Jackson &Campbell
Attorneys and Counselors at Law

DECISIONS

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ILLINOIS COURT REVIVES COUNT AGAINST NURSES UNDER RELATION BACK DOCTRINE

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Special points of interest:

- Illinois Appellate Court rules that count against nurses in First Amended Complaint should not be dismissed, pursuant to the relation back doctrine.
- Supreme Court of Florida resolves conflict among lower appellate courts over medical malpractice classification.
- Michigan Court of Appeals concludes a nurse practitioner is not qualified to testify about the standard of care for a registered nurse because they are two distinct professions.
- Ohio Court of Appeals holds that defendant medical providers waived their right to arbitration by failing to abide by the terms of their arbitration agreement.
- Massachusetts Appeals Court affirms dismissal of negligent discharge suit due to insufficient offer of proof.

In *Simpkins v. HSHS Medical Group, Inc.*, 2017 IL App (5th) 160478 (2017), the Appellate Court of Appeals, Fifth District, reversed the dismissal of a claim against hospital personnel on the grounds that the claim "related back" to the claims first asserted against the physician surgeon. In *Simpkins*, Dr. Nicholas E. Poulos ("Dr. Poulos") performed spinal fusion surgery on Judith K. Simpkins ("Plaintiff") on January 26, 2011. During the surgery, Dr. Poulos affixed two Medtronic plates to stabilize the fusions at the L4-L5 and L5-S1 vertebrae. April, 2011 x-rays showed one of the plates had become displaced, and was causing Plaintiffs' distal abdominal aorta to bow. On May 13, 2011, Dr. Poulos performed revision surgery on Plaintiff to remove the displaced plate. After the surgery, Plaintiff was transferred to the intensive care unit ("ICU"). At 4:30 p.m., Dr. Poulos left a written order directing the ICU nurses to perform a vascular assessment on Plaintiff every two hours. Within a few hours after the surgery, Plaintiff complained of numbness in her left foot. From approximately 5:00 p.m. until 4:00 a.m., nurses performed repeated assessments on Plaintiff. In particular, nurse Cynthia Kovach ("Ms. Kovach") performed multiple assessments on Plaintiff from 8:00 p.m. until 4:00 a.m. Even though Plaintiff's condition appeared to be worsening to the point where she had diminished sensations in both legs and feet, Ms. Kovach did not notify Dr. Poulos of her worsening condition during this time frame. At 4:20 a.m. on May 14, 2011, Dr. Poulos finally spoke with Ms. Kovach and ordered a stat CT of Plaintiff's lumbar spine. This eventually led to emergency surgery, and Plaintiff was diagnosed with complete occlusion of the aorta and ischemia, which lead to permanent nerve damage in the lower extremities. On April 5, 2013, Plaintiff filed a lawsuit against Dr. Poulos and the Hospital, alleging Dr. Poulos was negligent in delaying surgery to remove the plate from Plaintiff's body after learning of its displacement, which resulted in her permanent injuries. During his March 28, 2014 discovery deposition, Dr. Poulos testified that Plaintiff was being monitored and assessed by the nurses in the ICU after the revision surgery on May 13, 2011, and that he was not notified of Plaintiff's downward trend until approximately 4:00 a.m. on May 14, 2011. In May, 2015, Plaintiff amended her Complaint to include Count IV, which alleged that the Hospital personnel, including nurses, provided care to Plaintiff in the ICU after the May 13, 2011 revision surgery, and were negligent in "failing to adequately assess . . . and/or report the condition of Plaintiff[.]" The Hospital responded by filing a motion to dismiss the allegations in Count IV, asserting that the allegations constituted new and independent claims against the nurses, and that the allegations did not relate back to Plaintiff's original Complaint. The trial court dismissed Count IV, and Plaintiff appealed this decision. Under Illinois law, 735 ILCS 5/2—616(b) governs the relation back doctrine. This statute provides that a cause of action set up in an amended pleading shall not be barred by lapse of time under any statute prescribing or limiting the time within which an action may be brought, if the original pleading was timely filed and if it appears that the cause of action in the amended pleading grew out of the same transaction or occurrence set up in the original pleading. Taking this statute into account, the Appellate Court of Illinois, Fifth District ("the Court") ultimately ruled that Plaintiff's allegations in Count IV against the nurses should not be dismissed. The Court held, "the allegations in the original and amended pleadings are focused on the neurovascular compromise that resulted from the delayed revision surgery to remove the displaced plate and on the neurovascular injuries that [Plaintiff] subsequently suffered as a result of the neurovascular compromise. The postoperative care provided on May 13, 2011, and May 14, 2011, was at issue because of the surgery. The allegations regarding the delayed revision surgery and the failure to closely monitor [Plaintiff's] vascular status postoperatively were closely connected in time, subject matter, and character, and are stages of a singular occurrence . . . . This is not a case where a plaintiff is attempting to slip in an entirely distinct claim, based upon a separate nucleus of facts. Accordingly, The Court concluded that the trial court erred in dismissing count IV of the [F]irst Amended Complaint."

