DECISIONS

INSIDE THIS ISSUE:

Pennsylvania Supreme Court Holds that the Pennsylvania Peer Review Protection Restricts Discovery in Medical Malpractice Suits

On August 17, 2021, the Supreme Court of Pennsylvania issued a ruling in a case on whether a hospital's credentials committee qualified as a "review committee" in accordance with the Pennsylvania Peer Review Protection Act ("PRPA"). In *Leadbitter v. Keystone Anesthesia Consultants, Ltd.,* 2021 WL 3628734 (Pa. 2021), a patient brought a suit against the hospital where he underwent two spinal surgeries performed by an orthopedic surgeon, which resulted in the patient suffering from permanent brain damage among other injuries. The Pennsylvania Superior Court previously affirmed the Court of Common Pleas of Allegheny County's decision to grant the patient's motion to compel production of the surgeon's unredacted credentialing file. The lower court relied on a prior holding in *Reginelli v. Boggs*, 645 Pa. 470 (2018) which held in relevant part that, the "evidentiary privilege set forth in the [PRPA] applies to the documents of a 'review committee' but not to the documents of all 'review organizations'." The lower court reasoned that the surgeon's membership file with the hospital qualified as credential-review files as opposed to peer-review files and were therefore, not accorded the same protections by the PRPA. The Pennsylvania Supreme Court sided with the hospital's core position that a committee which performs a peer-review function, although it may not be specifically entitled a "peer review committee," constitutes a review committee whose proceedings and records are protected under Section 4 under the PRPA. The court explained that the purpose of the PRPA is to allow the medical profession to police itself given its highly complex nature and that the privileges afforded by the PRPA ensure "the candor and frankness in the creation and consideration of peer-review data by conferring immunity from liability, as well as confidentiality ..." The court explained that an application for appointment to a hospital involves not only the political rights that come with staff membership, but also entails hospital privileges. Distinguishing the present case from *Reginelli*, the court explained that the *Reginelli* court did not analyze the review process for delineated hospital privileges. This review process known as "privileging" is distinct from credentialing as it involves giving the physician permission to treat patients at the hospital. The Pennsylvania Supreme Court found that nothing in the laws and regulations governing such activities preclude a hospital from having its credentialing committee preclude review necessary for granting privileges. The court stated that, "[t]he regulations recognize this distinction, as they specify that the medical staff must define in its bylaws the requirements both for admission to staff membership and for the delineation and retention of clinical privileges." Thus, the Court remanded the case to the Court of Common Pleas to review the documents in camera and to make a determination as to whether they are protected as peer-review materials pursuant to the statutory definition of "peer review."

Arizona Appellate Court Upholds Constitutionality of Statute Which Bars Apologetic Statements by Health Care Providers as Evidence of Liability

The Arizona Court of Appeals Division One ("Arizona Appellate Court") recently upheld the constitutionality of Arizona's "I'm Sorry" statute, A.R.S. § 12-2605, in *Coleman v. Amon,* No. 1 CA-CV 19-0350, 2021 WL 3627099 (Ariz. Ct. App. August 25, 2021). In this case, plaintiff Jodie Coleman was pregnant with twins and anticipated a cesarean section due to the high risk nature of her pregnancy. However, at the time of labor, Ms. Coleman's obstetrician, Dr. Amon, was with an another patient requiring that another on-call doctor perform the delivery. The on-call doctor opted for vaginal birth instead of a caesarean section. During the birth, one of the twins suffered from brain damage after being deprived from oxygen for too long. Plaintiff alleged that after the birth, Dr. Amon apologized about the outcome of the delivery and for letting plaintiffs down. Dr. Amon filed a motion in *limine* to preclude testimony related to the alleged apology pursuant to Arizona's "I'm Sorry" statute, A.R.S. § 12-2605, which renders any statement by a health care provider of apology, responsibility, condolence, or compassion inadmissible to show the health care provider's liability. The trial court granted the motion and precluded the testimony to show Dr. Amon's liability. The plaintiffs appealed arguing that the statute violated the state constitution's separation of powers, the prohibition against special laws, and the prohibition against privileges and immunities. The Arizona appellate court affirmed the trial court's decision finding no constitutional violation and noting that the statute reasonably fosters health care provider-patient relationships by encouraging health care providers to speak compassionately with patients about adverse medical outcomes without worrying that the conversations will be used against them in a future lawsuit.

