IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

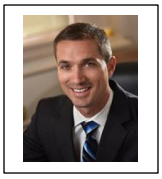
OCTOBER 2016

IN THIS ISSUE

Erik W. Legg reviews a recent decision of the Court of Appeals of Ohio addressing the application of statutory offsets and damages caps in a medical negligence case against a political subdivision hospital, and whether an unborn child may pursue an independent informed consent claim.

Ohio Court of Appeals Evaluates Offsets, Caps and Informed Consent

ABOUT THE AUTHOR



Erik Legg is a Member at Farrell, White, & Legg PLLC in Huntington, West Virginia. He practices in West Virginia and Ohio. Erik is active in pharmaceutical and medical products liability litigation, medical professional malpractice, workplace exposure and injury, commercial litigation and employment discrimination and wrongful discharge claims. He can be reached at ewl@farrell3.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

Erik W. Legg
Vice Chair of Publications
Farrell, White & Legg PLLC
ewl@farrell3.com

The Court of Appeals of Ohio recently tackled several issues of interest to medical liability defense counsel, in *Jones v. MetroHealth Medical Center*, __ N.E.3d __, 2016-Ohio-4858, 2016 WL 3632469 (Oh. App. 8 Dist, July 7, 2016). In *Jones*, Plaintiff-appellant Stephanie Stewart, as mother and next friend of her son, Alijah Jones, appealed a trial court's post-trial reduction of the jury's economic and non-economic damages awards pursuant to Ohio's medical professional liability act.[1] In her appeal, Appellant challenged both the applicability and constitutionality of the post-trial adjustments on multiple grounds. Appellee MetroHealth then cross-appealed on several points, most interestingly the viability of an informed consent claim on behalf of an unborn child.

The Eighth District Court of Appeals affirmed in part and reversed in part the post-trial reduction of damages, denied all constitutional challenges, and held that the trial court did not commit error by permitting the jury to consider the child's claim based upon alleged failure of informed consent prior to his birth.

This appeal arose from a jury verdict in favor of the plaintiff below in a medical negligence action against MetroHealth Medical Center and a physician. A jury found that the defendants deviated from the standard of care in the management of Ms. Stewart's pregnancy and delivery of her son, resulting in her son's premature birth and resultant cerebral palsy, developmental delays and visual impairment. It was established that the child would require life-long care. The jury awarded plaintiff $14.5 million in damages, broken down as follows: To the child, $500,000 for past economic damages, $5 million in non-economic damages, and $8 million for future economic damages; and to the mother, $1 million for non-economic damages. *Jones, supra*, at *1-2.

Defendants moved the trial court to deduct collateral benefits from the jury award pursuant to O.R.C. § 2744.05(B)(1), which provided that "the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant." *Id.* at *2 (quoting the statute). Defendants also moved for application of the $250,000 cap on non-economic damages provided by O.R.C. § 2744.05(C)(1). Plaintiff opposed both motions and challenged the constitutionality of both subsections (B)(1) and (C)(1). The trial court granted defendants' motions, resulting in the following findings and rulings which were pertinent to the appeal:

- That the jury's $500,000 award to the child for past economic damages included the entirety of the child's past medical expenses. The trial court based this conclusion on the fact that the medical bills had been fully satisfied by Medicaid and Social Security, leaving no out of pocket

[1] For medical negligence claims in Ohio, offsets for collateral sources are addressed by Ohio Revised Code § 2744.05(B)(1), and limitations on recovery of non-economic damages are provided for under Ohio Revised Code § 2744.05(C)(1).

expenses for the plaintiff. Thus, the court offset this $500,000 award.

- That the entirety of future medical expenses set forth in the child's life care plan were to be offset, and that the remaining future expenses (such as transportation, home care and housing) were to be offset by 80 percent in consideration of those amounts that would be paid in the future by Medicare. The court thus reduced the child's future medical expenses award from $8 million to $2,951,291.
- That the mother could recover only $250,000 for non-economic damages.
- That the child could recover only $250,000 for non-economic damages.

Id. at *2. With the court's applications of these offsets and caps, the plaintiff's award was reduced to $3.451 million. Plaintiff appealed on several grounds.

