

Decisions

INSIDE THIS ISSUE:

Remittitur—CT	1
Credentialing Claims—LA	2
Medical Negligence—FL	2
Insurance Voir Dire—MO	3
Sexual Misconduct—OH	3
Corporate Liability—PA	4
Jury Verdicts/Settlements	5
Defense Verdicts	5

The Supreme Court of Connecticut Concludes that Medical Malpractice Verdict Against Hospital Should Have Been Reduced

In a decision issued on June 4, 2019, the Supreme Court of Connecticut ruled that a \$5.7 million jury verdict in a medical malpractice case should have been reduced when loss of consortium damages exceeded the wrongful death damages. *Ashmore v. Hartford Hospital*, 2019 WL 2336631 (Conn. June 4, 2019). The wrongful death action was brought by the wife of a decedent on behalf of her and the estate of the decedent against a hospital stemming from alleged medical malpractice that took place in 2011. The decedent had gone to the hospital for routine elective heart surgery. The decedent initially recovered well from the surgery but during the second night at the hospital after the operation, he began to experience atrial fibrillation—a common postoperative condition. Over the next hour, he displayed signs of serious distress. Hospital staff, however, failed to connect epicardial wires to assist his heart rate or to contact the decedent’s surgeon until after the decedent experienced cardiac arrest. Although the hospital was able to restart his heart, the lack of heartbeat for seventeen minutes resulted in oxygen deprivation so severe that he had to be placed on life support. He never regained consciousness and life support was terminated, resulting in his death. Plaintiff subsequently filed a lawsuit alleging wrongful death in her capacity as executor of the decedent’s estate and a loss of consortium in her individual capacity. The case was tried to a jury, which returned a verdict that the negligence of the hospital’s employees was the proximate cause of the decedent’s death. The jury awarded the estate \$75,000 in economic damages and \$1.2 million in noneconomic damages. The jury also awarded the Plaintiff \$4.5 million in damages for loss of consortium. The hospital filed a motion seeking remittitur of the loss of consortium award pursuant to statute but the trial court denied the motion.

The hospital then appealed the judgment of the trial court to the Appellate Court, which then transferred the appeal to the Supreme Court of Connecticut. As an initial matter, the Court noted that a court should “rarely” exercise its authority to order a remittitur and only in the most “exceptional circumstances.” In addition, the Court noted that



appellate review of a trial court’s decision to grant or not grant remittitur requires careful balancing and the ruling of the trial court is entitled to great weight and every reasonable presumption should be given in favor of its correctness. The Court opined that this standard continues to apply even after the legislature enacted a statute using the phrase “excessive as a matter of law.” In the case at hand, the Court acknowledged that the appeal turned on a largely legal issue as to whether a loss of consortium award in a wrongful death action presumptively should not be substantially greater than the noneconomic damages awarded for the wrongful death claim itself. The Court agreed with the defendant that a spousal loss of consortium award in a wrongful death action presumptively should not be substantially greater than the wrongful death award. The Court ultimately adopted the rule that an award of noneconomic damages to the impaired spouse,

awarded at the same time by the same finder of fact, provides a natural and meaningful benchmark by which the Court may evaluate the reasonableness of the corresponding loss of consortium claim. The Court held that “where the latter is substantially greater than the former, a suspicion naturally arises that the loss of consortium claim was the product of sympathy or partiality toward the deprived spouse or prejudice against the defendant.” In applying this standard, the Court ruled that, in the present case, no evidence was presented from which the jury could have concluded that the plaintiff’s loss was somehow atypical, let alone to support a multimillion verdict that was well in excess of the underlying wrongful death award. In addressing the intangible, sentimental side of the claim, the Court noted that no evidence was presented at trial regarding several of the most fundamental aspects of married life nor was there any specific evidence as to how, if at all, the decedent helped to meet the plaintiff’s emotional needs or to provide her with affection, moral support, or other forms of emotional consortium. The Court further observed that the plaintiff failed to present evidence upon which a jury could have quantified the value of household services the decedent provided. The Court concluded that, on the record presented, no jury could have reasonably have found that the plaintiff’s lost consortium was substantially more damaging than the decedent’s loss of life. The Court, therefore, reversed the remittitur issue and remanded the case for reconsideration.

