



Issued by the Medical Liability Practice Group

November 8, 2006

## Patient's Comparative Fault Nixes Medical Liability Claims

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In this recent Michigan Court of Appeals decision, the court reversed and remanded a trial court's decision to grant the plaintiff's motion for judgment notwithstanding the verdict (JNOV) and also the trial court's decision to strike the jury's finding that the plaintiff was 70 percent comparatively at fault for his injuries. Because there was conflicting testimony between the plaintiff and defendant, the appellate court reasoned that a "jury is charged with weighing the credibility of witnesses and may reject or accept all or a portion of a witness's testimony." *Kelly v. Builders Square, Inc.*, 465 Mich 29; 632 NW2d 912 (2001). Therefore, it was not improper for the jury to believe the defendant doctor's testimony, based upon the evidence provided.

On Jan. 2, 2001, the plaintiff went to his family practice physician, the defendant, with complaints of pain and swelling in his left calf. The defendant diagnosed the symptoms as being deep vein thrombosis (DVT) and advised the plaintiff that he would require hospital treatment and told him to go to the Emergency Room (ER) and have an ultrasound. The plaintiff refused because his dental practice was very busy after the holiday break. The defendant agreed to treat the plaintiff's condition as a "superficial blood clot" advising the plaintiff to return for follow-up every two to three days and go to the ER immediately if the condition worsened.

The plaintiff saw the defendant again on Jan. 5 and Jan. 11 and reported that the pain and swelling improved when he rested and elevated his leg. Eleven days later, the plaintiff reported that the swelling was worse and an ultrasound performed on Jan. 24 revealed a DVT that was spreading into the upper thigh. The plaintiff received hospital treatment in January and March, but because of the delay in treatment, he now suffers from post-phlebotic syndrome.

The plaintiff filed suit against several defendants claiming that the defendant violated the standard of care by not ordering the ultrasound or recommending hospitalization on Jan. 2, 2001. The jury found that the defendant was negligent, but apportioned fault by finding that the plaintiff was 70 percent responsible for his injuries. The plaintiff moved for JNOV, arguing that there was insufficient evidence to support the jury's finding and the trial court agreed. The trial court reasoned that the delay in diagnosis contributed to the severity of the injury, but there was no evidence that the

plaintiff's refusal to go to the ER on Jan. 2, contributed to his injury.

The Michigan Court of Appeals reversed the trial court's order and remanded the case back for consideration consistent with the holding in *Shinholster v Annapolis Hosp* 471 Mich 540; NW2d 275 (2004) and MCL 600.6304(1)(b), which provides that a jury must determine the percentage of the total fault of all persons who contributed to the plaintiff's injuries, including the plaintiff. The doctrine of comparative negligence is predicated on the assumption that an adult plaintiff has a duty to exercise reasonable care for his own safety and protection. *Laier v Kitchen*, 266 Mich App 482, 496; 702 NW2d 199 (2005).

For a complete copy of the Michigan Court of Appeals decision on *Gerald Yax, DDS vs. Dr. Gary Knapp, et al.* (No. 260007, rel'd. 09/19/06) Unpublished, [click here](#).

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