defend or indemnify

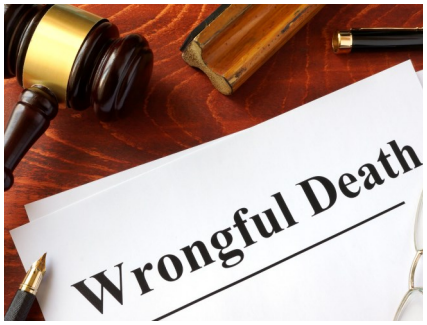
the physician's assistant. In assessing Allstate's duties, the court looked to whether the physician's assistant was an "insured" as defined by the policies. While the policies did not define "scope of employment", the court found that New York law instructs that "an employee acts within the scope of his employment if the relevant act was done while the [employee] was doing [the employer's] work, no matter how irregularly." The court determined that the physician's assistant was not working within the scope of his employment to qualify as an "insured" under the policies because the alleged acts were a departure from the normal methods of performance of the job. Additionally, the alleged sexual misconduct is the not the type of acts that an employer would reasonably anticipate to occur while on the job. Turning to occurrence-as-an-accident and the expected or intended exclusion, the court likewise found that the physician's assistant intended and expected the harm caused. While the court acknowledged that the law governing the interpretation of exclusionary clauses is highly favorable to insureds, Allstate' intentional injuries exclusions were "specific and clear," and its plain meaning prohibited coverage for intentional sexual torts. The court also found that there was no coverage for failing to meet the appropriate standard of care by virtue of the policies' professional services exclusion which excluded coverage for "the rendering or failure to render any professional service." The court likewise applied this exclusion to allegations on breach of care against the Vitality defendants and further determined that the exclusion applied to allegations of negligent hiring, investigation, and supervision of the physician's assistant. The court also determined that the exclusion for "actual or threatened abuse or molestation by anyone of any person while in the care … of any insured" similarly precluded coverage for the claimants' causes of action against Vitality and its principal physician.

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

Maryland Appellate Court Considers Wrongful Death and Survivorship Actions When the Alleged Negligence Did not Cause Decedent's Death

In *Scott Wadsworth, et al., v. Poornima Sharma, M.D., et al..,* 2021 WL 2802326 (Md. Ct. Spec. App. July 1, 2021), a decedent's relatives brought a wrongful death and survivorship action alleging that the defendant physician and her employers University of Maryland Oncology Associates, P.A. and University of Maryland Community Medical Group, Inc., failed to diagnose decedent's metastatic breast cancer. Plaintiffs' alleged that the physician's negligence shortened the decedent's life expectancy by thirty months. At issue before the Maryland Court of Special Appeals was whether decedents' relatives could successfully bring a wrongful death and survivorship action when the alleged negligence did not cause decedent's death. Evaluating first the viability of the wrongful death action, the court recounted prior precedent established in *Hetrick v. Weimer*, 67 Md. App. 522, 541, cert. granted, 307 Md. 469 (1986), in which the Maryland Court of Appeals held that in a wrongful death action a plaintiff must prove that it was more likely than not that the alleged negligence caused the decedent's death. Further citing to the opinion in *Weimer,* the court opined that, "it is crystal clear that determination [by a fact-finder] of such questions [whether the defendant's negligent conduct caused the decedent to lose less than a 50% chance of survival] is impermissible in an action for wrongful



death under the Maryland statute." The court found that decedents' relatives could not establish a successful wrongful death action because plaintiffs failed to establish that decedent's cancer was "still probably curable" and that the Maryland wrongful death statute requires proof that the alleged negligence caused the decedent's death. The court further rejected plaintiffs' "precious years" argument that, had decedent been diagnosed by defendants she would have lived an additional two and half years. Turning to the issue of whether decedent's relatives could bring a survival action, the court stated that a survival action may be brought even though there is no proof that the alleged negligence caused decedent's death. The court stated, "we shall hold that the personal representative may possibly recover some damages even though he was unable to prove that [the physician defendant's] negligence caused the decedent's death … It is important to emphasize that Section 6-401 of the Courts & Judicial Proceedings Article (dealing with a survival action) does not require that the plaintiff prove that death was caused by the defendants' negligence. The personal representative, unless he or she makes a claim for funeral expenses, must only show that the decedent, if he or she had lived, would have had a cause of action.

