JACKSON & CAMPBELL, P.C.

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Decisions

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Kentucky Supreme Court Rules That Medical Malpractice Review Panels Are Unconstitutional

In a decision issued on November 15, 2018, the Kentucky Supreme Court ruled that a 2017 state law requiring medical malpractice claims to be first reviewed by expert advisory panels is unconstitutional. *Commonwealth of Kentucky, et al. v. Claycomb*, 2018 WL 5994975 (Ky. Nov. 15, 2018). In Claycomb, a minor who suffered from brain damage and cerebral palsy allegedly caused by medical malpractice brought an action by and through his parent against the Commonwealth, challenging the constitutionality of the Medical Review Panels Act. The Franklin Circuit Court declared the Act unconstitutional and permanently enjoined the Commonwealth from enforcing any of its provisions. The Commonwealth sought emergency relief. The Court of Appeals granted emergency relief, and transferred to the Supreme Court. By way of background, the Kentucky Legislature enacted the Medical Review Panels in 2017 as part of tort reform measures. The statute required plaintiffs to bring a proposed malpractice complaint to the state health department's Medical Review Panels Branch, which would assign a four-person panel, including three doctors and one attorney. The plaintiffs had 60 days to submit evidence, then the defendant had 45 days to submit evidence. The panel could subpoena records, conduct hearings, and consult other medical professionals. The panel would then render a nonbinding opinion within nine months. If not, the plaintiff was allowed to file the complaint in the trial court, which had the option to admit or exclude the panel's opinions as sdivence. Sixteen other states have adopted review requirements prior to commencing a lawsuit and other states, including Ohio, have a requirement that a physician provide an affidavit on the validity of a malpractice claim before it can be filed. Since the Kentucky law passed in 2017, hundreds of cases have piled up awaiting review from the mandatory doctor review panel. The law required the panel opinion unless a health-care provider waived the requirement. Courts in other jurisdictions, including Maine, Indiana, and Montana have upheld the panels by applying a "reasonableness" standard to delays in malpractice lawsuit remedies. In *Claycomb*, the mother of the injured boy argued that the panel blocked her son's quick access to the court to get recovery for necessary treatment. The Kentucky Hospital Associated filed a friend-of-the-court brief supporting the law. A Franklin County Circuit Court Judge agreed with the plaintiff and concluded that the law violates the equal protection and special legislation guarantees under the Kentucky Constitution as it is not rationally related to lawmaker's goals. The Judge also found that the Medical Review Panels Act hindered Kentucky residents' access to the courts in violation of the state's open courts doctrine. In a unanimous decision, the Kentucky Supreme Court affirmed the trial judge's decision. In issuing its ruling, the Kentucky Supreme Court focused on the open courts provision, holding that section 14 applies to all branches of government, so any law that hinders an individual's immediate access to the courts must be held unconstitutional. "The [MPRA] contravenes one of the main purposes of section 14—to prohibit legislatively created delays in the ability of a claimant to seek immediate redress in the court of the Commonwealth for common-law personal injury." The Court further noted that "What makes the delay imposed by the [MRPA] unconstitutional is the General Assembly's usurpation of a claimant's freedom to access the ajudicatory method of his or her choosing at the time of his or her choosing." In a concurring opinion, Justice Keller said the majority takes a strict, fundamentalist interpretation of section 14 that effectively bars any future legislation that would result in the delay of a personal injury action. "I concur with the result here, because the MRPA clearly interferes with a fundamental right to access the courts in an unreasonably broad way, " she said. Justice Keller went on to say "However, I cannot say that any measure of the legislature may create to impose procedural steps prior to the bringing of an action under section 14 would always be unconstitutional." Governor Matt Bevin, who sponsored the medical panel legislation, responded to the court's decision and noted that "[w]ith this ruling, the seven members of the state Supreme Court have made it nearly impossible to initiate meaningful tort reform because they have chosen to assume for themselves the authority granted by our constitution to the state legislature."

