JACKSON & CAMPBELL, P.C.

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Decisions

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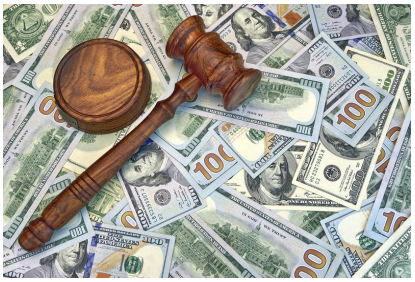
Kansas Supreme Court Rules That Statutory Cap on Noneconomic Damages is Unconstitutional

In a decision issued on June 14, 2019, the Kansas Supreme Court ruled that the limits imposed by the Kansas legislature on noneconomic damages are unconstitutional because they violate a person's right to a jury trial. *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019). In *Hillburn*, a motorist in Sedgwick County filed a lawsuit after sustaining injuries in November, 2010 when a semi-truck rear-ended her car. The woman sued the trucking company, alleging that the crash was the result of the truck driver's negligence and that the company was vicariously liable. At trial, the jury awarded the woman $335,000 in damages, including $33,490 for medical expenses. The jury also awarded $301,509 for noneconomic damages such as pain, suffering, and emotional anguish and loss of enjoyment of life. However, the trial court judge reduced the award by over $51,000 to conform it to the state's $250,000 cap. The motorist appealed the award reduction to the Court of Appeals, arguing that capping her damages was not reasonable or necessary to protect the public interest. She also argued that Kansas law does not provide an adequate alternative remedy for removing her constitutional right to have a jury decide the amount of her award. The Appeals Court rejected this argument. The woman appealed the decision to the Kansas Supreme Court. In a 4-2 decision, the Kansas Supreme Court reversed and ruled that the cap did, in fact, intrude on the jury's ability to award to a plaintiff whatever damages it saw fit to redress a plaintiff's injuries. The Supreme Court's decision was delivered by Justice Carol Beier, who reasoned that Section 5 of the state Constitution preserves the right to a jury trial in Kansas – a right that has historically existed in the state since the Constitution came into existence. The Supreme Court has consistently held that the determination of noneconomic damages was a fundamental part of a jury trial at common law and protected by Section 5. Although the legislature has the power to



change the common law, it does not have the power to alter the fixed meaning of Kansas' Constitution. Legislators had previously passed a law instituting a $250,000 cap on damages awards in 1988 to cut the cost of malpractice insurance for physicians and reign in large jury awards. At the time of the motorist's trial, the state's cap for noneconomic damages in personal injury cases was set at $325,000. Justice Beier concluded that the cap "certainly infringes on the constitutional right." Court precedent previously held that impairing Section 5's jury trial right was permissible so long as a two-part due process-based quid pro quo analysis (applicable in Section 18) was satisfied. However, the Court recognized that its precedent rested on shaky foundation – transforming what the Constitution determined was a right into something "violable at will." Looking outside the jurisdiction, cases that have addressed where damages caps are constitutional in the context of jury protections have not used a quid pro quo test in their analysis. The Court stated "[a]lthough, as a purely technical, theoretical matter, the Court agreed that the mere application of the existing damages cap to reduce a jury's award was a matter of law, this statement begged a question at the heart of the case: To whom have the people of Kansas assigned a determination of the amount of the award? Unless an injured party has decided to waive his or her right under Section 5, the answer is "the jury." The people's assignment of the jury's role in assessing damages furthers the purpose of awards to make the particular injured party whole. This includes the assessment of noneconomic damages. Regardless of whether an existing damages cap is technically or theoretically applied as a matter of law, the cap's effect is to disturb the jury's finding of act on the amount of the award, which substitute the legislature's nonspecific judgment for the jury's specific judgment." In a dissenting opinion, Justice Luckert stated he would apply the quid pro quo test to determine that K.S.A. 60-19a02 did not violate the Constitution. cases.

