HEALTH AND HOSPITAL

A New Approach to Capping Non-economic Malpractice Damages

By James G. Fouassier

We haven't been hearing much lately about "tort reform" as a panacea for soaring healthcare costs. Maybe it's because decision-makers realize that malpractice awards for non-economic loss do not constitute even two percent of total health expenditures in the US. Maybe it's because the issue is losing its political "legs." Just when things seem to be quieting down however, comes what appears to be a novel development, which may portend a resurrection of the issue.

Years ago Missouri enacted RS 538.201, a statute that limited the amount that could be awarded for non-economic loss in negligence actions to $350,000. The statute had survived a significant constitutional challenge (*Adams v. Children's Mercy Hospital,* 832 S.W.2d 898 (Supreme Court of Missouri, *en banc*, 1992) and apparently was being routinely applied by Missouri courts.

In 2007, a suit for common law malpractice was instituted against a hospital and several physicians arising out of a caesarian delivery and allegations of catastrophic brain injury. A jury returned a verdict of $1.45 million in non-economic damages, which the trial court reduced in accordance with 538.210. The plaintiffs, on appeal, asserted that the cap violated the constitutionally protected right to trial by jury, and argued that the precedent of the *Adams* case be expressly overruled.

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The Missouri Supreme Court did just that, finding that the statute was unconstitutional because it impaired some of the rights "heretofore enjoyed" under the common law at the time the state's constitution was adopted in 1820. (*Watts v. Lester E. Cox Medical Centers, et al*; 376 S.W.3d 633; 2012 Mo. LEXIS 155 [July 31, 2012; *mod. Court's own motion*, Sept 25, 2012]). At common law there were no caps on damage awards. Yes, courts could exercise some control over jury verdicts, judicial remittitur being a prime example (notwithstanding inconsistent precedent under the common law; some cases held remittitur to be an improper destruction of the integrity of the jury verdict system). But its use should be case specific, in the rare instances where passion, prejudice or illegality warranted that a verdict be set aside. The court also found that the Constitution's requirement that jury verdicts be held "inviolate" meant that a party is entitled to the full benefit of that right; i.e. all benefits that flow from the jury's role as the trier of fact. This includes the unfettered right to assess damages. "Section 538.210 imposes a cap on the jury's award of non-economic damages that operates wholly independent of the facts of the case. As such, section 538.210 directly curtails the jury's determination of damages and, as a result, necessarily infringes on the right to trial by jury *when applied to a cause of action to which the right to jury trial attaches at common law*." I emphasize that last phrase because that is the lynch pin upon which the "novel" development now taken by the Missouri legislature turns — more on this in a minute.

Since the *Adams* case could not be reconciled with this holding the court expressly overruled it. Besides the obvious rationale that overturning precedent is important when the precedent violates a constitutional right, the court also held that "the passage of time and the experience of enforcing purportedly incorrect precedent may demonstrate a compelling case for changing course." This invited a retort in a footnote in the dissenting opinion that "just this year, this Court upheld section 538.210 with regard to *statutorily* created causes of action" (emphasis in opinion).

While this might be brushed off merely as causal observation by the minority, I submit that when read together with the phrase I highlighted above regarding common law causes of action a different legislative approach is suggested ... and apparently acted upon. Just this past May 7 the governor of Missouri signed into law a bill that implements new non-economic damage limits in lawsuits involving medical negligence. What is different this time around is that, rather than fixing a cap on jury awards arising out of existing common law negligence actions, the law creates a *statutory* cause of action for "medical negligence." "By specifying in this year's legislation that medical malpractice cases are a statutory and not a common law cause of action, lawmakers said they believe the new caps will be backed by the courts." (*St Louis Post-Dispatch*, May 8, 2015).

The introduction to the "new" section 538.210 reads as follows:

> Black letter law applied everywhere is to the effect that a statute that is in derogation of the common law must be strictly construed. We'll see how the application of this rule of construction either facilitates or retards the professed purpose of this law, and presumably of others like it that may be adopted elsewhere.

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REAL ESTATE

Court of Appeals Simplifies Standing in Foreclosure Actions

By Andrew Lieb

From the start of the Great Recession standing has long been the battleground in the vast majority of residential foreclosure actions. In *Aurora Loan Services v. Taylor,* the Court of Appeals declared the battle to be mostly over, at least, with respect to the *Bank of New York v. Silverberg* progeny from which defendants' counsel had continuously argued, in reliance on what we now know to be the dicta of *Silverberg,* that the separation of the note and mortgage by involvement of Mortgage Electronic Recording Systems, Inc. (MERS), as nominee, precluded a valid subsequent assignment of the mortgage from MERS to the plaintiff, and therefore undercut plaintiff's standing to sue in many foreclosure actions.