SPECIAL POINTS OF INTEREST:

- *Kentucky Supreme Court strikes down Medical Review Panels as Unconstitutional*
- *Florida Supreme Court Affirms Frye Standard to Determine Admissibility of Expert Witness Testimony*
- *New York Appellate Court Concludes that a Physician Was Not Liable for Patient Suicide*
- *Illinois Court of Appeals Upholds MSJ in favor of hospital in an apparent agency case*

Florida Supreme Court Rules that the *Frye* Standard, Not the *Daubert* Standard Adopted by the Florida Legislature, Governs Admissibility of Expert Testimony

In a decision issued on October 15, 2018, the Florida Supreme Court held that the *Frye* test, not the *Daubert* standard adopted by the Florida Legislature in 2015, governed the admissibility of expert testimony in Florida. *DeLisle v. Crane Co.*, 2018 WL 5075302 (Fla. Oct. 15, 2018). In *DeLisle*, an injured worker brought an action against a valve manufacturer and tobacco company for negligence and strict liability based on exposure to asbestos, which he claimed to have caused mesothelioma. After admitting expert causation testimony, a Broward County jury awarded the plaintiff $8 million distributed among various defendants, including R.J. Reynolds Tobacco Co. The Circuit Court Judge entered judgment and the manufacturer and tobacco company appealed. The Florida Appellate Court for the Fourth District Court of Appeal, relying on the *Daubert* standard to determine the admissibility of expert testimony, held that the trial court erred by allowing three of plaintiff's experts to testify. The plaintiff appealed the decision to the Florida Supreme Court. At issue in the appeal was the 2015 amendment to Florida Statute Section 90.702 to adopt the *Daubert* standard for admitting expert testimony in Florida courts. In 2017, the Florida Supreme Court declined to adopt the *Daubert* amendment "to the extent that it is procedural due to the constitutional concerns raised, which must be left for a proper case or controversy." When faced with a "proper case and controversy" in the *DeLisle* case, the Florida Supreme Court detailed the philosophical and precedential support for *Frye* in Florida, definitively declared that the *Daubert* amendment unconstitutionally infringes on the rule-making authority of the court and, again, established *Frye* as Florida's standard for determining the admissibility of expert testimony. In so ruling, the *DeLisle* court noted that the Florida Legislature has the power to enact substantive law, but that procedural law is the "form, manner, or means by which substantive law is implemented." While acknowledging that the distinction is not always clear, the court stated that "when procedural aspects overwhelm substantive ones, the law may no longer be considered substantive." Although the Florida Evidence Code is both procedural and substantive, the Florida Supreme Court found, specifically, that the *Daubert* amendment is not substantive and "solely regulates the action of litigants in court proceedings." The Court further found that the *Daubert* amendment conflicted with a rule of the court, namely that *Frye* is the proper test for Florida. "We recognize that *Frye* and *Daubert* are competing methods for a trial judge to determine the reliability of expert testimony before allowing it to be admitted into evidence. Both purport to provide a trial judge with the tools necessary to ensure that only reliable evidence is presented to the jury. *Frye* relies on the scientific community to determine reliability whereas *Daubert* relies on the scientific savvy of trial judges to determine the significance of the methodology used. With our decision today, we affirm that *Frye*, not *Daubert*, is the appropriate test in Florida courts. The Court noted, however, hat *Frye* is inapplicable in most cases because it applies only where experts render opinions based on new or novel scientific techniques. In *DeLisle*, the court found that the medical causation was not new or novel and, thus, was not the subject to the *Frye* analysis.