SPECIAL POINTS OF INTEREST:

- *Kansas Supreme Court Strikes Down Cap on Noneconomic Damages*
- *No coverage for underlying judgment due to misrepresentations in insurance policy application*
- *Pennsylvania's highest court holds that evidence of surgical risks is admissible in med mal case*
- *North Carolina refuses to recognize "loss of chance" cause of action in medical malpractice suits*

Missouri Appellate Court Holds that There Is No Coverage for Underlying Judgment Due to Misrepresentations in Policy Application

In a decision issued on June 25, 2019, the Missouri Court of Appeals, Eastern District ruled that an insurer was not responsible for paying $870,000 to a widow who won a jury verdict in a wrongful death suit against a doctor because the insurer had previously rescinded the doctor's professional liability coverage. *Smith v. Keystone Mutual Insurance Co.*, 2019 WL 2588308 (Mo. App. June. 25, 2019). In *Smith*, Plaintiff filed an initial lawsuit against an ear, nose and throat physician ("Doctor") in 2010 after the death of her husband, who was his patient. The jury awarded her $1 million plus interest which was reduced to $680,000 with taxable costs and interest. The Doctor filed for bankruptcy in August 2016, which relieved him of obligation to pay the wrongful death judgment and hindered Plaintiff's ability to collect from him. While Doctor was in bankruptcy, Plaintiff filed a petition against his insurer to convert the verdict. Doctor purported to assign his claims against the insurer to Plaintiff in exchange for 10 percent of Plaintiff's recovery from the insurer. In January 2018, a jury ruled in Plaintiff's favor in the alleged breach of an insurance contract. The insurer appealed and argued that there was no coverage for the judgment , in part, because the Doctor had made material false misrepresentations in the insurance policy application. The insurer also

alleged that the Doctor had previously agreed that he had no coverage under the policy. The Doctor had a substantial past that resulted in and gave rise to numerous claims. He had been sued over 15 times, but only put a single lawsuit on his application. He had also been suspended from and reprimanded by the Missouri State Board of Registration, which he failed to disclose on his application. The insurer later issued a 2010 policy, partially based on his false representations. In 2010, the Doctor was indicted for Medicare fraud, yet did not tell his insurer. The insurer went on to renew his 2011 policy without the updated information, despite the fact that the application specifically asked about changed circumstances. In March 2011, the Doctor entered into a settlement agreement where he agreed to mutually rescind the policy and he received a check to reimburse him for the policy premium. On appeal, the Court held that the Doctor had filled out his insurance application without disclosing all of his past hospital suspensions, lawsuits and reprimands. The Court also held that the settlement agreement between the Doctor and the insurer effectively cancelled the policy such that he had no coverage for the Plaintiff's underlying claim. Although Plaintiff argued that the settlement agreement was invalid, the Appeals Court determined that this was not a case of duress or undue influence and the settlement rescinding the policy was valid. Next, the Appellate Court found that Plaintiff was bound by the agreement because, as an assignee, Plaintiff could only acquire the rights that the Doctor had at the time the assignment was made. The Appellate Court reversed judgment and directed the trial court to enter judgment in favor of the insurer.

Pennsylvania Supreme Court Allows Evidence of Surgical Risks in Medical Malpractice Cases

In a decision issued on June 18, 2019, the Pennsylvania Supreme Court ruled that evidence regarding the risks and complications of surgery can be admissible in medical malpractice cases. *Mitchell v. Shikora*, 2019 WL 2504475 (Pa. June 18, 2019). The action involved an obstetric surgeon that severely cut a woman's colon during a laparoscopic hysterectomy. Her bowel was later successfully repaired; however, she had to wear an external ileostomy pouch for some time during the healing process. Plaintiff filed a medical negligence action against surgeon and the hospital in connection with the surgery, alleging that Surgeon's failure to identify her colon prior to making an incision in her abdomen constituted a breach of the applicable medical standard of care. Prior to trial, Plaintiff filed a motion to exclude evidence of her informed consent and regarding the risks of her laparoscopic hysterectomy, which included a perforated colon. She claimed that the risks of surgery were irrelevant, unfairly prejudicial, or confusing. The trial court granted her motion as to the informed consent to the risks, however, denied the motion as far as whether a bowel injury is a known risk or complication of the surgery. At trial, each party put forth competing expert evidence as to the standard of care. The surgeon offered evidence that injury to the bowel is a recognized complication of surgery even with a properly performed laparoscopic hysterectomy. The jury returned a defense verdict in favor of the surgeon. The Appellate Court reversed the verdict. The surgeon appealed to the Supreme Court. In ruling in favor of admitting the evidence, the Supreme Court reasoned that a physician can never guarantee the outcome of care or warrant that he/she will provide a cure. In a medical negligence case, without the admission of testimony of the known risks or complications, a jury would be deprived of information that a certain injury can occur in absence of negligence and would be encouraged to believe that a physician is a guarantor of services.