Indiana Medical Malpractice Act Applies To Third Party Negligence Claims

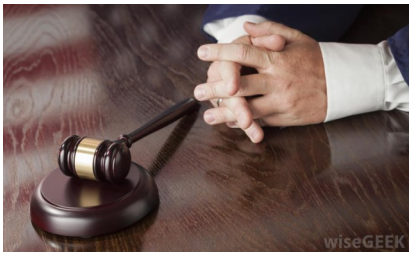
The Indiana Supreme Court recently ruled that the state's Medical Malpractice Act applies to claims brought by third-party plaintiffs alleging injury resulting from negligent treatment of someone else. *See Jeffrey B. Cutchin v. Amy L. Beard,* 21S-CQ-48 (Ind. June 30, 2021). The matter arises from an auto accident resulting in the death of the plaintiff's wife and daughter. The driver's motor skills were allegedly impaired by prescription medication prescribed by a person referred in the opinion only as "physician." The plaintiff filed a medical malpractice claim as well as a civil complaint alleging that the physician breached the standard of care as to the driver and had negligently caused the wrongful deaths of his wife and daughter. The action also sought declaratory judgment that the Indiana Medical Malpractice Act ("MMA") applied to the case. The MMA requires physicians to secure medical malpractice insurance up to $250,000 in order to qualify for a statutory damages cap of recovery of the same amount. Additionally, the Act requires physicians to pay a surcharge into the state's Patient's Compensation Fund, (the "Fund") which acts as an excess insurer, providing up to $1 million above the physician's liability. The plaintiff sought excess damages from the Fund after settling the claim against the physician and the physician's clinic. The Fund argued that it could not be held liable because the MMA did not apply to the case. The primary issue before the court was whether the MMA applied to claims brought against qualified providers for individuals who did not receive medical care from the provider, but who are injured as a result of the provider's negligence in providing medical treatment to someone else. Ultimately, the court found for the plaintiff, holding that he qualified as a "statutory patient" under the Act. The Indiana Medical Malpractice Act provides for two categories of patients. The court explained, "the first category is a traditional patient, i.e., one with a physician-patient relationship with a health-care provider...The other category is a third party with a claim against a health-care provider under state law: 'a person having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice on the part of a health care provider.'.. This latter category refers to a third party whose claim results from a provider's malpractice to someone in the first category, namely, a traditional patient." The court determined that the plaintiff is "nevertheless a statutory 'patient' because he had a wrongful-death claim resulting from alleged malpractice to the driver, who was a traditional patient to the physician."

Kentucky Supreme Court Finds Claimant Could Not Establish Third Party Bad Faith Claim