SPECIAL POINTS OF INTEREST:

- *Connecticut Supreme Court reverses remittitur denial by the trial court*
- *Florida Appellate Courts split over whether patient falls involve medical malpractice*
- *Louisiana Appellate Court holds that negligent credentialing claim is not medical malpractice*
- *Pennsylvania Court holds that no expert evidence is necessary to establish liability of hospital*

Louisiana Appellate Court Holds That Negligent Credentialing Claim Did Not Involve Malpractice and, Thus, Did Not Have to Be Submitted To A Medical Malpractice Panel Prior to Litigation

In a decision issued on February 27, 2019, the Court of Appeal of Louisiana, Third Circuit, held that a negligent credentialing claim did not involve medical malpractice and, therefore, did not have to be submitted for a medical review panel prior to filing the claim in court. *Thomas v. Regional Health System*, 266 So.3d 354 (La. App. 3rd Cir. 2019). In *Thomas*, a newborn patient remained in the hospital and under the care of a non-board certified pediatric cardiologist, who was credentialed at the hospital, following the baby's premature birth. The Plaintiff alleged that, during the hospitalization, the cardiologist ordered several echocardiograms that revealed abnormal findings of a patent ductus arteriosus ("PDA"). The Plaintiff alleged that the PDA in a premature baby could cause pulmonary artery hypertension, a serious and life-threatening condition. Despite these findings, Plaintiff claimed that the cardiologist took no further action. A month later, the baby was admitted to the pediatric intensive care unit because of low saturation oxygen levels. A board certified pediatric cardiologist immediately diagnosed pulmonary artery hypertension and transferred the child to another facility to undergo a heart catheterization

procedure to close the PDA. The Plaintiff made a request to convene a Medical Review Panel alleging malpractice to the Louisiana Patient Compensation Fund. Plaintiff also commenced a lawsuit against the treating hospitals and the cardiologist asserting that the hospitals were liable under general tort principals rather than medical malprac-



tice based upon the alleged negligent credentialing of the defendant cardiologist and the negligence in providing the cardiologist with privileges to practice in the hospital. The defendants filed exceptions to the Complaint and argued that the claims sounded in medical malpractice and should have been submitted for review by the medical review

panel. The trial court agreed and dismissed the case. The Plaintiff appealed. The Appellate Court began its analysis by examining the language of the Louisiana Medical Malpractice Act ("LMMA"). The Appellate Court noted that the statute specifically listed many different types of health care activities but that the terms "credentialing," "recredentialing," "hiring," and "retention" are not included within the legal responsibility of a health care provider under the definition of malpractice under the LMMA. The Court opined that it was "clear from the language of the LMMA that decisions involving the hiring or retention of a physician are not included within the definition of malpractice and, thus, are excluded from the procedural framework of the LMMA." As a result, the Court held that the Plaintiff was not required to submit the claim to the medical review panel as a prerequisite to filing suit against the hospitals for negligent credentialing or recredentialing. The Appellate Court, therefore, held that the trial court erred in granting the exception on the grounds that the negligent credentialing claim was not within the scope of a malpractice claim under the LMMA.

Florida Appellate Courts Split As to Whether Claims Involving Patient Falls Constitute Claims for Medical Negligence or Ordinary Negligence

