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DECISIONS

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TENNESSEE APPELLATE COURT REVERSES DEFENSE VERDICT OVER THE INTRODUCTION OF EVIDENCE OF AFFORDABLE CARE ACT BENEFITS

INSIDE THIS ISSUE:

Special points of interest:

- Tennessee Appellate Court holds that introduction of evidence of ACA warrants reversal of defense verdict
- Ohio Appellate Court reverses summary judgment against hospital in negligent credentialing claim involving sexual misconduct of contractor physician
- United States Court of Appeals for the First Circuit concludes an insurer has no duty to defend a case alleging unauthorized access to medical records
- Arizona Supreme Court reverses 75 year legal precedent and concludes that physician's settlement does not preclude claims against hospital employer

In a decision issued on August 20, 2018, the Court of Appeals of Tennessee vacated a jury's defense verdict in favor of a physician on the grounds that defense counsel improperly introduced evidence that some of the child's medical expenses would be covered by the Affordable Care Act ("ACA"). *McKenzie v. Women's Health Services — Chattanooga, P.C.,* 2018 WL 4005511, (Tenn. Ct. App. Aug. 20, 2018). In *McKenzie*, Plaintiffs Kristen McKenzie and Joshua McKenzie ("Plaintiffs") filed a medical malpractice action on behalf of their infant child, Jacob, against Dr. Matthew A. Roberts and his employer, Women's Health Services — Chattanooga, P.C. Plaintiffs alleged that Jacob sustained injuries during birth while being delivered by Dr. Roberts. The delivery and injury occurred on February 18, 2011. At one point, while Dr. Roberts was assisting Ms. McKenzie in delivery through the use of a vaccum extractor, Jacob's head "tortoise-shelled" back into the birth canal. All of the medical experts agreed that this indicated shoulder dystocia, a complication in which the baby's shoulder is lodged behind the mother's pubic bone, causing the child to be stuck. Dr. Roberts engaged in a series of unsuccessful attempts to free Jacob's shoulder during delivery. Plaintiffs alleged that Jacob suffered from a fractured humerus and extensive nerve damage resulting in paralysis of his left arm. His Apgar score, a measure of how vigorous a baby is, was zero at one minute, a condition that some of the experts in the matter described as "brain dead" and subsequently revived. He also incurred brain injuries, the extent of which were disputed at trial. At the time of trial, he purportedly had limited use of his arm. At trial, the jury returned with a defense verdict. Plaintiffs appealed the defense verdict on seven separate grounds. The first ground for appeal was whether the trial court erred in allowing evidence of potential benefits to Plaintiffs from collateral sources that may cover some of Jacob's medical and educational needs. Specifically, defense counsel was allowed to question Plaintiffs' economic experts regarding whether the ACA had been factored into the life care plan for the child. Defense counsel was also permitted to elicited defense expert testimony that certain educational benefits would be available to the child under the federal Individuals with Disabilities Education Act ("IDEA"). Defense counsel argued that the trial court correctly interpreted the applicable statute (Tenn. Code Ann. § 29-26-119) as to the admissibility of the evidence. The Court of Appeals of Tennessee, consistent with past precedent, applied a strict construction in interpreting the statute and held that, by its express terms, it applied only in actions in which liability is admitted or has been established. In this regard, the Court noted that the rule of damages set forth in the statute applies after a jury returns a verdict imposing liability. The Court determined that defense counsel's line of questioning—which implied that some of Jacob's past and future medical expenses or educational costs would be covered by the ACA or IDEA, violated the state's "collateral source" rule barring evidence of past or future compensation that plaintiffs receive from third parties, or collateral sources. The Court stated that "in the present case, liability was not admitted or established at the time pertinent to the inquiry regarding the admissibility of collateral source evidence." The Court adopted the analysis of the Pennsylvania Superior Court in the *Deeds v. University of Penn. Medical Center* case decided in 2015 and further concluded that the admission of collateral source evidence was not harmless error. In so ruling, it noted that the evidence tainted the jury's thinking and that it was impossible to determine with any confidence that the introduction did not have a prejudicial impact on the jury's deliberations. Accordingly, the Court held that "the trial court erred in allowing testimony in violation of the collateral source rule" and, as such, vacated the jury's defense verdict and remanded the case for further proceedings.