The Supreme Court of Florida Ends Conflict Over Med Mal Classification

"[F]or a claim to sound in medical malpractice, the act from which the claim arises must be directly related to medical care or services, which require the use of professional judgment or skill."

In *National Deaf Academy, LLC v. Townes*, No. SC16-1587, 2018 WL 1959642 (Fla. Apr. 26, 2018), the Supreme Court of Florida ("the Court") resolved a conflict among lower appellate courts by ruling that a personal injury suit accusing staff at a residential treatment facility of negligently injuring an unruly patient while attempting to physically restrain her cannot be recognized as medical malpractice. The Court affirmed the Florida Fifth District Court of Appeal's decision to revive a suit brought by Plaintiff Denise Townes ("Plaintiff"), accusing the National Deaf Academy, LLC ("the Academy") of ordinary negligence when it tried to restrain her niece, Cinnette Perry. The patient had been throwing rocks and the attempt to restrain her purportedly caused a dislocated knee that ultimately led to a leg amputation. The trial court had granted the Academy's motion for summary judgment, which argued that Plaintiff's claims sounded in medical malpractice and she failed to comply with the applicable pre-suit notice requirements and two-year statute of limitations under Florida law. While ordinary negligence claims have a four-year statute of limitations, medical malpractice claims are subject to a two-year deadline and also necessitate an expert medical opinion to be submitted before suit can be filed, among other requirements. The Court ultimately determined that because the Academy staff members' actions did not require medical judgment and were not for treatment of a condition, Plaintiff's claims sounded in ordinary negligence rather than medical malpractice. Accordingly, Plaintiff's lawsuit was improperly dismissed for failing to meet Florida's pre-suit requirements for medical malpractice cases. The Court stated, "we hold that for a claim to sound in medical malpractice, the act from which the claim arises must be directly related to medical care or services, which require the use of professional judgment or skill." The Court said its ruling "flows naturally" from certain case law that it and the intermediate appellate courts have established, and remains true to state lawmakers' intentions in enacting requirements for medical malpractice cases. The Court said, "[o]ur holding will allow ordinary negligence cases to proceed without requiring the plaintiff to obtain a pre-suit corroborating expert and follow the additional matrix of pre-suit procedures, while still advancing the Legislature's policy goals of encouraging the early settlement of meritorious [claims] and screening out frivolous medical malpractice claims."

Nurse Practitioner Cannot Testify About Registered Nurses, Michigan Court Says

In *Cox v. Hartman*, 322 Mich.App. 292 (2017), the Michigan Court of Appeals upheld the trial court's entry of summary judgment in a case in which plaintiff failed to retain an appropriate expert nurse witness. The case arises from alleged malpractice on the part of defendants Eric J. Hartman, M.D. and Tracey McGregor ("McGregor"), a registered nurse, related to the birth of the plaintiff's daughter. The plaintiff filed a medical malpractice action asserting, in part, a professional negligence claim against McGregor. The defendants argued that the plaintiff's proposed nursing expert was not qualified to offer standard of care testimony against McGregor pursuant to MCL § 600.2169(1). Therefore, they were entitled to summary judgment regarding the plaintiff's nursing malpractice claim. The Court noted that under MCL § 600.2169 (1), in order to be deemed a qualified expert, one must have spent the majority of time working or teaching in the same profession as the defendant in the year preceding the date of the alleged malpractice. The Court said that the nurse expert spent the bulk of the applicable year instructing nurse practitioner students and only a fraction of that time teaching undergraduate nursing students. The Court also determined that the two occupations are distinct health professions because registered nurses in Michigan receive a license whereas nurse practitioners receive a registration or specialty certification. The Court held that because the expert did not spend the majority of the applicable year teaching nursing, she was not qualified to testify about the appropriate standard of care. The Court also held that because her testimony was inadmissible and the plaintiff presented no other expert witnesses to testify about the standard of care for McGregor, the claims against McGregor were properly dismissed. The Court noted that the expert could have qualified had she spent the applicable year serving as registered nurse or teaching about the registered nurse profession.