In a decision issued on August 7, 2019, the District Court of Appeal of Florida, Second District, concluded that a trial court erred in dismissing a lawsuit based on Plaintiff's failure to comply with the pre-suit requirements set forth in 766.106(2) of the Florida Statutes. *McManus v. Gamez*, 2019 WL 3673646 (Fla. App. Aug. 7, 2019). In the lawsuit, the Plaintiff alleged that the physician defendant was negligent in leaving him on an examination table without sides after the physician completed neurological testing. Plaintiff fell from the table, struck his head and sustained a concussion. The defendant physician moved to dismiss the Complaint on the grounds that the pro se Plaintiff failed to comply with Florida's pre-suit requirements applicable to medical mal-

practice actions and because the suit was untimely. The trial court granted the motion to dismiss and the Plaintiff appealed. The appellate court reversed the dismissal and noted that the mere fact that a negligent act occurred in a medical setting does not make it medical negligence. The Court noted that no medical services were being provided at the time of the incident and no one was assisting him off of the table. The Court concluded that the trial court erred in finding that the claim was grounded in medical negligence and that any doubt must be resolved in favor of the Plaintiff. The District Court of Appeal, Second District, reached a different result in a decision issued two weeks later. *North Broward Hospital District v. Slusher*, 2019 WL 3938792 (Fla. App. Aug.

21, 2019). The Appellate Court in *Slusher* upheld the dismissal of a lawsuit filed by a man who alleged that a nurse caused him to fall while helping him out of a hospital bed. The case was dismissed by the trial court due to the Plaintiff's failure to comply with the pre-suit requirements in Chapter 766. Plaintiff argued that the acts of the nurse did not involve medical malpractice. The Appellate Court disagreed. In so ruling, the Court agreed with the hospital's argument that the claim involved the sufficiency of the nurse's supervision of an admitted patient deemed to be a "fall risk" and that the Plaintiff will have to rely on the professional standard of care that exists for nurses transferring patients from beds in order to prevail against the defendant hospital.

Ohio Federal Court Denies Insurer's Motion for Summary Judgment In Coverage Action Involving Sexual Misconduct Claims Despite Physician's Conviction for 66 Counts of Sexual Imposition

In a decision issued on May 30, 2019, the United States District Court for the Southern District of Ohio denied a motion for summary judgment filed by an insurer seeking a ruling that it did not owe a duty to defend or indemnify a chiropractor under a professional liability policy for claims alleging sexual assault. *NCMIC Insurance Co. v. Smith*, 2019 WL 2304070 (S.D. Ohio May 30, 2019). In the underlying class action lawsuit, a plaintiff alleged that the chiropractor sexually assaulted her and 40 other female patients during the course of his chiropractic treatment. In addition to causes of action for assault and battery, plaintiffs also alleged that the chiropractor acted negligently and committed additional common law torts. Plaintiff alleged that the chiropractor touched her breasts and positioned himself so that his genitals were pressed into her hands. The chiropractor was insured under a professional liability policy that provided coverage for injuries caused by any negligent omission, act or error in providing "professional services." The insurer filed a declaratory judgment action seeking a ruling

that it did not have a duty to defend or indemnify the chiropractor for the underlying lawsuit. The insurer subsequently moved for



summary judgment arguing that the claims did not trigger coverage under the policy, that they were precluded from coverage pursuant to a sexual misconduct exclusion, and that coverage for sexual assault violated Ohio public policy. The insured countered, arguing that the claims were broader and presented allegations of medical malpractice and lack of informed consent. The Court ruled that the causes of action involving

intentional torts fell outside of the insuring agreement and within a sexual misconduct exclusion. However, the Court held that the failure to obtain informed consent triggered the insuring agreement—primarily the failure to disclose that plaintiff's breast could be touched and that her hand could be pressed against the insured's genitals during treatment. The court, therefore, concluded that the insurer had a duty to defend. With respect to indemnity, the Court held that it could not rule out the possibility that the chiropractor acted negligently, despite his conviction for 66 counts of sexual imposition and the allegations in the underlying complaint that he committed unauthorized touching. The Court noted that the underlying plaintiff alleged that the contact was made either for the purpose of providing chiropractic treatment or intentionally. The Court held that "at this stage in the litigation, no jury has resolved whether [the insured] acted intentionally, negligently, both or neither" and, as such, the Court could not conclude as a matter of law that the insurer had no to indemnify the insured.