In *Taylor,* the court affirmed the Second Department's Order, which, in turn, affirmed the Supreme Court's, Westchester County, Order, under Index Number 13735/2010, granting summary judgment to the plaintiff by holding that the plaintiff had standing to commence the mortgage foreclosure action. In affirming, the Court of Appeals unambiguously ruled that "the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law."

Andrew Lieb

As in many cases before it, the *Taylor* defendants argued that the involvement of MERS, by serving as nominee concerning the mortgage, raised issues as to the validity of the assignment by MERS to the plaintiff prior to the institution of the action. Specifically, defendants' moving papers cited to the Second Department case of *Bank of New York v. Silverberg* and argued that "MERS, as the assignor of the mortgage, did not possess a lawful and valid mortgage" in reliance on their apparent misreading of *Silverberg* to stand for the rule that no standing to sue exists where the plaintiff's assignor was MERS and MERS "was listed in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording, but was never the actual holder or assignee of the underlying notes."

The facts before the court in *Taylor* involved a note and mortgage that were separated immediately following their execution in July 2006. Initially, MERS, as nominee, was granted a mortgage lien on the subject property, but not the note, which remained delivered to the lender, First National Bank of Arizona. Subsequent thereto the note's chain of ownership went from "First National Bank of Arizona, to First national Bank of Nevada, to Residential Funding Company, LLC, to Deutsche" and then to Aurora, in the last instance, by physical delivery. Contemporaneous to the transfer of the note, the mortgage was assigned by MERS to the loan servicer, Aurora. Consequently, Aurora held both the note and mortgage at the time that the foreclosure action was commenced, but arrived to Aurora through different paths. In such, the MERS assignment created false hope for the defendants, who apparently thought that the same precluded the plaintiff's standing to sue.

In ruling, the Court of Appeals explained that it was irrelevant if MERS had the authority to transfer the mortgage. In opposite to the Second Department's dissenting decision in *Taylor*, the court further explained that it was irrelevant that the plaintiff's affidavit of physical delivery "did not give any factual details of a physical delivery of the note."

Now, the court leaves the bar with a closed understanding of standing to sue in foreclosures where the mortgage and note were separated. If standing is

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put into issue by a defendant, a plaintiff can dispositively prove standing by way of an affidavit swearing to physical delivery of the note so long as such affidavit sets forth the date of delivery as a date existing before the commencement of the foreclosure action. Strikingly, the status of the mortgage is irrelevant as its transfer occurs as an indispensable incident to the note and nothing more. As stated succinctly by the Second Department, when this case was initially heard before having been taken up by the Court of Appeals, "since the exact delivery date was provided [in the plaintiff's affidavit], there is no further detail necessary for the plaintiff to establish standing."

The Court of Appeals did leave one door open following *Taylor* by notating, in dicta, therein, that producing the "original note" with a plaintiff's affidavit "to clarify the situation completely" as to "how it came into possession" would be "the better practice" rather than a plaintiff just utilizing an affidavit swearing to the physical delivery of the note prior to the institution of the foreclosure action. Nonetheless, in the case at bar, said the Court of Appeals, defendants never "requested such production in discovery or moved Supreme Court to compel such production" so it was not incumbent on the plaintiff to satisfy best practice and the plaintiff did not need to produce the original note and the history of the chain of its title. As a takeaway, the plaintiff's bar should always strive for best practice and include the original note and the facts establishing the precise means by which a plaintiff came into possession of the note. In contrast, the defense bar should always make the requisite discovery demands prior to moving for summary judgment on the issue of want of standing. Too often practitioners jump the gun when they feel that they have a good theory of the case. As the Court of Appeals indicated, in the *Taylor* dicta, fleshing out all factual issues prior to applying for relief from the court is best practice.

Another reading of this case explains that *Bank of New York v. Silverberg* was not decided based upon the defendant's creative argument that the "mortgages and notes were bifurcated, rendering the mortgages unenforceable and foreclosure impossible," but instead, on a simpler understanding, that the "agreement gave MERS the right to assign the mortgages themselves, [but] it did not specifically give MERS the right to assign the underlying notes, and the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender." Stated otherwise, *Silverberg* appears to have created confusion through its dicta, but in line with *Taylor, Silverberg* now clearly stood simply for the concept that a foreclosing plaintiff's standing is solely dependent on it proving, through competent evidence, that it possessed the note prior to the commencement of the foreclosure action.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as a Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.