SPECIAL POINTS OF INTEREST:

- *Peer-Review Files are Protected From Discovery in Pennsylvania*
- *No Apparent Agency in Maryland Hospital Liability Case*
- *Indiana Court Finds No Apparent Agency Between Surgeon and Hospital*
- *Michigan Malpractice Claim within Statute of Limitations*

Kentucky Supreme Court Finds That a Kidney Transplant Recipient Provided Informed Consent in Clinical Trial

In *University Medical Center, Inc. v. Shwab*, 2019-SC-0641-DG (August 26, 2021 KY), Plaintiff Reagan Brooke Shwab required a kidney transplant and opted to enter into a Phase 1 Clinical trial as an alternative to taking anti-rejection and immunosuppressant medication. Phase 1 trials are characterized as "initial safety trials" to determine the tolerance level associated with certain medications or treatments. In these types of trials, safety is not guaranteed and toxicity is generally unknown. Plaintiff and her husband consulted with multiple medical providers during the course of several meetings prior to Brooke Shwab executing a sixteen page consent form to participate in the clinical trial that, if successful, would replace the need for her to take a lifetime supply of immunosuppressant drugs following her transplant. The consent form detailed the trial and included possible side effects such as cancer, infertility, and death. Plaintiffs were given the consent form to take home prior to having it executed. Shortly after participating in the trial, Plaintiff developed a rare form of blood cancer known as myelodysplastic syndrome ("MDS"). Plaintiffs filed suit alleging that Ms. Shwab's consent to the clinical trial was invalid pursuant to Kentucky Revised Statute (KRS) 304.40-320, the statute that sets forth the framework for determining when informed consent has been properly given in medical care actions. KRS 304.40-320 states that a claimant's informed consent is deemed to have been given when: "(1) The action of the health care provider in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with the accepted standard of medical ... practice among members of the profession with similar training and experience; and (2) A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedure and medically ... acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures ..." To meet the first requirement of the statute, a claimant must show that the process in which consent was obtained did not comply with "accepted standards" within the medical profession. The court determined that the defendant medical providers satisfied subsection (1) of the statute when during the course of several weeks various medical providers met with the Shwabs' to inform them of the trial's lack of success, substantial risks, and potential complications. Additionally, the Shwabs' had opportunities to ask questions related to the trial. The court further found that the consent form was sent to the FDA for approval and that the Shwabs' failed to present expert testimony establishing any deviation from the acceptable standard of care. The court additionally found that the Shwabs' also failed to present evidence that they lacked a "general understanding" of any "substantial risks" associated with the trial when MDS was not a "substantial risk" given its low prevalence, and no other patient in the clinical trial or similar study had developed MDS. The court also held that, "a reasonable person would certainly understand from even a casual reading of the informed consent form that developing cancer (of which MDS is one type) was a risk of the clinical trial procedure and treatment."

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 Upholds Decision that Plaintiff Failed to Establish Apparent Agency Between Physician and Hospital

The Court of Special Appeals of Maryland ("Maryland Appellate Court") recently upheld a decision finding for a defendant-hospital on allegations of vicarious liability and apparent agency. In *Williams v. Dimensions Health Corp*., No. 0036, 2021 WL 3052830 (Md. Ct. Spec. App. July 20, 2021), the plaintiff initiated a medical malpractice suit against Dimensions Health Corporation, Inc., d/b/a Prince George's Hospital Center ("the hospital") and three of his treating physicians for the negligent care he received following a motor vehicle accident that resulted in the amputation of both of his legs. Specifically against one of the physicians, Dr. Blundon, the plaintiff alleged that the hospital was vicariously liable for his failure to comply with the standard of care that would have prevented one of the amputations Following his arrival to the hospital, plaintiff was presented with a two-page universal consent form that included an acknowledgement that the physicians providing services were not the employees or agents of the hospital. The form was signed by another individual on the plaintiff's behalf. At issue was whether the plaintiff could establish that Dr. Blundon was an apparent agent of the hospital so as to hold the hospital vicariously liable for his actions. In Maryland, a plaintiff must show that: "(1) 'the apparent principal create[d], or acquiesce[d] in, the appearance that an agency