Ohio Appellate Court Reverses Entry of Summary Judgment In Sexual Misconduct Case Against Contractor Physician

"An employer may be directly liable for injuries resulting from its own negligence in selecting or retaining an independent contractor."

In a decision issued on August 1, 2018, the Court of Appeals of Ohio for the Ninth District reinstated negligent credentialing claims made against a hospital by a woman who alleged that an emergency room doctor sexually assaulted her. *Evans v. Akron General Medical Center*, 2018 WL 3650791 (Ohio App. Ct. Aug. 1, 2018). In *Evans*, Akron General Medical ("AGMC") was named as a defendant in a lawsuit in which the Plaintiff patient alleged she was sexually assaulted by a physician employed by General Emergency Medical Specialists, Inc. ("GEMS"), a company that provided contracted emergency room physicians to hospitals. Plaintiff alleged a cause of action for negligent hiring, supervision and retention against AGMC. AGMC subsequently filed a Motion for Summary Judgment on the grounds that Plaintiff failed to demonstrate all of the elements to support a cause of action based on negligent hiring, supervision, or retention because AGMC did not employ the doctor who allegedly assaulted the Plaintiff and Plaintiff had not brought suit against the doctor and no court had found him liable civilly or criminally. The Plaintiff asserted that, under Ohio law, a hospital is responsible for the service providers in its emergency room, irrespective of whether it retains such providers as it own employees or delegates emergency room services to an independent contractor. The trial court granted summary judgment in favor of AGMC and Plaintiff appealed. On appeal, the Court of Appeals noted that "an employer may be directly liable for injuries resulting from its own negligence in selecting or retaining an independent contractor" and, as such, the sole argument that the doctor was not AGMC's employee is not enough to show that there is no issue of material fact with regard to whether an employment relationship existed. The Court further rejected AGMC's argument that it cannot be held vicariously liable for the doctor's actions because he was not held to be civilly or criminally liable and because the statute of limitations on a direct claim had expired. In so holding, the Court noted that the Plaintiff was seeking to hold AGMC liable for its own torts and negligent hiring, supervision and retention and the claim is based on a theory of direct liability, not on vicarious liability. As such, the Court reversed and remanded the case against AGMC to the trial court.

Kentucky Appellate Court Upholds Trial Court's Exclusion of "Root Cause Analysis" and Subsequent Action Plan

In an unpublished opinion issued on July 27, 2018, the Court of Appeals of Kentucky found that a hospital's "root cause" analysis ("RCA") and subsequent action plan were properly excluded from evidence in a medical malpractice action because they qualified as subsequent remedial measures. *Thomas v. University Medical Center*, 2018 WL 3612775 (Ky. App. July 27, 2018). The malpractice action was brought by the husband of a woman who died as a result of complications from neck surgery performed at the University of Louisville Medical Center in 2008. An autopsy revealed the patient's respiratory distress after surgery was caused by swelling and a blood clot that had gradually developed at the site of the incision post-surgery. The Medical Center conducted an internal investigation of the death and the products resulted in an RCA and Action Plan that concluded that the death was not attributable to any factor within the Center's control but also noted that a factor was "medical management of airway in post-operative patient." The "risk reduction strategy" portion of the Action Plan recommended inservice education for staff to recognize signs and symptoms of mechanical airway obstruction. Plaintiff sought to introduce the reports at trial to demonstrate the care was substandard. The Center moved to keep the reports out of evidence pursuant to Rule 407. The trial court agreed and, after a defense verdict was rendered, the Plaintiff appealed. On appeal, the Court noted that "formulating a plan to require additional training" qualified as a "subsequent measure" within the meaning of Rule 407. The appellate court also rejected Plaintiff's argument that the rule did not apply because the evidence indicated that the Center never followed through with the recommended training.