Supreme Court of Missouri Upholds Defense Verdict and Rules That Refusal to Permit Voir Dire on Insurance Issues Was Proper

In a decision issued on August 13, 2019, the Supreme Court of Missouri reinstated a defense verdict in a lawsuit accusing a physician of causing a newborn's death through the negligent use of a vacuum extractor. *Eoff v. McDonald*, 2019 WL 3793877 (Mo. Aug. 13, 2019) (en banc). The underlying case involved wrongful death claims brought by the parents of a baby girl that died during delivery. Prior to trial, the Plaintiffs learned that the physician and her practice were insured with a small insurance company. During voir dire, the Plaintiff's counsel forgot to ask "the insurance question." "The insurance question" is a question asked during voir dire to determine if a juror has any potential relationship with the defendant's insurer. In a case decided by the Supreme Court of Missouri in 1994, the Court held that a circuit court has no discretion to refuse to permit such a question. In

the instant case, Plaintiff's counsel requested additional voir dire time so he could ask the question. The circuit court refused because it believed it would unduly highlight the question. A defense verdict was ultimately entered in favor of the defendants after a six day trial and Plaintiffs appealed. On appeal, the Plaintiffs argued that the trial court committed reversible error when it refused to allow their counsel additional time to ask "the insurance question." The appellate court agreed and the defendants appealed the ruling to the Supreme Court of Missouri. On appeal, Plaintiffs argued that they had the right, based on prior case law, to ask that "insurance question" whenever counsel does so in the manner set out by case law and, as such, the trial court lacked discretion to deny their right to ask the question regardless of the circumstances. The Court disagreed and held that the case law

does not give counsel the unqualified right to ask the question whenever or however counsel wishes. Instead, the procedure allows counsel to ask the question in a manner that does not highlight it. The Court noted that the problem for the Plaintiffs is that the trial court gave counsel permission to ask the question. It was then up to counsel to do his part and ask that question. Here, he failed to do so during his lengthy voir dire. "By failing to take advantage during voir dire of the opportunity to ask that question in a manner that would not unduly highlight the question, the [Plaintiffs] took themselves outside the procedure approved [previous case law]." The Supreme Court, therefore, held that the trial court did not abuse its discretion in finding that asking the question at such a late point would highlight it. As a result, the Court affirmed the judgment in favor of the defendants.

Supreme Court of Utah Rules That State Law Requiring “Certificate of Compliance” Prior to Suit is Unconstitutional

In a decision issued on July 19, 2019, the Supreme Court of Utah ruled that a state law requiring medical malpractice claimants to obtain a “certificate of compliance” from a pre-litigation panel is unconstitutional. *Vega v. Jordan Valley Medical Center, LP*, 2019 UT 35, -- P.3d -- (Utah 2019). In *Vega*, the wife of a forty-four year old male filed a medical malpractice action against a medical center after her otherwise healthy husband went in for a routine gallbladder operation and came out in a coma. He died a week after surgery. The wife prepared to file a lawsuit under the Utah Health Care Malpractice Act (“the Act”). Prior to a change in the law in 2010, the Act only required that plaintiffs submit to a non-binding prelitigation hearing. Regardless of the outcome, they were permitted to file their claims in district court and no “certificate of compliance” was required. After a change in the law in 2010, claimants bringing lawsuits under the Act were required to obtain a “certificate of compliance” from the Division of Occupational and Professional Licensing (“DOPL”) after presenting their cases to a prelitigation panel

consisting of a lawyer, a doctor and a layperson. Under the procedure, if the DOPL panel finds that a plaintiff’s claim has merit, it issues a certificate of compliance for a meritorious claim and then the plaintiff can file suit. If it decides the claim lacks merit, the plaintiff can compel the panel to issue a



certificate of compliance by obtaining an affidavit of merit from a healthcare provider. The DOPL concluded in the instant case that the claim lacked merit and the Plaintiff was only able to obtain an opinion from a healthcare provider that there was a breach in the standard of care but the provider could not provide specifics based on the medical records. The DOPL determined that the opinion was deficient and did not pro-