Florida Supreme Court Adopts *Daubert* Standard to Determine the Admissibility of Expert Witness Evidence

In a decision issued on May 23, 2019, the Florida Supreme Court reversed its 2017 ruling and adopted the stricter Federal standards for admitting expert testimony. *In Re: amendments to the Florida Evidence Code*, 2019 WL 2219714 (Fla. May 23, 2019). Since 1980, Florida courts have used the *Frye* standard for determining the admissibility of expert testimony. *Frye* is based on the 1923 decision – *Frye v. US*, which calls for the judge to gauge whether to allow expert testimony based on whether it represents principles that have gained "general acceptance" in their particular field. On the other hand, *Daubert*- established in the 1993 case- *Daubert v. Merrell Dow Pharmaceuticals*, says a witness may testify as an expert in a particular field only if the testimony "is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case." The Florida Bar's Board of Governors and its Code and Rules of Evidence committee recommended the issue before the high court in 2017 after a fierce debate among Florida lawyers who urged the court to reject a 2013 Florida legislation that proposed adopting the *Daubert* standard. At the time, the Justices declined to adopt *Daubert* and rejected the legislation. Although in the recent decision, the Justices decided to adopt *Daubert*, the Justices declined to decide the constitutional or substantive concerns that were raised about the legislation and amendments. The Supreme Court agreed with the Committee Minority Report that the *Daubert* amendments remedy deficiencies of the *Frye* standard. Whereas the *Frye* standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, *Daubert* provides that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The Court also noted that adopting the *Daubert* standard will create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping. In a dissenting opinion, Justice Labarga noted that the *Frye* standard was superior standard for determining reliability of expert testimony, noting that in its previous decision, the Court cited *Frye* as relying on the scientific community to determine the reliability of testimony, while *Daubert* relies on the scientific savvy of trial judges to determine the significance of methodology used. The dissent found compelling the fact that adopting *Daubert* as the standard would make it more expensive and impose additional time constraints to try personal injury cases- impacting litigants' access to the courts.

Indiana Appellate Court Holds that the Indiana MMA Does Not Apply to Privacy Claim

In a decision issued on May 6, 2019, an Indiana Appeals Court revived a suit accusing a doctor and hospital of negligently discussing a patient's HIV-related medical condition while the patient's co-worker was present, resulting in him being ostracized at work. *G.F. v. St. Catherine Hosp., Inc.*, 124 N.E.3d 76 (Ind. Ct. App. 2019). The patient was receiving in-patient treatment for pneumonia-related symptoms at the defendant hospital. During a visit from his co-worker, his treating physician entered the room and began discussing his condition. The discussion included mention that the patient should see his infectious disease doctor because his CD4 count is low. Because the co-worker had some family history with HIV, she understood the implications of the doctor's statements. After the patient was discharged, his co-worker severed all ties with him and the patient felt that the word was out at his job that he had HIV. The patient filed a complaint for medical malpractice against the doctor and hospital, first with the Indiana Department of Insurance, and then with the Circuit Court. The medical review panel found no breaches of the standard of care. The panel concluded that the patient's allegations hinged on material fact issues - for consideration by a jury. The patient then filed a DJ action against the hospital, doctor, and Insurance Department, seeking a declaration that his claims fell outside Indiana's Medical Malpractice Act ("MMA"). The trial court disagreed and the Appellate Court reversed. On appeal, the Court held that the MMA dictates the procedures for medical malpractice actions. In order for a claim to fall within the MMA, the provider's conduct must "be undertaken in the interest of, or for the benefit of, the patient's health" and the conduct must be directed toward the person to whom the provider owes a duty of care. The Court held that the MMA does not apply to conduct unrelated to the promotion of the patient's health or the provider's exercise of profession, expertise, skill or judgment. Here, the patient framed his claims in terms of violation of his medical confidentiality and the negligent disclosure of protected health information. The fact that he was a patient in a medical facility did not put the claims within the boundaries of the MMA. The Court, therefore, reversed the trial court's grant of summary judgment in favor of the hospital and doctor.