Ohio Court Says Defendant Medical Providers Cannot Arbitrate Lawsuit

In *Goerlitz v. SCCI Hospitals of America, Inc.*, No. 1-17-43, 2018 WL 985935 (Ohio Ct. App. Feb. 20, 2018), the Court of Appeals of Ohio, Third District, Allen County ("the Court") declined to send to arbitration a suit accusing a hospital and others of being responsible for the death of a patient following surgery, saying the defendants waived their right to arbitration by failing to abide by their own terms set forth in the arbitration agreement. The Court affirmed the trial court's decision to deny a motion to compel arbitration in a suit brought by estate administrator John A. Goerlitz ("Appellee"), accusing SCCI Hospitals of America, Inc. d/b/a Kindred Hospital Lima and others ["Appellants"] of unspecified medical negligence, which purportedly caused the death of his wife Joanne Goerlitz after an October, 2015 surgery. The Court said the trial court properly ruled that because Appellants failed to initiate arbitration proceedings within sixty days of the conclusion or termination of mediation, as stipulated in their arbitration agreement, they waived their right to arbitration. The parties had failed to resolve the matter through mediation about five months before Appellee filed suit in November, 2016. The Court stated, "the trial court found it significant that Appellants had nevertheless waited nearly eight months after filing their answers, and nearly a year after the sixty-day timeline to convene arbitration had expired before attempting to convene arbitration by filing a motion for a stay and to compel arbitration on August 24, 2017." The Court held that because Appellants: (1) failed to abide by their own terms in the arbitration agreement, (2) had the case transferred from Cuyahoga County to Allen County, without first requesting that it be stayed pending arbitration, and (3) waited almost eight months before finally asking the trial court to compel arbitration, the trial court did not err by denying their request for arbitration. The Court also noted there were eleven other defendants in the case who have continued to work to resolve the matter based on the same facts asserted against Appellants, so enforcing arbitration would complicate the case as it would require one claim to be split from the rest and sent back to Cuyahoga County for arbitration. The Court said, "enforcement of the arbitration agreement, assuming it to be valid, would engender contemporaneous proceedings in two different forums not only with respect to the non-arbitrable claims, but also with respect to the multiple parties involved in the case."

"[E]nforcement of the arbitration agreement, assuming it to be valid, would engender contemporaneous proceedings in two different forums not only with respect to the non-arbitrable claims, but also with respect to the multiple parties involved in the case."

Claims Adjusters May Be Sued Directly for Insurance Bad Faith Under Washington Law

In *Keodalah v. Allstate Insurance Company*, 413 P.3d 1059 (Wash. Ct. App. 2018), the Court of Appeals of Washington ("the Court") determined whether an insured may bring bad faith claims against individual insurance claims adjusters under RCW § 48.01.030. The statute imposes a duty of good faith on "all persons" involved in insurance, including the insurer and its representatives. It requires that "all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters." A person who violates this duty may be liable for the tort of bad faith. RCW § 48.01.070 defines "person" as "any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation." Taking this definition into account, the Court held that the claims adjuster in *Keodalah* was acting as an Allstate Insurance Company representative. Thus, "under the plain language of the statute, she had the duty to act in good faith" and could "be sued for breaching this duty." The Court also held that she could not "avoid personal liability for bad faith on the basis of her employment." The Court stated that "in sum . . . RCW [§] 48.01.030 imposes a duty of good faith on corporate and individual insurance adjusters alike." The Court further considered whether a claims adjuster may be directly liable for a violation of the Washington Consumer Protection Act ("CPA"), which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." The CPA allows *"[a]ny person* who is injured in his or her business or property by a violation" of the act to bring a CPA claim. Taking this into account, the Court concluded that an insured need not show the existence of a contractual relationship with a claims adjuster to establish a CPA claim against the adjuster.

The Court of Appeals of Washington holds that an insurance claims adjuster may be sued directly for insurance bad faith and violations of the Washington Consumer Protection Act.