> *"Procedural law is the form, manner or means by which substantive law is implemented."*

Tennessee Appellate Court Vacates Jury's Defense Verdict Because of Evidence of Benefits Available Under the Affordable Care Act

In a decision issued by the Court of Appeals of Tennessee on August 20, 2018, a three-judge panel vacated a jury's verdict in favor of a physician in a lawsuit in which the plaintiffs accused the physician of causing a newborn's injuries due to negligent delivery on the grounds that defense counsel improperly introduced evidence that some of the child's medical expenses would be covered by Affordable Care Act ("ACA") benefits. *McKenzie v. Women's Health Services Chattanooga, PC*, 2018 WL 4005511 (Tenn. Ct. App. Aug. 20, 2018). Plaintiffs filed suit on behalf of their infant son against a physician who they allege was negligent in the delivery of their son. Plaintiffs asserted that he applied a vacuum extractor during the delivery without first obtaining the mother's informed consent. As a result, Plaintiffs allege that their son has limited use of his left arm. Following a two-week trial, the jury returned a verdict in favor of the physician and his employer. Plaintiffs argued that the trial court committed several errors that entitled them to a new trial. They claimed that the court erred in allowing the introduction of evidence that violates the collateral source rule. Specifically, they argued that the defendants were allowed to extensively cross-examine plaintiffs' witnesses regarding possible health insurance benefits under the ACA and other benefits under the Individuals with Disabilities Education Act. The appellate panel agreed and vacated the jury's defense verdict. In so ruling, the panel concluded that the defense attorney improperly quested the plaintiffs' economic experts regarding whether the ACA had been factored into the "life care" plan for the child and also improperly elicited defense expert testimony that certain educational benefits would be available under the Individuals with Disabilities Act. The Court concluded that under the state's "collateral source" rule, "parties in health care liability actions may not introduce evidence that all or part

of a plaintiff's losses have been covered by insurance or another collateral source until after liability has been admitted or established." The Court further noted that "liability was not admitted or established at the time pertinent to the inquiry regarding the admissibility of collateral source evidence, i.e. during the jury trial."

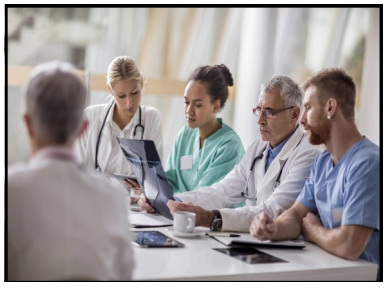
The Fourth Circuit Court of Appeals Concludes That A Physician Insured Was Not Owed a Defense Under Liability Policies for Sexual Misconduct Claims

In an unpublished decision issued on December 20, 2018, the United States District Court of Appeals for the Fourth Circuit upheld a lower court's summary judgment ruling in favor of an insurer which concluded that the insurer did not owe a defense against five lawsuits filed by female patients claiming that he groped and made lewd remarks towards them. *State Automobile Mutual Insurance Company v. Allegheny Medical Services*, 745 Fed. App'x 487 (4th Cir. 2018). The insurer, who issued a series of business liability policies, filed a coverage lawsuit seeking a declaration that its policies did not provide a defense or coverage for the five lawsuits. The policies at issue provided coverage for "bodily injury" caused by an "occurrence." The term "bodily injury" was defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." An "occurrence" was defined, in part, as "an accident." The Policies excluded bodily injury "expected or intended from the standpoint of the insured." The insurer filed a summary judgment motion and argued that that there was no "occurrence" as defined by the Policies, that the plaintiffs did not allege that they suffered "bodily injury," that the "intentional acts" exclusion applied to any otherwise covered claims, and that the Policies excluded injuries sustained during medical treatment. The insureds argued that the claims were not limited to intentional conduct, but included claims sounding in negligence for which coverage is available. In addition, they contended that the underlying damage claims include physical, as well as psychological, harm and that the duty to defend is broader than the duty to indemnify. The District Court, concluded that the underlying claims did not allege either an "occurrence" or "bodily injury," and the exclusion for intentional conduct was applicable. The Court held that the "underlying complaints assert physical contact related to the sexual misconduct, but not physical injury. "Bodily harm," in the policies at issue is defined narrowly, and does not include certain categories of serious harm recoverable under tort law. "The complaints here allege a variety of emotional and psychological damages, but do not contain any allegations of physical manifestations of those damages, nor do they contain specific factual allegations of physical injuries resulting from the sexual assaults." The District Court further rejected the insureds' arguments that the conduct, when viewed from the standpoint of the entity was accidental, not intentional. In so ruling, the District Court held that the structure of the entity, as an LLC with the physician as the sole owner and officer "belies any suggestion that the entity acted negligently with respect to its handling of the physician's intentional conduct. The Court additionally noted that the policy designates both the entity and the physician as "insureds." Thus, the District Court held that the conduct at issue was not accidental. On appeal, the Fourth Circuit Court of Appeals reviewed the matter *de novo* and affirmed the summary judgment ruling for the reasons stated by the district court. *See State Automobile Mutual Insurance Company v. Allegheny Medical Services*, 2018 WL 1833216 (S.D. W.V. April 17, 2018).