Political subdivision. Appellant first argued that the trial court erred in applying the damages offsets and caps to MetroHealth because it did not qualify for such provisions as a political subdivision. Appellant's two-pronged attack on this point included both the argument that the State of Ohio (and, consequently, its subdivisions) had waived immunity from suit under the State Constitution, and that even if political subdivisions were immune, MetroHealth had not proven at trial that it is a political subdivision. The Court of Appeals disagreed, rejecting the waiver of immunity argument as based upon mere dicta from a prior Ohio Supreme Court opinion[2], and holding that MetroHealth was not required to prove its political subdivision status during the trial where it appropriately demonstrated its status during a post-trial hearing. The Court noted that plaintiff did not contest at any stage that MetroHealth was, in fact, a political subdivision, and held that the trial court did not err in finding that MetroHealth was a county hospital and political subdivision for purposes of the statute. *Id*. at *3-5.

Reasonable certainty of collateral benefits. Ohio recognizes that in order to qualify for an offset based upon collateral benefits, said collateral benefits must be established to a reasonable degree of certainty. *Id*. at *4 (citing *Buchman v. Bd. of Edn.*, 73 Ohio St.3d 260, 652 N.E.2d 952 (1995)). Appellants contended that because MetroHealth did not submit special interrogatories to the jury for a determination of the amount of the verdict attributable to lost wages, the trial court had to speculate regarding the nature of the award when reducing it and, therefore, "could only guess at what amount of the general verdict was made up of damages covered by a collateral source." *Id*. at *5.

As to the *past* economic damages award, the Court rejected this argument, noting that special interrogatories, although a preferred method of quantifying categories of damages within a general verdict, are not required. *Id*. at *5, 9-10. The Court found that the evidence

[2] *See, Butler v. Jordan*, 92 Ohio St.3d 354, 750 N.E.2d 554 (2001).

presented sufficiently enabled the trial court to determine with reasonable certainty "that the $500,000 award encompassed all of the child's past economic damages" requested by plaintiff. *Id*. at *5. Accordingly, this aspect of the trial court's offset order was affirmed.

The Court of Appeals found error, however, in the trial court's determination of the offset applicable to plaintiffs' *future* economic damages award. The child's future economic damages consisted of lost future income and "expenses associated with a life care plan". *Id*. at *8. At trial, plaintiffs' expert economist valued the life care plan at $4.3 million for in-home care and $8.2 million for in-facility care (present values). The jury award totaled $8 million for future economic damages. In evaluating this award post-trial, the trial court concluded that the amount calculated by the jury "correspond[ed] to the categories of future care recommended by Plaintiff's expert", and offset the entire $8 million award. *Id*. On appeal, the Eighth District Court found that the trial court "erred because it could not have concluded to a reasonable degree of certainty" that the award "comprised only the life care plan" and that the trial court "failed to consider the possibility that at least some of the $8 Million award consisted of future lost wages." As the Court explained:

> [T]to accept the court's finding that the award consisted entirely of future medical care forces the conclusion that the jury ignored uncontradicted evidence concerning the child's lost future income and decided to award nothing for that loss. While that could have been a possible outcome, it is just as likely that the $8 million award consisted of an amount for the life care plan and lost future income. The two life care plans presented to the jury valued at-home care at $4.3 million and facility care at $8.2 million. While counsel for Stewart asked the jury to award $8 million for the life care plan, the jury may have assigned a middle value to the life care plan consistent with testimony by one of the child's experts who testified that the child would not necessarily have to enter facility care immediately, but was of the firm opinion that the child would have to enter facility care at some future point in time. That the possibility exists that the jury could have determined the amount of damages in that fashion takes the court's finding out of the realm of what is reasonably certain for purposes of offset.

Id. at *9. Determining, based upon uncontested evidence presented at trial by the child's expert economist, that the minimum amount of the future economic damages award that could have comprised future lost income was $1.7 million, the Court exempted that sum from the offset. The offset was therefore applied to the balance of the $8 million economic damages award ($6.3 million) as compensation for the life care plan. *Id*. at *10-11.

Plaintiff further argued that the trial court committed error "by offsetting the damage

award based on the child's present and future access to Social Security and Medicaid benefits." It was apparently undisputed below that the child would become eligible for benefits at age 20, after which his medical expenses would be satisfied by Medicare, thereby qualifying plaintiff for an offset for all expenses after attaining the age of 20. Appellant argued that the child's ability to realize and receive these benefits was uncertain due to the potential "that Medicare could cease to exist in the future." The Court of Appeals rejected this argument, finding that accepting it would "effectively nullify the statute" providing for offsets, and could eviscerate the concept of offsets based on government funds because the funding program(s) could conceivably end at some unseen date in the future. *See Id*. at *11-12.