First Circuit Rules That Insurer Had No Duty to Defend Claim Involving Unauthorized Access to Medical Records

In a decision issued on August 10, 2018, the United States Court of Appeals for the First Circuit concluded that a medical malpractice insurer did not have a duty to defend a lawsuit in which a doctor's spouse claimed that the insurer had illegally obtained her medical records to harass her. *Medical Mut. Ins. Co. v. Burka*, 2018 WL 3805909 (1st Cir. Aug. 10, 2018). In *Burka*, the insurer filed a declaratory judgment action seeking a ruling that it had no duty under a professional liability insurance policy to defend an insured physician in underlying actions alleging that the insured used his status as doctor to obtain his estranged wife's medical records so he could harass and embarrass her and gain an advantage in their pending divorce proceedings. The policy at issue provided coverage for claims arising from "medical incidents" or from "non-patient incidents" which result from "professional services." The term "medical incident" was defined as any act, failure to act, or omission in the furnishing of professional services to a patient by any insured. The term "professional services" was defined, in part, as healthcare services to a patient performed in the practice of a physician or surgeon as well as the obligation to maintain patient confidentiality in the handling of patient records in the direct course of providing professional services to that patient. The insurer filed a motion for summary judgment and argued that the claims fell outside of the coverage provided by the policy. The district court granted summary judgment and held that the claims did not arise from the furnishing or in the direct course of providing the claimant with professional services. The insured appealed. On appeal, the insured argued that, under Maine law, the duty to defend is broad and the term "professional services" embraces a meaning that could cover the allegations in the complaint. The Court disagreed and held that the policy language makes clear that the confidentiality obligation covers only records relating to *patient* interactions and, thus, the reference to "professional services" necessarily refers only to service provided to patients. The Court further noted that the definition of the term "patient" confirms that a doctor-patient relationship is an essential component of the confidentiality obligation. Accordingly, and absent such a relationship, the Court concluded that the insurer had no duty to defend the underlying lawsuits.

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Florida Appellate Court Holds Immunity Extension Is Not Unconstitutional

The Third District Court of Appeal of Florida issued an opinion on August 1, 2018 upholding the dismissal of two medical malpractice lawsuits against University of Miami doctors treating patients at a public hospital as part of an affiliation agreement, finding that the Legislature's decision to expand sovereign immunity to such doctors was not unconstitutional. *Bean v. University of Miami*, 2018 WL 3636846 (Fla. Dist. App. Aug. 1, 2018). In the two underlying lawsuits, the plaintiffs accused University of Miami's Miller School of Medicine doctors of committing medical malpractice during tumor removal surgery and childbirth, respectively, performed at state-operated Jackson Memorial Hospital. The trial court judges had dismissed the two lawsuits on summary judgment on the grounds that the doctors were entitled to immunity under Florida Statutes §§ 768.28(9)(a) and (10)(f), which were amended in 2011 to cover nonprofit independent universities that provide patient care at government teaching hospitals. On appeal, the Plaintiffs argued that the amendments were unconstitutional expansions of sovereign immunity and violated an individual's due process rights and equal protection access to the courts and a jury trial. The Appellate panel disagreed, saying precedential rulings by the Florida Supreme Court had already rejected such challenges to the state's sovereign immunity law. The panel also rejected Plaintiffs' arguments on access to the courts and a jury holding that the existing path for a plaintiff to pursue damages for governmental negligence was a "fair means of recovery." The panel likewise rejected Plaintiffs' argument that the doctors and university could not claim immunity because the operator of the hospital (Miami-Dade Public Health Trust) had no control over the university doctors. In so holding, the panel noted that the university agreed in the affiliation agreement that the trust would determine the activities and manner in which patient services were performed at Jackson hospital.