> *"The underlying claims did not allege either an 'occurrence' or 'bodily injury', and the exclusion for intentional conduct was applicable."*

New York Intermediate Court of Appeals Upholds Summary Judgment in Favor of Physicians Holding that Physicians Were Not Liable for Patient's Suicide

In a decision issued on November 27, 2018, the New York Supreme Court, Appellate Division upheld a trial court's grant of summary judgment in favor of physicians concluding that the physicians established prima facie that they did not depart from good and accepted medical practice in their treatment of the decedent. *Morillo v. N.Y. Health & Hospitals Corp.*, 166 A.D.3d 525 (N.Y. Sup. Ct. App. Div. Nov. 27, 2018). The case involved the suicide of a patient after he underwent a gastrointestinal procedure. After the procedure, plaintiff's decedent was found crying and saying that he was depressed, and he was transferred to the emergency department for psychiatric evaluation. The decedent was diagnosed with anxiety disorder NOS, prescribed an anti-anxiety medication, given a follow-up appointment, and discharged later the same day. Two days later, he shot and killed himself. Plaintiff alleged that defendants' decision to discharge, rather than admit, the decedent was the proximate cause of his death. Medical records showed the decedent repeatedly told the physicians he was not contemplating suicide and that his anxiety was caused, in part, by his living situation. The physicians also found that the decedent did not present a danger to himself or others, did not have a sudden emergency psychiatric condition, and demonstrated good insight and impulse control. The physician's expert witness testified that they met the standard of psychiatric care in the circumstances and that it was appropriate for them to discharge the decedent after evaluation since he had denied on multiple occasions that he had any suicidal or homicidal ideation. Defendants filed a motion for summary judgment on the standard of care and the motion was granted by the trial court. On appeal, the Appellate Division noted that plaintiff failed to raise any issue of fact, notwithstanding plaintiff's submission of the affidavit of the decedent's girlfriend, who accompanied him to the emergency department and averred that defendants never inquired as to suicidal ideation. The Appellate Division further held that plaintiff's expert's opinion that, given the circumstances surrounding decedent's presence in the emergency department for psychiatric evaluation, the decision to discharge him led to his death, was speculative.



Appellate Division Upholds Trial Court's Grant of Summary Judgment in favor of Physicians in Suicide Case

New Jersey Supreme Court Rules That a Hospital May Withhold a Portion of Self-Critical Case Report From Production During Discovery in Malpractice Case