vide the certificate of compliance. Plaintiff filed suit anyway and defendant filed a motion to dismiss on the grounds that Plaintiff failed to comply with the provisions of the Act. The district court granted the motion to dismiss and Plaintiff appealed the dismissal to the Supreme Court of Utah. The Supreme Court held that the law requiring a certificate of compliance was unconstitutional. In so ruling, the Court noted that the state constitution vested the core judicial power in the courts and that this vesting is an inherent prohibition against any attempt to vest it elsewhere. The Court noted that the portion of the statute requiring the dismissal of a lawsuit if the Plaintiff fails to obtain a certificate of compliance results in the DOPL making final determinations on the merits of claims without judicial review and results in the panel exercising judicial power in violation of the state constitution. Accordingly, the Court concluded that the actions of the DOPL violated the court’s grant of judicial power. The Court, however, left in tact the Act as it existed prior to its amendment in 2010—relating to notice procedures and the panel’s role as an advisory panel.

Pennsylvania Appellate Court Holds That Plaintiff Was Not Required to Present Expert Evidence to Establish Liability of Hospital

In a decision issued on July 19, 2019, the Superior Court of Pennsylvania affirmed a jury’s decision to award \$3.5 million to the Plaintiffs in a lawsuit accusing a hospital of failing to timely diagnose a man’s heart disease even though no expert testimony was offered to support their claims. *Macosky v. Udoshi*, 2019 WL 3246993 (Pa. Sup, July 19, 2019). The case involved claims by a 47 year-old man who underwent a stress EKG for screening due to a family history of coronary artery disease. The EKG result was abnormal and showed a low ventricular ejection fraction. The physician, however, reported to the man’s primary care physician that the overall impression of the EKG was normal except for poor physical conditioning. Two years later, the man presented to an emergency department with shortness of breath and an EKG showed his symptoms worsened. He underwent cardiac catheterization and was placed on a wearable defibrillator. The man and his wife later filed a law-

suit alleging that the defendants’ negligence caused an increased risk of progression and worsening of his cardiac condition. Prior to trial, the Plaintiffs settled their claims against the cardiologist and proceeded to

“Unless a hospital’s negligence is obvious, a plaintiff must produce expert testimony to establish [liability].”

trial on the sole claim of corporate negligence against the hospital. After Plaintiffs presented their case, which included testimony from several hospital personnel and a medical expert who testified on the physician’s standard of care, the hospital moved for a directed verdict arguing that Plaintiffs failed to present expert testimony that the hospital deviated from the standard of care or that the deviation was a substantial factor in causing the harm. The court denied the

motion. A jury held the hospital 20% responsible and the cardiologist 80% responsible. The hospital appealed and argued that there was no expert opinion that the hospital was liable for the incomplete or incorrect interpretation of the EKG. The Court rejected the hospital’s arguments. In reaching its conclusion, the Court followed a 2001 appellate decision which held that expert testimony was not necessary where a hospital failed to send an x-ray report to the attending physician. The Court noted that plaintiffs must present expert testimony where the defendant’s negligence is not obvious but not when the issue is simple and the want of care is obvious. In the instant case, the Court noted that Plaintiffs presented testimony that it was the hospital’s responsibility to send the EKG report to Plaintiff’s physician and it was the hospital’s responsibility to enforce the procedure. Thus, the Court held that no expert testimony was required to establish the hospital’s liability.

Jackson & Campbell

ATTORNEYS AND COUNSELORS AT LAW

1120 20th Street NW
Washington, DC
20036

Phone: 202-457-1600
Fax: 202-457-1678
www.jackscamp.com



Recent Notable Verdicts and Settlements

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

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

Peter J. Jenkins
(202) 457-1605
pjenkins@jackscamp.com

Susan Knell Bumbalo
(202) 457-1642
sbumbalo@jackscamp.com

Sathima H. Jones
(202) 457-1656
sjones@jackscamp.com

Jury Verdicts/Settlements

Gloucester County, NJ — May 2019. A Gloucester County jury awarded \$45 million to a 12 year old child who alleged that an emergency room physician failed to call the mother and the then 2 month old child back to the hospital or notify authorities after an x-ray revealed possible fracture due to child abuse. Plaintiff asserted that the failure to report the fracture resulted in a skull fracture and brain damage after being assaulted by his father. Plaintiff alleged that if DYFS had been notified, it could have protected child from father.