Massachusetts Appeals Court Affirms The Dismissal of a Negligent Discharge Suit

"Although Dr. Farrell opines that [Dr.] Martinucci's conduct fell below the standard of care 'in terms of conducting and documenting an inadequate discharge risk assessment,' Dr. Farrell does not explain how such deviation is relevant to the discharge decision as mandated by law[.]"

In *Clifford v. Universal Health Services, Inc.*, 92 Mass. App. Ct. 1127 (2018), Erin Clifford ("Erin") was admitted to Arbour Hospital in Jamaica Plain, Massachusetts on a conditional voluntary status to receive mental health treatment after the death of her premature twins. On July 3, 2012, Erin asked to be discharged and signed a "three day notice." Under Massachusetts law, a conditional, voluntary patient may submit a written notice to the hospital of his or her intent to leave, but the hospital can hold the patient while staff evaluates the person's clinical progress and suitability for discharge. A person may not be held against his or her will for longer than three days unless, prior to the end of the third day, the hospital petitions for the patient's involuntary commitment. On July 6, 2012, Dr. Diego Martinucci ("Dr. Martinucci") evaluated Erin, provided her with an after-care treatment plan, and discharged her. The following day, Erin died in a homeless shelter due to "acute mixed drug intoxication." The plaintiff, Erin's aunt ("Plaintiff"), brought a wrongful death action in Superior Court, alleging negligence in the discharge of Erin. Initially, at the medical malpractice tribunal stage, Plaintiff was obligated to present an offer of proof demonstrating, in part, that: (1) Dr. Martinucci was a provider of health care as defined under Massachusetts law, (2) who failed to exercise that degree of care and skill expected of "the average member of the profession practicing the specialty, taking into account the advances in the profession," and (3) that such failure more probably than not caused the harm. The medical malpractice tribunal ultimately found no credence to an affidavit submitted by Plaintiff's expert witness, Dr. Helen M. Farrell ("Dr. Farrell"), in support of Plaintiff's claim that Arbour Hospital was responsible for Erin's fatal overdose because it allowed her release prematurely. A lower court had dismissed the case, in line with the tribunal's findings. The Appeals Court of Massachusetts ("the Court") ultimately affirmed the tribunal's decision, stating, "[t]he evaluation was not in affidavit form, it was not on letterhead, and it did not provide any contact information. [It] also did not provide any information regarding Dr. Farrell's education, training, experience, practice areas, or specialties . . . . Although Dr. Farrell opines regarding practice standards, she does not indicate that she in fact is familiar with the standards she purports to identify." The Court noted that Erin admitted herself voluntarily and Dr. Martinucci had no choice but to release her unless he felt it necessary to begin commitment proceedings in court. The Court ruled, "Although Dr. Farrell opines that [Dr.] Martinucci's conduct fell below the standard of care 'in terms of conducting and documenting an inadequate discharge risk assessment,' Dr. Farrell does not explain how such deviation is relevant to the discharge decision as mandated by law . . . or that, had such adequate evaluation been conducted, it would have revealed that grounds existed . . . for an involuntary commitment."

California Court Rules Policy Excluded Coverage For Claims Known Prior to Policy

In *Admiral Insurance Company v. Superior Court*, 18 Cal.App.5th 383 (2017), the insured, A Perfect Match, Incorporated ("Perfect Match") matched surrogates and egg donors with infertile families. In June, 2012, a lawyer sent three letters to Perfect Match, alleging medical negligence and threatening to file a lawsuit on behalf of two former clients of Perfect Match. In October, 2012, Perfect Match applied to Admiral Insurance Company ("Admiral") for a liability policy ("the policy"). The application asked whether Perfect Match was "aware of any act, error, omission, fact, circumstance, or records request from any attorney which may result in a malpractice claim or suit?" Perfect Match responded, "No," and did not otherwise disclose the threatened lawsuit. In December, 2012, Admiral issued a liability policy to Perfect Match providing coverage for certain claims made during the policy period arising from a "professional incident . . . provided that prior to the inception date of the policy, no insured knew, nor could have reasonably foreseen, that the professional incident might result in a claim." In March, 2013, Perfect Match's former clients filed the threatened lawsuit. Admiral denied coverage on the grounds that Perfect Match knew or should have known that the lawsuit would be filed. Perfect Match responded by filing a bad faith lawsuit, and Admiral moved for summary judgment. The California Court of Appeal, Fourth District, Division 1 ("the Court") ultimately ruled in favor of Admiral. The Court held that, even assuming that Perfect March truthfully answered the application questions, the policy language clearly negated coverage for claims arising from a "professional incident" if, prior to the inception of the policy, Perfect Match "knew" or "could have reasonably foreseen, that the professional incident might result in a claim." Because a lawyer had sent three letters to Perfect Match threatening a lawsuit, the Court held that Perfect Match had been given "indisputable notice" that its professional services rendered to its former clients "might result in a claim." Accordingly, "by the clear terms of the policy, there was no coverage."