Constitutional challenges. Appellants also mounted several constitutional challenges to the application of the offsets and damages caps, including on grounds of due process, equal protection, the right to a jury trial, and separation of powers. Noting first that similar *facial* challenges had previously been denied in *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205, the Court then rejected each challenge on an "as-applied" basis in this case. *Id*. at *13-18. As constitutional analyses go, the discussion of these challenges is rather brief but worth reviewing for attorneys defending similar challenges to offsets and damages caps under state medical liability acts.

Informed consent claim. Finally, the Court rejected several cross-assignments of error by MetroHealth, including one which questioned whether an unborn child is owed a duty of informed consent. Before trial, MetroHealth had filed a motion for partial summary judgment against the child's informed consent cause of action, taking the position that Ohio does not recognize an independent cause of action for informed consent by an unborn fetus arising from information provided or withheld from its mother prior to delivery. The trial court denied the motion and found that "an unborn minor has a claim for lack of informed consent when a physician fails to obtain informed consent from the minor's mother." *Id*. at *19.

After reviewing prior cases and finding "no binding authority directly on point", the Court engaged in an analysis of the viability of an unborn child and reviewed related case law from other jurisdictions. *See Id*. at *20-22. Ultimately disagreeing with MetroHealth's assertion that recognizing the cause of action would improperly conflate a claim of medical negligence with a claim of informed consent, the Court reasoned:

> [T]here are two givens under Ohio law: unborn, viable children have the legal right to seek redress for injuries caused *in utero* and there is an independent tort claim based on the lack of informed consent. These givens lead to the question of whether an unborn, viable child can bring an independent claim for lack of informed consent when the child's mother grants consent *on behalf*

> *of the child* based on information provided to her. We answer that question in the affirmative because if the cause of action exists for a child, it must exist both prenatally and postnatally. And if an unborn, viable child has the general right to seek redress for injuries suffered *in utero,* the cause of action for lack of informed consent must also be available to him.

Id. at *23. The Court likened an unborn child's claim for informed consent to the right of a young child to informed consent. In either situation, reasoned the Court, whether within or outside of the womb, the consent would actually be given (or withheld) by the child's parent or guardian, but the harm caused would be to the child. Thus, the Court held that the trial court did not err in permitting the jury to consider the informed consent cause of action brought by the child. *Id*. at *23-24.

Given the ever-evolving struggles of courts and parties to wrestle with collateral source issues in medical negligence cases, *Jones v. MetroHealth* would be a worthwhile read for medical defense practitioners even if that were the only issue addressed. The additional presence of other timely issues such as damages caps and the rights of unborn children only add to the interest value of the decision.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

SEPTEMBER 2016
Illinois Appellate Court Addresses Issues Regarding Apparent Agency, Consent Forms, and a Non-English Speaking Patient
Mark D. Hansen and J. Matthew Thompson

AUGUST 2016
The Supreme Court Weighs in on Implied Certification Theory of FCA Liability
Jane Duke

JUNE 2016
Electronic Health Records: The Future of Standard of Care?
Doug Vaughn and Autumn Breeden

MAY 2016
Illinois Supreme Court Limits Claims of Privilege in Negligent Credentialing Cases
Mark D. Hansen and J. Matthew Thompson

MARCH 2016
Catching Up On Medical Malpractice Opinions
From 2015 – Part II
Erik W. Legg

JANUARY 2016
Catching Up on Medical Malpractice Opinions from 2015
Erik W. Legg

DECEMBER 2015
Ignoring Your State's Contemporaneous Objection Rule Can Put Your Hard-Earned Defense Verdict at Unnecessary Risk
Stuart P. Miller and Benjamin D. Jackson

NOVEMBER 2015
Ohio Takes a Closer Look at Foreseeability
Erik W. Legg

OCTOBER 2015
A Comparison of the Prescription Drug Monitoring Programs (PDMPs) For Three States with a High Public Health Burden of Prescription Drug Abuse: West Virginia, Ohio and Kentucky
Tamela J. White and Samantha Thomas-Bush

SEPTEMBER 2015
Kentucky Supreme Court Allows a Foot in the Door on Ex Parte Treating Physician Communications by Defense Counsel
Catherine Corless and Chad O. Propst