The Third District Court of Appeal of Florida holds that private doctor's sovereign immunity is not unconstitutional

Arizona Supreme Court Holds that Physician Settlement and Release Did Not Extinguish Claims Against Hospital

"[A] stipulated dismissal with prejudice of an agent-surgeon does not preclude a party from asserting a claim against the surgeon's principal for its own independent negligence. This is true even when the independent negligence claim requires proof of the surgeon's negligence."

In a consolidated case involving allegations of medical malpractice in the performance of three bariatric surgeries, the Arizona Supreme Court ruled that even through the claims against the doctors were settled, the Plaintiffs could still pursue their claims against the hospital. *Kopp v. Physician Group of Arizona, Inc.*, 421 P.3d 149 (Ariz. 2018). In the consolidated case, three patients filed medical malpractice lawsuits against a physician, his physician group employer, and a hospital after they suffered post-operative complications. They alleged that he was negligent in how he performed the surgery and that the remaining defendants were vicariously liable for the doctor's negligence and independently negligent in their overseeing and execution of the surgeries. The physician settled with the Plaintiffs and the remaining defendants argued that both the vicarious liability and independent claims were precluded by the settlement. The trial court agreed and dismissed Plaintiffs' negligent credentialing, hiring and supervisory claims although it noted that any independent negligence claims survived the settlement. The dismissal was made pursuant to an Arizona Supreme Court ruling from 1945, which held that a dismissal with prejudice is a judgment on the merits and carries preclusive effect. The Court of Appeals affirmed the dismissal holding that the dismissal of the claims against the physician precluded Plaintiffs from litigating the hospital's alleged liability as vicariously derived from any alleged negligence of the physician. The Arizona Supreme Court reversed. In so ruling, the Court held that "a stipulated dismissal with prejudice of an agent-surgeon does not preclude a party from asserting a claim against the surgeon's principal for its own independent negligence. This is true even when the independent negligence claim requires proof of the surgeon's negligence." The Court further noted that, in the case, the Plaintiffs' claims were actually not vicarious or "derivative" of the malpractice claim but, rather, stood on their own. "Although plaintiffs must prove [the physician's] negligence to establish the causation and damages elements for their claims against the hospital, those claims are not properly characterized as vicarious liability claims. Plaintiffs do not attempt to hold otherwise faultless defendants liable for [the physician's] negligent surgical care, but rather assert that the hospital breached a separate duty of care in its administration of the surgery program." In so ruling, the Court recognized that it was "disavowing" its own ruling from 1945 that a dismissal with prejudice carries a preclusive effect.

Maryland Court of Appeals Upholds Trial Court's Setting Aside of Verdict in Patient Suicide Case

In a decision issued on July 12, 2018, the Maryland Court of Appeals upheld a Baltimore Circuit Court trial judge's set aside of a $2.3 million verdict against a psychiatrist and a hospital in a case in which the Plaintiff accused them of improperly discharging a mental health patient who committed suicide the next day. *Bell v. Chance*, 2018 WL 3409919 (Md. July 12, 2018). In *Bell*, the Plaintiff (the mother of deceased son) brought a wrongful death and survivorship action against a psychiatrist and a mental health facility alleging that the premature release of her son from involuntary commitment allowed him to commit suicide. After the trial court denied the defendants' motion for summary judgment, and after a trial resulted in a jury verdict in the mother's favor, the trial court granted the defendants' motion for judgment notwithstanding the verdict (JNOV) on the grounds that § 10-613 through 10-619 of the Maryland Mental Health Law provided immunity to civil liability for physicians who in good faith discharge an involuntarily admitted person. The Maryland Court of Special Appeals reversed the ruling and the defendants appealed to Maryland's highest court. On Appeal, the Court of Appeals upheld the trial judge's decision holding that a physician who uses his or her discretion to discharge an involuntarily committed mental health patient cannot be subject to civil liability under the Maryland Mental Health Law so long as that decision is conducted in good faith and on reasonable grounds. "In our view, the plain language of the immunity statutes—read in context, illuminated by their legislative history, and considered together with the agency regulations—extends immunity to every stage of the process by which an individual is involuntarily admitted to a mental health facility, and at which the facility and its employees must apply the criteria set out in the [Maryland Mental Health Law]." The Court further held that "immunity does not depend on the merits or reasonableness of a decision to admit—or to release—an individual proposed for involuntary admission, but on whether the process required by the statute was followed and whether the decision … was based on the statutory criteria."