relationship existed'; (2) the plaintiff subjectively believed that an agency relationship existed between the apparent principal and apparent agent and relied on that belief in seeking the services of the apparent agent; and (3) the plaintiff's personal belief and reliance are reasonable." The court acknowledged that generally plaintiffs do not have a duty to inquire into the treating physician's relationship with the hospital. However, under the second element, a plaintiff must be able to show a subjective belief that "that an employment or agency relationship existed between the apparent principal and the apparent agent and relied on that belief in seeking medical care from the apparent agent." The court ultimately found that the plaintiff could not establish that he subjectively believed that Dr. Blundon was an employee of the Hospital when he only presented testimony related to his state of conscious awareness, but "nothing about his perception about who—an employee or independent contractor—was providing treatment." The court additionally stated, "...assuming that [plaintiff] was able to form a subjective belief does not reasonably support the conclusion that he did in fact hold such a belief…"

Indiana Court Finds Apparent Agency Between Surgeon and Hospital

The Indiana Court of Appeals recently found that an agency relationship existed between the plaintiff's selected operating surgeon and the hospital facility that the surgeon chose to operate in. In *Anonymous Hospital v. Amer Newlin*, No. 21A-CT-111, 2021 WL 4186447 (Ind. Ct. App. Sept. 15, 2021), the plaintiff initiated a medical malpractice suit after complications arose from a gallbladder surgery. In responding to the plaintiff's claim that the hospital was vicariously liable, the hospital argued that it could not be found vicariously liable when the plaintiff personally selected his physician prior to surgery and the hospital simply provided the facility for the surgery to take place. Additionally, the hospital argued that due to plaintiff's own selection of his surgeon, the plaintiff reasonably should have known that the surgeon was not the hospital's employee. In Indiana, the doctrine of apparent agency allows a hospital to be held liable for a non-employee's actions if the patient reasonably believed, based on the hospital's actions or inactions, that the physician treating the patient is acting on behalf of the hospital. The court explained that in *Sword v. NKC Hosps., Inc.,* 714 N.E.2d 142, 148 (Ind. 1999), the Indiana Supreme Court adopted the Restatement (Second) of Torts § 429, which permits an employer to be held vicariously liable if an independent contractor is reasonably believed to be acting on behalf of the employer. The court citing to *Sword* stated that, "[w]hen applying § 429, the focus is 'on the reasonableness of the patient's belief that the hospital or its employees were rendering health care.' Whether an independent contractor physician is an apparent agent of the hospital is a question of fact concentrating on the hospital's manifestations and the patient's reliance...This determination requires 'consideration of the totality of the circumstances, including the actions or inactions of the hospital, as well as any special knowledge the patient may have about the hospital's arrangements with its physicians.'" In siding with the plaintiff, the court reviewed the totality of the circumstances paying special attention to the fact hat the plaintiff only had a 9th grade education, that he believed the surgeon was an employee of the hospital given the close proximity of the surgeon's office and the hospital, and that plaintiff was never informed verbally or through consent forms that the surgeon was not an employee of the hospital. The court also rejected the theory that there could be no agency relationship when a patient seeks out a physician who then in turn opts to utilize a hospital's facilities The court determined that case law supporting that theory was expressly rejected by the *Sword* case.