On June 17, 2021, the Kentucky Supreme Court found that a third party claimant could not meet the three prong test to establish bad faith liability against two insurance carriers. In *Mosley v. Arch Specialty Ins. Co.,* 2021 WL 2618196 (Ky. June 17, 2021), the widow of a deceased man brought a negligence and wrongful-death action against four companies involved in a mining operation after her husband died from a crush injury. The companies were insured by either Arch Specialty Insurance Company ("Arch") or National Union Fire Insurance Company ("National Union"). After accepting the full $1 million policy limits to resolve all claims with Arch's insureds and later $2 million from National Union, the widow sued both Arch and National Union under the Kentucky Unfair Claims Settlement Practice Act (KUCSPA) alleging that the insurance carriers leveraged claims by forcing global settlements instead of negotiating each claim individually, that the companies acted in bad faith by sending only one attorney to the second mediation to negotiate for both insurers and their respective insureds, and that Arch and National Union would not settle unless she reduced the settlement request from National Union. National Union's policy limits were $6 million. The insurance companies moved to dismiss. On appeal, the Kentucky Supreme Court found that the widow could not maintain a third-party bad faith claim. The court explained that in order to maintain a third-party bad faith claim, a claimant must prove three elements, "(1) an insurance company's obligation to pay under the policy; (2) an insurance company's lack of a reasonable basis for denying the claim; and (3) an insurance company's knowledge that no reasonable basis existed for denying the claim or acting with reckless disregard toward the claim." The court further added that the evidentiary threshold in bad faith claims is a heightened standard and that a claimant must prove that an insurer engaged in outrageous conduct towards its insured. As to the first prong, the court found that Arch could not have acted in bad faith under KUCSPA because no contractual duty to pay the claims against the insureds existed. Specifically, Arch's policy expressly excluded "bodily injury to an employee of the insured arising out of and in the course of employment." The widow's husband fell into this exception as a leased employee. The court found that National Union, on the other hand, had a potential obligation to pay. As to the second prong, an insurer's lack of reasonable basis for denying the claim, the court determined that Arch's liability was not reasonably clear because its insureds may have been immune from the claim and because Arch's policy excluded bodily injury coverage for employees. Likewise, the court found that National Union's liability was also unclear as it had potential immunity defenses and there was still no resolution as to who was at fault or how fault would be apportioned. The court also determined that the widow failed to meet the third prong because she could not prove actual damages as a result of outrageous conduct. While her complaint lacked any allegation that she incurred damages as a result of any delay in settlement, the court also reasoned that had there been any alleged delay, the widow would have been partly at fault for any delay by failing to budge from her settlement demands.

Tennessee Court of Appeals Allows Paralyzed Patient to Set Aside Hospital's Dismissal From Case

In *Ingram v. Gallagher,* 2021 WL 3028161 (Tenn. Ct. App. July 19, 2021), the Court of Appeals of Tennessee found that the trial court erred in not permitting the plaintiff to withdraw his voluntary dismissal of a hospital and amend his complaint to re-name the hospital as a defendant. The action arises from a health care liability claim after the plaintiff suffered complications and paralysis from a medical procedure. The plaintiff's initial complaint named his physician, the hospital, and two other defendants. The plaintiff voluntarily dismissed the action against all defendants except the physician. The physician defendant argued that the claim against him should also be dismissed because the hospital as the physician's employer, was not a party to the case. The plaintiff then moved to set aside the order of dismissal in order to withdraw the voluntary dismissal of the hospital as a party. The Trial Court held that the voluntary dismissal order was a final order and could not be altered or amended. At issue before the court was whether the order granting plaintiff's voluntary dismissal was a final or interlocutory order. On appeal, the plaintiff argued that his motion to set aside the judgment should have been granted pursuant to



Tenn. R. Civ. Pro. 54.02 which states that: "without being certified by the trial court as final, any court order that adjudicates less than all the claims, rights, and liabilities of fewer than all of the parties involved in the action is not a final order and 'shall not terminate the action as to any of the claims or parties.' Any such non-final order by the trial court shall be subject to revision by the court at any time prior to entry of the final judgment." The court determined that there was no final judgment on the voluntary dismissal when the order dismissing the claims did not apply to all of the parties in the action. Thus, the order could not have been "final" when there were claims still pending before the court. The court, therefore, found that the order granting the voluntary dismissal was an interlocutory order and plaintiff's motion to withdraw the order which should have been treated as a Rule 54.02 motion to revise. The court also explained that Rule 54.02 confers "the privilege of reversing itself up to and including the date of entry of a final judgment." In further support of its finding that the order of voluntary dismissal was an interlocutory order, the court also considered that the voluntary dismissal was granted without prejudice and that the plaintiff filed his first motion to amend the complaint only two months after the order of dismissal was entered.