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Recent Notable Verdicts and Settlements

Notable Verdicts/Settlements

Prince George's County, MD—April, 2018. After a six day trial, a Prince George's County jury awarded $1.4 million to the Estate of a 36 year old woman who suffered a laceration of the abdominal aorta during laparoscopic stomach Lap-Band removal surgery. She suffered shock and multi-system failure as the result of the injury. She survived but died two months later of unrelated causes. The estate argued that the surgeon was negligent in losing his way during the surgery, removed the camera used to guide him, and then blindly conducted the surgery.

Pimaton County, AZ—June, 2018. A Pimaton County jury entered a $15 million damage award to a woman in her 40's in a case in which plaintiff alleged the emergency department was negligent in its decision to use profyline to bring plaintiff (a Coumadin patient) into therapeutic range instead of a safer and slower acting Vitamin K or blood plasma. She suffered a myocardial infarct and blood clot causing a hypoxic event resulting in her requiring 24 hour per day care. Plaintiff argued that the drug should not have been used in the absence of a serious bleed or in conjunction with surgery. The jury found the defendant physician and hospital 80% negligent and the plaintiff 20% negligent.

Aiken County, SC—July, 2018. After a seven day trial, an Aiken County jury awarded $13.75 in damages to 54-year old woman who alleged that the hospital's failure to timely diagnose and treat sepsis resulted in bilateral above-the-knee amputations, amputation of her left arm below the elbow and the fingers of her right hand. The defendant hospital concluded at the time that she was suffering from pneumonia. The award was comprised of $10 million in non-economic damages and $3,750,000 in economic damages.

Cook County, IL — July 2018. A minor plaintiff reached a $9 million settlement with a hospital in a case in which plaintiff contended that the physicians at the hospital negligently failed to take routine Group B Strep testing at the end of her mother's pregnancy. As a result, plaintiff alleged that she suffered Group B Strep and meningitis within 3 days of birth and was left with extensive brain damage, memory deficiency, and ADHD which will prevent her from working .

Notable Defense Verdicts

Suffolk County, NY—January, 2018. A Suffolk County jury found in favor of an oncologist defendant in a case in which a 56 year old breast cancer patient alleged that she should have been advised of alternative options to radiation treatment to treat her cancer and that, as a result, she was not able to complete breast reconstruction. The physician alleged that the plaintiff was aware that irradiation posed a high risk of failure of the reconstruction and that, at the time her treated her, the only alternative treatment was radiation or no radiation.

Baltimore, MD — August, 2018. The Maryland Special Court of Appeals affirmed a Baltimore City trial judge's decision to grant a hospital's midtrial motion for judgment in a suit brought by a registered nurse accusing a physician of causing her to undergo an unnecessary partial removal of her right lung. On the fifth day of trial, the trial judge ruled that the medically trained plaintiff had been put on notice of the alleged malpractice in 2009 so that her lawsuit filed in late 2013 was untimely.

Chautauqua County, NY — June, 2018. A Chautauqua jury concluded that a defendant surgeon was not negligent in a case in which a nurse in her 30's contended that he should have taken additional imaging studies after an ultrasound revealed sludge in her gallbladder. Plaintiff contended that the testing would have disclosed that the removal of the gall bladder was not necessary. Plaintiff also alleged that the robotic assisted laparoscopic cholecystectomy perforated her bowel. Defendant contended that the results of her ultrasound justified the surgery and that a perforation is a known risk that is disclosed to the plaintiff.

Passaic County, NJ—April, 2018. A New Jersey appellate court affirmed a Passaic County jury's finding that a physical therapist was not to blame for problems a woman experienced after should surgery, ruling that the trial court acted properly in allowing the defendant therapist to testify as an expert in the case.