Michigan Supreme Court Finds Claimant Timely Initiated Medical Malpractice Suit

In *Bowman v. St. John Hosp. & Med. Ctr.,* No. 160291, 2021 WL 3266790 (Mich. July 30, 2021), a patient diagnosed with metastatic breast cancer filed a medical malpractice suit against her treating physician and hospital due to the physician's alleged misreading of a mammogram in concluding that the lumps in the plaintiff's breasts were benign cysts. The mammogram occurred in June 2013 and the plaintiff later discovered in May 2015 that she had breast cancer requiring that she undergo a double mastectomy. In August 2016, the plaintiff visited a specialist for a second opinion after learning that the cancer had spread to her bone marrow It was then that she was informed that the 2013 mammogram was likely misread by the treating physician. The plaintiff sent a notice of intent to the sue the defendants six months after her meeting with the specialist. The defendant physician and hospital filed a motion for summary judgment arguing that the complaint was untimely because the statutory period had lapsed two years after the physician allegedly misread the mammogram and that the claim was barred by MCL 600.5838a(2), which allows a medical-malpractice plaintiff sue within six months after she "discovers or should have discovered the existence of the claim." The defendants claimed that the plaintiff should have discovered her medical malpractice claim in May 2015 when she learned she had metastatic breast cancer. The Supreme Court of Michigan in finding for the plaintiff that the claim was within the statute of limitations, explained that MCL 600.5838a(2) states, in relevant part, that a medical malpractice claim may be commenced at any time within the statutory limitations periods or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later, but generally may not be commenced later than six years after the date of the act or omission that is the basis for the claim. The statute further states, that, "the burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred." The court analyzed the role of diligence in determining whether a patient "should have discovered the existence of a claim". Citing to *Solowy v Oakwood Hosp Corp*, 454 Mich. 214, 224, 561 N.W.2d 843 (1997), the court concluded that in evaluating a patient's diligence courts should, "consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." Here, the court noted that plaintiff's claim survived summary disposition because there was nothing to suggest that she was not diligent in her discovery of the claim prior to the August 2016 visit with the specialist that informed her that the mammogram was misread. In fact the court noted, that the plaintiff continuously followed up with doctors leading up to and after her beast cancer diagnosis and it was only after the visit with the specialist that she learned that she possibly had a claim.

Fourth Circuit Sides With Insurer in Bad Faith Settlement Claim

The Fourth Circuit Court of Appeals, applying South Carolina law, recently sided with an insurer in a bad faith settlement claim initiated by third party claimants. In *Columbia Insurance Company v. Waymer,* No. 20-1265, No. 20-1266, No. 20-1267, 2021 WL 2556586 (4th Cir., June 22, 2021), the fourth circuit considered whether Columbia Insurance Company (CIC) acted in bad faith under South Carolina law when it rejected the third party claimants' settlement demands, rendering CIC liable for the full amount of damages arising from an auto-accident involving its insured. Relevant to the court's siding with CIC were the unorthodox settlement demands made by the third party claimants' in negotiating settlement of the case. In January 2014, counsel for the claimants' imposed a ten day deadline on the initial settlement demand requesting that CIC pay the full policy limits available of $1 million. This demand was made with a description of the claimants'' injuries, but lacked any substantial medical record or bills to back up the policy limits demand. In April 2014, CIC was provided the full medical records and it promptly offered its full policy limits in settlement of the case. However, the claimants' rejected the offer and made a second settlement demand, this time alleging that CIC acted in bad faith when it rejected the January 2014

demand. Their new demand imposed a fifteen day deadline and offered an option to skip over a trial on liability or damages, and litigate only on the bad faith claim. If the jury found bad faith, CIC would pay $3.5 million, a finding of no bad faith, would require that CIC pay its full policy limits. In a second option, the parties would litigate the extent of the claimants' injuries and the bad faith claim. If the jury found CIC liable in bad faith, then CIC would pay the full jury verdict – without any right to appeal that verdict as excessive. The Furth Circuit affirmed the district court's ruling that CIC did not unreasonably refuse to settle when plaintiffs' counsel unilaterally imposed a short response time and CIC could not exercise its right to reasonably investigate the legitimacy of the claims before making a decision on whether to accept or reject the settlement demand. In drawing from Florida case law, the court stated, "an insurer does not delay unreasonably when, acting diligently, it conducts a reasonable investigation before acceding to a settlement demand. Any rule to the contrary, the court concluded, "would 'starv[e] the insurer of the information needed to make a fair appraisal of the case' and undermine the adversarial system."

