



May 2, 2016

**A MEDICAL MALPRACTICE DEFENDANT CAN USE PLAINTIFF'S EXPERT AGAINST A SETTLING CO-DEFENDANT TO PROVE NEGLIGENCE AND ALLOCATE FAULT TO THE SETTLING DEFENDANT**

In the unpublished decision of Gatesy v. Perotte, the New Jersey Appellate Division clarified the requirements on the non-settling defendant to establish fault of a settling defendant at the time of trial and have the jury allocate damages to the settling co-defendant. The Court ruled that a non-settling defendant can establish a settling defendant's liability through cross examination of the plaintiff's own expert who practices in the same specialty as the settling defendant, even if the plaintiff only offers such expert's testimony at the time of trial to establish causation and not negligence.

In this action, the plaintiff sustained a neck fracture and was evaluated by Dr. Perotte, an emergency room physician. Dr. Pan, a neurosurgeon, was contacted and asked to evaluate the patient. Plaintiff alleged that emergent surgery was delayed causing catastrophic injury.

Dr. Perotte asserted his intention to seek allocation of fault and damages to any settling co-defendants under Young v. Latta, 123 N.J. 584 (1991) in his Answer. He did not produce an expert report or adopt plaintiff's report against the co-defendant neurosurgeon. However, during the de bene esse deposition, Dr. Perotte's counsel cross examined the plaintiff's neurosurgeon expert on his opinions regarding the neurosurgery defendant Dr. Pan's deviations from standards of care. The expert neurosurgeon expressed those opinions in his written report. The plaintiff settled with the defendant neurosurgeon at trial and moved to bar Dr. Perotte from using the video cross examination of the plaintiff's expert in which he testified that Dr. Pan deviated from standards of care. The trial court disagreed and allowed the jury to consider that testimony.

The Appellate Division affirmed and held that as long as the non-settling defendant puts the plaintiff on notice that he would be seeking to prove negligence of settling co-defendants, such defendant need not specifically adopt any other party's expert against such settling defendant to prove the settling co-defendant's negligence. If the plaintiff calls his own expert against the settling co-defendant to provide trial testimony, even if his direct trial testimony focuses only on causation, the non-settling defendant may cross examine the plaintiff's expert on his opinions against settling defendants that were expressed in this expert's written report.

Comments

This case affirms the principle that a crossclaim under Young v. Latta will satisfy the notice requirements that a non-settling defendant will seek a jury allocation for the settling defendant's liability. In cases where plaintiffs do not call expert witnesses that criticize settling codefendants, the non-settling defendant will still need to retain and present expert testimony critical of the settling party.

For more information on this matter or related issues, please contact Peter A. Marra, Esq., [ptm@spsk.com](mailto:ptm@spsk.com) a partner in the SPSK Health Care Law practice group for further discussion.

Peter A. Marra, Esq.  
William J. Buckley, Esq.  
James B. Sharp, Esq.

Olga Kats-Chalfant, Esq.  
Julie E. Gendel, Esq.

Scott A. Leaman, Esq.  
Benjamin A. Hooper, Esq.

**DISCLAIMER:** This Client Alert is designed to keep you aware of recent developments in the law. It is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of the client.

<b>FLORHAM PARK</b> 220 Park Avenue PO Box 991 Florham Park, NJ 07932 Tel: 973-539-1000 <a href="http://www.spsk.com">www.spsk.com</a>	<b>PARAMUS</b> Country Club Plaza 115 West Century Road Suite 100 Paramus, NJ 07652 Tel: 201-262-1600	<b>SPARTA</b> 351 Sparta Avenue Sparta, NJ 07871 Tel: 973-295-3670	<b>NEW YORK</b> 116 West 23 <sup>rd</sup> Street Suite 500 New York, NY 10011 Tel: 212-386-7628
---	---	---	---