In a decision issued on July 25, 2018, the New Jersey Supreme Court concluded that a hospital may withhold a portion of its self-critical analysis of a former patient's case in her medical malpractice action. *Brugaletta v. Garcia*, 190 A.3d 419 (N.J. 2018). The plaintiff in the case was initially diagnosed with pneumonia but a CT scan of her abdomen and pelvis later revealed a pelvic abscess that most probably resulted from a perforated appendix, according to one physician's report. Plaintiff subsequently filed a complaint in Passaic County Superior Court and alleged that the hospital and several healthcare providers negligently diagnosed and treated her condition. The Superior Court, Law Division, Passaic County, determined that a report containing the hospital's self-critical analysis of the patient's care included information on a Serious Preventable Adverse Event (SPAE) and ordered the hospital to release to the patient a redacted version of the report. The hospital sought leave to appeal. On appeal, the appellate panel sided with the hospital's argument that the statutory privilege over the document under the state Patient Safety Act ("PSA") does not depend on compliance with the requirement to report an SPAE to the Department of Health or a patient, finding that a self-critical analysis is protected as long as the review is conducted according to the proper procedures set forth in a hospital's safety plan. A 6-1 majority of the New Jersey Supreme Court affirmed the appellate ruling and found that the Legislature "inserted no role for a trial court to play in reviewing the SPAE determination made by a patient safety committee of a health care facility" and that "the finding that an event is not reportable does not abrogate the self-critical analysis privilege." Writing for the majority, Justice LaVecchia wrote that "the application of the privilege to the documents developed through self-critical analysis, regardless of the conclusion reached, is an integral part of the legislative scheme on which courts should be wary to transgress." In addition, the Court noted that the "pertinent provisions of the [state statute] evidences an intent to encase the entire self-critical analysis process in a privilege, shielding a health care facility's deliberations and determinations from discovery or admission into evidence." "As the Appellate Division properly held, the only precondition to application of the PSA's privilege is whether the hospital performed its self-critical analysis in procedural compliance with [state statute] and its implementing regulations. In a dissenting opinion, Justice Barry Albin argued that the Patient Safety Act should not be construed to extinguish the state's Patient Bill of Rights. "The statutory scheme does not sacrifice the patient's right to know the truth about her medical treatment on the altar of the privilege."

> *"The pertinent provisions of the [state statute] evidences an intent to encase the entire self-critical analysis process in a privilege, shielding a health care facility's deliberations and determinations from discovery or admission into evidence."*

Illinois Appellate Court Concludes That Hospital Was Not Liable for Nonemployee Physician's Kidney Surgery

In an unpublished decision issued on November 8, 2018, the Appellate Court of Illinois, Second District upheld a Kane County Circuit Court Judge's summary judgment ruling in favor of a hospital that the plaintiff failed to raise any issues of material fact demonstrating that the physician was an apparent agent of the hospital. *Martin v. Rush-Copley Medical Center,* 2018 WL 5880209 (Ill. Ct. App. Nov. 7, 2018). The underlying action involved claims against a hospital and a physician accusing them of failing to timely remove a woman's kidney stone that caused serious injuries. The trial judge had dismissed the claims against the hospital from the lawsuit concluding that it could not be held vicariously liable for an independent contractor physician's actions because, given his independent status, the physician was not acting as the hospital's actual or apparent agent. The hospital had successfully argued at the trial court level that a disclosure form that the plaintiff signed on admittance—listing 70 doctors who were actual hospital employees—had unambiguously informed the patient that the physician defendant was not an employee or agent of the hospital. On appeal, the plaintiff argued that the form cannot rule out a finding of apparent agency because it was ambiguous and confusing as it failed to list the specialties of employee doctors and did not clearly state that the physician defendant was an independent contractor. The three-judge panel of the appellate court disagreed. As an initial matter, the Court held that the hospital was under no obligation to expressly state that the physician was not an employee. "Although that might have been desirable (though perhaps not practical), the obvious indication of what the form said was sufficient." The Court noted that, as a whole, "including parts that plaintiff does not mention—the form unmistakably indicated that [the physician] was not employed by [the hospital]. It was not unduly difficult to check the list and see that [the physican] was not on it. That the list did not specify the areas of practice of the people on it was logically irrelevant." Plaintiff also argued that a material dispute existed as to whether the hospital adequately informed her of the doctor's status because she suffered from a "deteriorating medical condition" when she signed the disclosure form. The appellate court rejected this argument and concluded that, although she may have been tired or confused when she signed the form, "there was no evidence that she was mentally incapacitated. Her nonspecific testimony that she had felt confused would be at best a shaky foundation that she did not know what she was doing."