Georgia Appellate Court Holds that a Georgia Hospital is Not Entitled to Immunity for Patient's Attempted Suicide Claim

In a decision issued on June 28, 2019, the Georgia Court of Appeals upheld a denial of summary judgment, declaring that a doctor and hospital were not immune from suit. *Fulton-DeKalb Hosp. Auth. v. Hickson*, No. A19A0215, 2019 WL 2710186 (Ga. Ct. App. June 28, 2019). In *Hickson*, a patient had a confessed history of mental issues and was brought to the hospital after an incident with neighbors. Upon arrival at the hospital, the triage nurse identified that the patient was a suicide risk due to statements he made about hurting himself. An emergency room physician later signed a certificate for an involuntary mental health evaluation, secondary to a "suicidal bipolar/anxiety" diagnosis – involuntarily committing the patient for inpatient treatment on the psychiatric floor. At the end of his shift, the doctor reported that he did not think the patient's mental status would clear up or that he could be discharged. Shortly thereafter, the patient received medication and was reevaluated by a licensed clinical social worker. The social worker found the patient to be stable and recommended his discharge to the next shift doctor. The following shift doctor rescinded the evaluation order, finding the patient calm and cooperative. Without consulting the initial doctor, the patient was discharged from the hospital and shortly thereafter attempted to commit suicide. The patient's mother filed a lawsuit on behalf of her son seeking to recover damages for injuries he sustained in the suicide attempt. The hospital sought summary judgment arguing that it was entitled to immunity under OCGA § 37-3-4. OCGA § 37-3-4 provides immunity for the failure to follow the notice requirements and other procedures involved in admitting and discharging patients. The trial court denied the hospital's motion for summary judgment, concluding that the statute does not provide immunity for the failure to properly evaluate and/or treat patients between their arrival and discharge. On appeal, the Appellate Court affirmed the ruling and held that the hospital did not act in accordance with its own policies in following the social worker's recommendation to discharge the patient. She knowingly declined to follow an admittance order by the emergency room physician, and her recommendation to discharge the patient without attempting to corroborate his personal history from family members and without a documented safety plan were in violation of the hospital's own policies. Second, the Court held that OCGA § 37-3-43 contains a notice provision requiring notice must be given to the admitting physician prior to discharge of a patient. The hospital argued that it acted in good faith compliance, and if it did not, then any lack of compliance was harmless since the initial doctor would have agreed to discharge. However, the initial physician did not think that the patient's mental status would clear up and that he could be discharged before he left. The Appellate Court held that the hospital failed to demonstrate that it complied in good faith with the discharge provisions and that genuine issues of material fact existed as to whether the hospital gave sufficient notice to discharge to the admitting physician.

North Carolina Appellate Court Refuses to Recognize Loss of Chance Claim in a Medical Malpractice Claim

In a decision issued on May 21, 2019, the Court of Appeals of North Carolina refused to recognize a claim for damages due to "loss of chance" in a medical malpractice case. *Parkes v. Hermann*, 2019 WL 2180316 (N.C. App. May 21, 2019). The case involved a patient who exhibited signs of a stroke. Her family transported her to the hospital. Proper protocol in the case of a stroke is that after diagnosis, a physician will administer a tissue plasminogen activator ("tPA"), which if administered within three hours after a stroke, provides a patient with a 40% chance of an improved neurological outcome. However, when the patient arrived at the hospital, she was improperly diagnosed, did not receive the tPA, and suffered a number of adverse neurological effects, including diminished mobility She brought a medical malpractice action against the emergency room doctor claiming that her chance for an improved neurological outcome was diminished. The doctor filed for summary dismissal on the grounds that the patient failed to satisfy the "proximate cause" element of her claim. The trial court agreed and granted summary judgment. The patient appealed. In reviewing the case, the Appellate Court noted that to survive summary judgment in a medical malpractice action, a plaintiff must demonstrate not only that a doctor was negligent, but also that his treatment proximately caused the injury. In the instant matter, Patient suffered a diminished neurological function, which was truly proximately caused by her stroke. But even granting some proximate causation to her medical treatment, she only showed the Court that there is a 40% chance that the doctor's negligence caused her injury. On this basis, the Court concluded that she failed to meet her burden of proof. Plaintiff argued that she suffered a second and different injury that entitled her to recover – a loss of chance of a better neurological outcome. The Court held that "loss of chance at a better result" is not a separate type of injury for which she may recover in a medical malpractice action. The Court further held that North Carolina has expressly refused to adopt "loss of chance" as a separate cause of action in a negligence claim and that "any change in our negligence law lies within the purview of the legislature, not the courts. Accordingly, the Court affirmed the trial court's order granting summary judgment.