East St. Louis, IL — August, 2019. A District Court Judge in the US District Court for the Southern District of Illinois awarded a family \$8.3 million after concluding that negligent care by an OB-GYN in a federally supported clinic caused permanent injury to a child whose shoulders were

stuck in his mother's vaginal canal for nine minutes during delivery. The now 5-year old has an immovable right arm as a result of the birth injury.

Miami, FL — May, 2019. After a bench trial in the United States District Court for the Southern District of Florida, a three year old boy was awarded \$33.8 million in damages in a case involving the failure to perform a C-section which resulted in catastrophic hypoxic ischemic brain damage to the new born. The heart monitoring strip indicated signs of fetal distress but despite the distress, the physicians never offered the 19 year-old mother a C-section. The boy requires 24-hour attendant care for the rest of his life as a result of the brain injury he suffered at birth.

Duchess County, NY — May, 2019. The parties to a case involving the alleged negligence of an emergency department settled for \$5.95 million. The case was brought by a 21 year-old female plaintiff who contended that she arrived at the hospital with classic signs of an infarct but was discharged with no cardiac intervention. She alleged that negligent delay in diagnosing her caused heart muscle damage that required her to undergo a heart transplant.

Union County, NJ — May, 2019. The family of a 42 year-old female reached a \$4.75 million settlement in the days before trial in a case in which the woman died of stomach cancer. The family alleged that the defendant pathologist negligently misread pathology slides resulting in a 16-month delay in diagnosing the stomach cancer.

Notable Defense Verdicts

Alexandria, VA — August, 2019. After a four day trial, an Alexandria federal jury in the Eastern District of Virginia entered a verdict in favor of a radiologist in a lawsuit alleging medical malpractice. Plaintiff alleged that the radiologist missed diagnosing a bowel obstruction on a CT scan that led to the loss of much of her small intestine. The jury concluded that the radiologist did not breach the standard of care.

Albany County, NY — May, 2019. An Albany County jury concluded that a pediatrician was not negligent in a medical malpractice case involving claims that he failed to order sufficient testing to lead to the diagnosis of intestinal neuroblastoma. Plaintiff contended that an earlier diagnosis would have enabled the child to avoid adjuvant chemotherapy following surgery. The physician alleged that the chemotherapy would have been required regardless.

Harris County, TX — November, 2018. A Harris County judge granted summary judgment in favor of a urologist in a lawsuit in which an 83 year-old man suffering from benign prostatic hyperplasia alleged the physician and staff improperly monitored him following a TURP procedure resulting in severe complications. The plaintiff's expert testified at deposition that the only breach in the case was the failure to respond quickly enough to post-operative complaints. There was no evidence, however, that this would have altered plaintiff's medical outcome.

Clark County, WA — March, 2019. A Washington Appellate Court affirmed the dismissal of a claim brought by a patient alleging that she suffered an injury to her hip while undergoing an IME by an orthopedic surgeon as part of her workers' compensation claim. The Court held that she failed to present expert testimony to support her claim.

Lauderdale County, MS — January, 2019. The Supreme Court of Mississippi upheld the dismissal of a medical malpractice case involving the death of an 83-year old man after suffering a stroke. The decedent's family alleged the hospital was negligent in delaying treatment of the stroke that resulted in the patient's death. The Court held that the plaintiff's expert lacked sufficient support that he had a greater than 50% chance of a better outcome if treatment had been provided.

Sullivan County, NY — July, 2019. A New York state appellate court has upheld a jury verdict in favor of a Hudson Valley hospital in a lawsuit brought by the family of a deceased hip replacement patient who died from respiratory and cardiac arrest a few days after surgery. The Court noted that the evidence presented at trial supported the judgment in favor of the defendant hospital.