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Jury Verdicts/Settlements

Erie County, OH — Aug., 2018. Following a seven-day trial, an Erie County jury awarded $7.4 million to a woman who sustained massive neurologic damage after physicians failed to diagnose and treat a brain abscess and instead focused on investigating lung cancer that ultimately did not exist. The jury concluded that two of the woman's neurologists caused her to sustain permanent brain damage.

Supreme Court of Missouri — Jan., 2019. The Supreme Court of Missouri affirmed a Greene County jury's $28.9 million award in a lawsuit accusing a hospital of failing to diagnose a now 27 year old woman with a rare genetic disorder, which caused permanent brain damage and paralysis. The court also ruled that the award must include post-judgment interest.

Bronx County, NY — Oct., 2018. A Bronx County jury awarded a female plaintiff $50 million in a lawsuit in which a then 31 year-old woman suffered a fourth degree laceration during delivery of her child. She alleged that the defendant ob/gyn was negligent in performing a midline episiotomy while at the same time advising her to push after the baby's head had been delivered. Plaintiff also alleged the physician failed to adequately examine her and failed to properly repair the laceration prior to discharge.

Philadelphia, PA — Oct., 2018. A Philadelphia jury awarded the mother of an infant son $10.1 million in a case in which she alleged a hospital and two emergency room physicians failed to properly and timely diagnose her son as suffering from bacterial meningitis following two separate visits to the hospital's ER department. Plaintiff alleged that the undue delay left the son with permanent, severe disabilities, including neurological deficiencies and hearing loss.

Georgia Appellate Court— Sept., 2018. The Georgia Court of Appeals, Fourth Division affirmed a $4.5 million jury award entered in a lawsuit involving a claim that an emergency medicine physician and hospital failed to diagnose a spinal canal hematoma compressing his spine, which caused him to be paralyzed from the waist down. On appeal, the defendants argued that plaintiff's counsel improperly elicited expert testimony on ordinary and gross negligence.

Notable Defense Verdicts

Cook County, IL — Sept., 2018. After a four week trial, a Cook County jury found in favor of a hospital and co-defendant neurosurgeon in a lawsuit where a 31 year-old female alleged the physician's negligent clipping of an aneurysm resulted in permanent neurologic injuries and right-sided paralysis. The defendants argued that plaintiff's injuries were the result of a recognized complication that occurred without negligence.

Cook County, IL — Nov., 2018. A Cook County jury found in favor of a hospital and its employed family medicine physician in a lawsuit where a 30 year-old male alleged the physician failed to recognize signs of sepsis and negligently performed an incision and drainage of a boil under semi-sterile conditions. Defendants argued that the plaintiff did not have sepsis upon presentation.

Kansas Supreme Court — Aug., 2018. The Kansas Supreme Court affirmed a jury's decision that a doctor was not liable in a suit accusing him of providing negligent emergency care (failing to order an EKG test) to a woman who later died, concluding that jury instructions were properly given by the trial judge. Plaintiff challenged a jury instruction stating that a doctor cannot be negligent when he or she chooses a certain type of treatment when more than one is accepted in the medical community.

Kentucky Supreme Court — Aug., 2018. The Kentucky Supreme Court affirmed a jury's decision that a doctor was not liable in a lawsuit accusing him of malpractice in conducting a woman's bowel surgery, finding that certain jury selection decisions made by the trial judge were not unfair.

Washington, DC — Aug., 2018. After a six day trial, a District of Columbia Superior Court jury found in favor of a physician sued by a 55 year-old man who developed a colovesical fistula with related urinary residuals after undergoing a diagnostic colonoscopy. The physician denied any negligence and argued that the plaintiff's colon was not perforated and that he suffered from underlying, ongoing diverticulitis.

Illinois Appellate Court, First District — Nov., 2018. The Illinois Court of Appeals, First District, affirmed a Cook County jury decision clearing a physician of malpractice in a lawsuit accusing him of leaving a gauze in a patient's neck wound after hematoma surgery. Plaintiff argued that the verdict went against the weight of the evidence. The appellate panel disagreed.