> *"Any change in our negligence laws lies with the purview of the legislature, not the courts."*

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Jury Verdicts/Settlements

Prince George's County, MD — July, 2019. A Prince George's County jury awarded $229.6 million to a woman whose baby suffered brain damage at birth. The woman was told prior to delivery that she had dangerously high blood pressure from preeclampsia and that her baby would die or suffer brain damage. She decided not to have a C-section and the baby suffered brain damage due to lack of oxygen during delivery.

Polk County, FL — March, 2019. A Polk County jury awarded $4.9 million to a man who had to have his lower left leg amputated after a vascular surgeon failed to respond to a "Stat order" to treat the patient's emergent medical condition. The jury held the hospital was negligent in delaying care for 22 hours.

Suffolk County, MA—May, 2019. A Suffolk County jury awarded $30 million in a lawsuit alleging medical negligence after a baby delivered at a Massachusetts hospital suffered brain damage. The medical team had not been using a continuous fetal heart-rate monitor during labor and, after five hours of pushing by the mother, the child was not breathing and had almost no heartbeat at birth. The boy suffered brain injury, the result of the umbilical cord being wrapped around his neck. The child cannot walk, speak or eat on his own.

Tuscaloosa County, AL — May, 2019. A Tuscaloosa County jury awarded $30 million in damages to the family of a man who died while waiting in a hospital's emergency department for a surgeon to show up and treat him for a gunshot wound.

Cook County, IL — May, 2019. A Cook County jury awarded $12 million in damages in a medical malpractice case involving a 70 year-old woman and allegations that four physicians failed to timely diagnose her with lung cancer. The plaintiff alleged that by the time the cancer was diagnosed, it had metastasized and was terminal.

Hennepin County, MN — May, 2019. A Hennepin County jury awarded $8.9 million in damages to a woman in a lawsuit in which she alleged a certified nurse midwife failed to diagnose her with gestational diabetes, which lead to shoulder dystocia and permanent injury to her baby at birth due to size.

Notable Defense Verdicts

Hennepin County, MN — May, 2019. A Minnesota Court of Appeals vacated a Hennepin County's $2.5 million verdict in a lawsuit accusing an orthopedic surgeon and clinic of medical negligence involving knee replacement surgery that resulted in an infection and ultimately brain injuries. On appeal, the defendants argued that two treating physicians that testified at trial were not qualified to testify as experts on causation. The Court Appellate agreed.

Vanderburgh County, IN — May, 2019. The Indiana Court of Appeals overturned a $1.25 million award against a hospital in a lawsuit over a boy's death from a chemotherapy reaction. In so ruling, the Appellate Court argued that the boy's parents did not present expert testimony to support a determination that the hospital breached the standard of care.

Montgomery County, PA — March, 2019. A Montgomery County jury concluded that an orthopedist was not negligence in a lawsuit in which the plaintiff alleged that the physician failed to diagnose an infection and placed a knee prosthetic into an infected joint causing the need for the prosthetic removal and another replacement procedure. The defendant denied all allegations of negligence and argued that the plaintiff was treated properly in accordance with all medical standards.

Broward County, FL—June, 2019. A Florida Appellate Court ordered a new trial in a medical malpractice case against a physician and hospital in which the patient was awarded more than $15.5 million in damages. The Court held that the informed-consent issue was not tried during the case and should not have been part of the jury instruction

Philadelphia County, PA — May, 2019. A Philadelphia County jury concluded that a neurosurgeon was not negligent in a lawsuit in which the plaintiff alleged that the defendant removed healthy parts of his brain while conducting surgery to remove part of his pituitary adenoma. Plaintiff alleged that the mistake left him with brain damage, including abnormal cognitive function, and diminished strength and muscle control.

Palm Beach County, FL — Nov., 2018 A Palm Beach County jury determined that a defendant nursing home was not negligent in a lawsuit in which a resident left the premises, drove his car into a lake and drown. The family alleged that the nursing home was negligent and violated the decedent's resident rights by allowing him to leave the facility and failing to protect him.