Jackson & Campbell
Attorneys and Counselors at Law

Jackson & Campbell, P.C.
1120 20th Street, NW
Washington, DC 20036
www.jackscamp.com

Timothy Dingilian
(202) 457-1664
tdingilian@jackscamp.com

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

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

Elderidge A. Nichols, Jr.
(202) 457-1696
enichols@jackscamp.com

Alyssa Lechmanik
(202) 457-1629
alechmanik@jackscamp.com

Recent Notable Verdicts and Settlements

Notable Verdicts/Settlements

Fresno County, CA – March, 2018. After a three-month trial, a Fresno County Superior Court jury found a physician negligently performed an aortic valve replacement on a patient at Community Regional Medical Center in 2012 and awarded the plaintiff $68 million in damages. The surgery resulted in bleeding complications causing oxygen deprivation to the brain leaving him in a permanent near-vegetative state. The award included $12.4 million in punitive damages.

Philadelphia, PA—March, 2018. A Philadelphia County jury awarded $20 million to the estate of an Ohio woman in a case involving claims that she died of adverse drug interactions after being prematurely discharged two hours after a procedure at a facility to treat her back pain.

Union County, NJ—April, 2018. After a four-week trial, a Union County Superior Court jury found in favor of a plaintiff and awarded him $4.6 million in a lawsuit accusing two physicians in negligently performing his spinal surgery. Plaintiff accused the physicians of failing to diagnose a negligently positioned spinal screw that ultimately caused nerve damage. The verdict was reduced to $2.25 million by a high-low agreement entered into by the parties after closing arguments.

Prince George's County, MD—September, 2017. After a four-day trial and about 90 minutes of deliberation, a Prince George's County Circuit Court jury found that a physician was negligent in the care and treatment of a patient following the removal of her uterus. The jury concluded that the gynecologist negligently treated the patient after a hysterectomy that showed possible signs of cancer. The jury awarded the woman $1 million but the verdict was later reduced pursuant to the state cap on non-economic damages.

Sacramento County, CA — February, 2018. A Sacramento County jury awarded $7.6 million to a 14 year old female patient in a lawsuit in which she alleged a hospital negligently failed to properly take diagnostic films, causing a radiologist to fail to diagnose a mass resulting in the patient suffering permanent paraplegia. The jury apportioned the liability 58% against the defendants and 42% against the patient's parents.

Notable Defense Verdicts

Philadelphia, PA—February, 2018. The Superior Court of Pennsylvania upheld a jury verdict in favor of a physician in a lawsuit brought by the husband of a deceased patient who blamed a bungled biopsy for his wife's death. Plaintiff alleged that the physician breached the standard of care by damaging her artery during a throat and lung biopsy. Plaintiff alleged the trial court erred in allowing expert testimony from several treating physicians and from a standard of care expert. The appellate court disagreed.

Summit County, OH—February, 2018. The Ninth District Court of Appeals affirmed a jury verdict in favor of a nurse practitioner and supervising physician in a lawsuit brought by the estate of a patient in a lawsuit accusing them of being responsible for the man's health attack death. In reviewing the evidence, the court of appeals concluded that there was sufficient evidence for the jury to conclude the defendants did not cause the patient's death.

Omaha, NE— March, 2018. The Nebraska Supreme Court affirmed a jury verdict clearing two physicians of liability in a lawsuit alleging that the physicians negligently conducted heart bypass surgery that caused a colon injury that led to the patient's death. In upholding the verdict, the Court held that certain medical expert testimony relating to opinions and methodologies was properly allowed by the trial court.

San Diego County, CA—April, 2018. The Fourth District Court of Appeal affirmed the dismissal of a San Diego County case accusing a hospital of failing to provide life-saving measures to a terminally ill cancer patient with an advance medical directive that it do so. The hospital contended that following the directive would have caused her more harm. In upholding the summary judgment ruling, the Court noted that the plaintiff failed to show how the treatment caused the patient's death.