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

Sarabeth Rangiah
(202) 457-1619
srangiah@jackscamp.com

Jury Verdicts/Settlements

Appellate Court, California — August 2021. A California Appellate Court affirmed a jury verdict in the amount of $3.9 million awarded to the family of a 33 year-old patient who committed suicide by jumping from the roof of a drug rehabilitation treatment facility. Plaintiffs argued that he should have been in a medically managed detox facility. Although he stated at admission that he had no suicidal thoughts, the jury found the facility 65% negligent.

Superior Court, Connecticut — June 2021. A Superior Court Judge awarded a husband and wife $37.6 million in a medical malpractice action alleging that there was cytomegalovirus in the donor sperm used during intra uterine insemination procedure that exposed twins to CMV in utero leading to the death of one twin and life-long medical conditions in the other.

Appellate Court, New York -- July 2021. A New York Appellate Court issued a decision reducing a $3.8 million jury verdict in a case involving the wrongful death of a woman who died from ovarian cancer. Plaintiff's estate alleged that her physician failed to diagnose the cancer. In reducing the judgment, the court held that damages in a wrongful death action are limited to pecuniary injuries suffered by the distributes of the decedent's estate and the award here deviated materially from what would be reasonable compensation.

King County, Washington -- June 2021. A King County jury awarded $6 million to the family of a 34 week old baby who was having breathing problems shortly after birth and suffered a torn vocal cord and other injuries to his airways while being intubated at the hospital.

Baltimore, Maryland -- August 2021. After a two week trial, a Baltimore City Circuit Court found against a hospital and awarded $34.77 million to the family of a newborn who suffered an irreversible hypoxic brain injury just hours after his birth. The plaintiff's lawyers strategically requested that the jury award zero in noneconomic damages, such as pain and suffering, which are subject to a damages cap, so that the jury would focus on the large amount of economic damages.

Orange County, California -- April 2021. An Orange County jury awarded $5.7 million to the family of a baby who suffered a catastrophic brain injury at birth. Plaintiffs alleged that the Ob-Gyn failed to timely recognize signs of fetal distress and that the baby suffered hypoxic ischemic encephalopathy.

Notable Defense Verdicts

Appellate Court, California—September 2021. A California appellate court affirmed a jury's decision to clear a cosmetic surgeon and his clinic of liability in a lawsuit accusing the surgeon of medical negligence in connection with a patient who died days after a "tummy tuck" operation. The Court found that the trial judge did not abuse his discretion when forbidding nursing staff testimony.

Appellate Court, Texas—August 2021. A Texas Appellate Court upheld the trial court's dismissal of a medical malpractice lawsuit filed by a husband who claimed a Corpus Christi hospital and its doctor failed to treat his wife's stroke, In upholding the trial court's ruling, the appellate court held that the husband should have listed all physicians who had cared for her in his pre-suit notice form.

Appellate Court, Illinois — August 2021. An Illinois state appellate panel issued a decision in August holding that a hospital should not face vicarious liability claims over an orthopedic surgeon's alleged negligence in a widower's wrongful death suit because the hospital made known that the surgeon was an independent contractor and not an employee of the hospital.

Appellate Court, Minnesota -- August 2021. In a decision issued on August 2, 2021, the Minnesota Court of Appeals found in favor of two hospitals in a lawsuit alleging that they failed to quickly administer labor-delaying medication to a woman in labor. In the decision, the Court held that while the trial court was wrong to exclude one expert's testimony, that testimony would not have saved the mother's claims against the hospitals.

Supreme Court, Arizona — July 2021. The Supreme Court of Arizona issued a decision on July 30, 2021 finding in favor of a surgical center and a physician in a medical malpractice action involving the deaths of a four year old boy during tonsillectomy and adenoidectomy. In the ruling, the Court held that Plaintiff's expert witness equivocated over the applicable standard of care and he did not opine that insufficient observation was the probable proximate cause of the boy's death. The Court held that in a medical malpractice action causation must be established by competent expert testimony, and that a jury may infer such causation only if malpractice is "readily apparent." The Court concluded that lay jurors in this case were not able to properly determine causation without expert guidance.