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Jury Verdicts/Settlements

Jefferson County, New York — May 2021. A Jefferson County jury entered a $13.5 million verdict against staff at an upstate hospital, finding that their failure to diagnose an Army veteran's blood clot forced him to later undergo an above-the-knee amputation. The 50-year plaintiff was awarded $10 million in damages for pain and suffering and $3.5 million in economic damages, including lost wages and medical expenses, following a six-day trial.

Appellate Court, Illinois — May 2021. In May, an Illinois state appellate panel upheld a $14 million jury verdict for a man who claimed he suffered injuries from a delayed spinal abscess diagnosis, rejecting a health center's argument that several errors, including jury instruction errors and the misconduct of counsel, entitled it to a new trial.

Federal Court, West Virginia -- June 2021. A West Virginia federal jury entered a $10.8 million verdict against Raleigh General Hospital and the U.S. government in a lawsuit brought by a couple who alleged the hospital's staff caused their newborn to suffer a lack of oxygen, or hypoxia, leaving her with cerebral palsy. The jury found that the staff at the hospital and the government deviated from the standard of care and that the hospital was 70% responsible for the injuries while the government, as funder of the care, was 30% responsible.

DuPage County, Illinois -- June 2021. A DuPage County jury handed down a $3.35 million verdict against an Illinois neurologist in a medical malpractice case brought by a former patient who said she suffered permanent brain damage from an undiagnosed brain tumor

Washington State -- July 2021. Washington State has agreed to pay $3.25 million to the family of a 57-year-old prison inmate who died from an abdominal incisional wound following cancer surgery that the prison medical staff failed to properly treat and for which he was only provided over-the-counter Tylenol for his pain. The prisoner was in severe pain during 26 days before his death due to undiagnosed septic shock, acute pancreatitis, and a perforated intestine.

North Iowa -- June 2021. A North Iowa jury returned a $6 million verdict against a nursing home in a nursing home neglect case involving the death of an 83-year-old resident in June 2017. They alleged the facility failed to provide proper medical care, including preventing her from suffering falls.

Notable Defense Verdicts

Appellate Court, Massachusetts— May 2021. A Massachusetts' appellate court in May upheld a defense verdict in a lawsuit accusing an emergency room physician of causing a woman's bowel injury, saying a questionable jury instruction was properly given by the trial judge. In its decision, the court held that the trial court properly instructed the jury on the concept that errors in judgment are not negligent if they are within the standard of care.

Appellate Court, New York— June 2021. A New York appellate panel on June 15 vacated a $2.5 million pain-and-suffering award entered in a lawsuit accusing a nursing home of causing a resident's death, concluding that the trial court failed to have the jury determine whether the patient had a certain level of "cognitive awareness" to justify the award.

Appellate Court, New Jersey — May 2021. The Superior Court of the New Jersey Appellate Division ruled that a plaintiff, who alleged that the defendants failed to timely diagnose and drain his spinal abscess that led to permanent paralysis from the waist down, filed his lawsuit too late. The Court held that the two-year statute of limitations expired well before plaintiff filed his amended complaint against the defendants.

Appellate Court, New York-- June 2021. A New York appeals court dismissed a medical malpractice suit filed against a radiologist on behalf of a woman who died of breast cancer. Reversing a trial court's denial of summary judgment, the court held that the physician did not breach a standard of care because the radiologist did not assume any duty beyond reading the mammography images and documenting his findings.

Seventh Circuit — June 2021. The Seventh Circuit Court of Appeals dismissed a lawsuit brought by a Chicago-area woman against a hospital relating to her mother's death after finding the Emergency Medical Treatment and Active Labor Act cannot be the basis for a malpractice suit, joining the circuit with a "chorus" of other appellate courts.

Supreme Court, Rhode Island -- June 2021. In a June 9 decision, the Rhode Island Supreme Court reinstated a defense verdict in favor of a physician in a case alleging medical negligence in the physician's failure to diagnose ovarian cancer. In upholding the defense verdict, the Supreme Court held that there was evidence that the physician failed to refer the patient to an oncologist but that the negligence was not the proximate cause of her injury because the cancer was incurable at that time.