Uniform Bar Exam (Continued from page 20)

ing of many firms during the recession have made the job market ultra-competitive. This in part, has resulted in fewer applications to law schools. New York is now adding potentially, tens of thousands of potential new job seekers for the same positions with the implementation of the UBE. This could be an unsustainable addition to an overcrowded employment field. If law schools are forced to close, graduates of those schools, especially recent graduates, will have an even more difficult time finding employment. It will devalue their law school degree, as the institution will cease to exist, increase unemployment as many graduates are hired by their alma mater, and even lower pay for younger attorneys.

The Law School Admissions Council, in a report released in March of this year, states the number of individuals applying for law school admission is down almost 5 percent, while new applications are down almost 7 percent nationwide. A law school is only as valuable as the tuition paying students that inhabit it. This not only devalues future New York law school degrees, but potentially, can negatively affect graduates as well, especially if their alma mater has to close its doors. New York State moving to the Uniform Bar Exam may have just made New York law schools uninhabitable.

Note: George Pammer is a 3L at Touro Law School. He is a part-time evening student and the President of the Student Bar Association. He has also held the position of Vice-President in the SBA as well as in the Suffolk County Bar Association – Student Committee.

[i] All tuition statistics are from the 2014-2015 school year courtesy of The Last Gen X American's "host site," The Law School Tuition Bubble (LSTB) https://lawschooltuitionbubble.wordpress.com/about/

Mind Your Own (Business) Records (Continued from page 20)

Q: Other than speaking with these two folks, you did no other separate investigation, correct?
A: That's correct.
Q: And Mrs. Doe, whose counsel called you today, does she work for the police department to your knowledge?
A: No, not that I know of."

You've now shown that the maker of the record (the officer) was not a witness and therefore his knowledge was derivative; and that the person who told the officer their version of events was under no business duty to do so. Under the prevailing Court of Appeals case law[iii], and the rules of evidence, the report should not be admitted because it is not only the entrant of the record who must be under a business duty to do make the record (as is unquestionably the role of a responding officer) but the person giving the information must be under a reciprocal duty to report the occurrence as well.[iv] It is beyond cavil that Mrs. Doe was under no business duty to report anything to the police.

You should also be able to keep out the statements in the police report if offered as admissions on Mrs. Doe's direct case, as bolstering and self-serving (and thus can only be attempted to be offered to rebut a claim of recent fabrication). But there is no prohibition to using these (if they contain or omit key facts) as fodder for cross-examination since they are a) party admissions and b) (possibly) prior inconsistent statements.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

[1] *Gagliano v Vaccaro*, 97 AD2d 430, 431 [2d Dept 1983]
[2] *Lodato v. Greyhawk North America LLC,* 39 AD3d 494 [2d Dept. 2007]
[3] *Johnson v. Lutz*, 253 NY 124, 128; *Toll v. State of New York*, 32 AD2d 47, 50
[4] Prince, Richardson, Evidence [10th Ed. Section 299]

Pro Bono (Continued from page 19)

bono representation in divorce actions. Ms. Krakow spoke about the dire need for new pro bono volunteers to assist the Project's matrimonial clients, for whom the Project is their only hope for an attorney. She described the support and resources the Pro Bono Project can provide its attorney-volunteers, such as providing sample pro bono retainer agreements, legal research assistance, mentoring assistance, and free professional liability insurance. The Suffolk Academy of Law generously waived the event's tuition fee for the program's attendees, who had agreed to accept a divorce referral from the Pro Bono Project within the next six months.

Ms. Krakow, who assisted Professor Silverman in planning the program, was very pleased with how it came together. Said, Ms. Krakow, "Our aim was to provide a solid nuts-and-bolts program from which new matrimonial attorneys could walk away feeling like they had the essential information and materials needed to take on their first divorce matter." She added, "Based on the very positive feedback I received from several attorneys who attended, I think we succeeded."

According to Ms. Krakow, Professor Silverman's involvement in the planning and organizing of the event was critical to its success. "This program really was Professor's Silverman creation, from the early planning stages through its presentation," said Ms. Krakow. "It was the time he dedicated to its planning, his expertise and his terrific enthusiasm for teaching that made offering this kind of comprehensive and effective program possible."

The program was recorded and is available on-line at the SCBA website. Attorneys interested in learning more about the Pro Bono Project's referral process are encouraged to contact Ellen Krakow at Nassau/Suffolk Law Services at (631) 232-2400.

Note: Ellen Krakow is a staff attorney at Nassau Suffolk Law Services. She began her legal career in 1989 in California, practicing commercial litigation and appellate law for many years. In 2005, Ellen joined Nassau Suffolk Law Services and for several years represented individuals with disabilities in matters concerning public benefits, access to medical and support services, special education, housing and child support. In 2013, she became the Suffolk Pro Bono Project Coordinator and now oversees the screening of the Project's potential clients, refers financially eligible clients to appropriate private counsel, and recruits new attorneys for pro bono service.