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Pre-Presentment Negligence in Arkansas Law

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"Pre-presentment negligence" is generally defined as a plaintiff's negligence that caused the condition a defendant undertook to treat. *See* Restatement Torts, 3d, Apportionment of Liability, § 7, comment m, p. 83. It most often arises in a medical malpractice context, but theoretically could arise in other tort cases as well. No Arkansas appellate court has spoken directly on the issue of pre-presentment negligence.

Pre-presentment evidence became a significant underlying issue in a recent case out of Sebastian County, *Sengdetka v. Al-Refai*, *et al*, Sebastian Co. Circuit, No. CV-2012-1570 (VI). The case at one time included over sixty (60) defendants including a hospital, more than a dozen physicians, clinics, nurses, physician assistants and numerous corporate entities related to these providers. Some of AADC's most seasoned med mal attorneys characterized it as the largest med mal case they had ever witnessed in their careers. The case settled in December, 2015, approximately 3 weeks before trial was to begin.

Sengdetka involved a 19-year-old plaintiff who had been in a motor vehicle accident that caused serious vascular and orthopedic injuries, eventually resulting in bilateral, above-knee amputations. The plaintiff admitted she had been drinking prior to the accident and further admitted to driving while tired and sleepy. It was undisputed she had crossed the centerline and caused the accident. The defendants filed several unsuccessful joint motions *in limine* asking the circuit court to allow evidence of the plaintiff's own negligence in causing her motor vehicle accident and her subsequent injuries. The plaintiff, relying on cases from other states, argued that her own pre-presentment negligence should not be admitted because the plaintiff's negligence only caused the occasion for the defendants' negligent medical treatment and therefore should not be compared to the defendants' negligence. Despite the fact

that several defense experts provided deposition testimony that there was a reasonable probability that some of the injuries (primarily her orthopedic injuries) would have occurred regardless of any medical negligence by the defendants, the circuit court denied the defendants' motions *in limine*.

A plaintiff's pre-presentment negligence in a medical malpractice case could – and certainly should in the opinion of many defense lawyers – be compared to that of the health care provider under Arkansas' comparative fault statute. (Ark. Code Ann. § 16-64-122). Alternatively, pre-present negligence might also be deemed the basis for a concurrent or intervening proximate cause affirmative defense to permit the fact finder to determine whether the plaintiff's own negligence was a proximate cause of her injuries. Arkansas' comparative fault statute provides that "[i]n *all* actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability *shall be* determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages." Ark. Code Ann. § 16-64-122(a) (emphasis added). The statute goes on to define "fault" as "*any act*, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is *a proximate cause of any damages* sustained by any party." Ark. Code Ann. § 16-64-122 (c) (emphasis added). Proximate causation, as we know, is ordinarily a question for the trier of fact. *See C & L Trucking, Inc. v. Allen*, 285 Ark. 243, 247, 686 S.W.2d 399, 401 (1985).

Despite this seemingly mandatory comparative-fault language in the statute, the plaintiff in *Sengdetka* essentially argued for a med-mal exception to the statute, effectively barring evidence of a plaintiff's pre-presentment negligence in the context of a medical malpractice case. While pre-presentment negligence has never been addressed directly in Arkansas caselaw *per se*, some decisions may provide guidance.

In *Gartman v. Ford Motor Co.*, the driver and the estate of a passenger involved in a motor accident brought a products liability action against the manufacturer of the vehicle seeking recovery under the "crashworthiness" doctrine for injuries they suffered as a result of the accident. 2013 Ark. App. 665, 430 S.W.3d 218 (2013). "The crashworthiness doctrine recognizes that a manufacturer may be held liable for an enhanced or greater injury that occurs following an initial accident, which was brought about by some independent cause." *Id.* at 3, 430 S.W.3d at 220. The plaintiffs argued they did not suffer life-threatening injuries in the initial crash, but that several minutes following the accident the vehicle caught fire, resulting in serious injuries to the driver and the death of the passenger. *Id*. at 2, 430 S.W.3d at 220. Over the plaintiffs' objection, the circuit court allowed evidence of the driver's alcohol consumption before driving and his blood-alcohol content at the time of the accident. *Id*. In

affirming the circuit court's ruling, the Arkansas Court of Appeals held that the broad language of Ark. Code Ann. § 16-64-122 provided that the driver's own negligence in drinking and driving prior to the vehicle catching fire should be compared to the manufacturer's negligence. *Id*. at 3, 430 S.W.3d at 221.

The court in *Gartman* also based its holding on its previous decision in *Bishop v. Tariq, Inc.*, 2011 Ark. App. 445, 384 S.W.3d 659 (2011). In *Bishop*, the widow of a man who drowned in a hotel pool brought a negligence action against the hotel. *Id*. At the close of the trial, the circuit court instructed the jury on comparative fault and the jury returned a verdict in favor of the hotel. *Id*. at 6, 384 S.W.3d at 663. On appeal, the plaintiff argued that under the "enhanced injury" or "crashworthiness" doctrine, a plaintiff's own negligence should not be compared to that of the defendant. *Id*. at 6-7, 384 S.W.3d at 663. However, the Arkansas Court of Appeals found the plaintiff's argument unpersuasive and held the "broad language chosen by our legislature [in Ark. Code Ann. § 16-64-122]," provides comparative fault is "applicable to *all* actions for personal injury or wrongful death." *Id*. at 8, 384 S.W.3d at 664.

In response to the defendants' multiple motions *in limine* on this issue in *Sengdetka*, the plaintiff cited to multiple cases from various other states, holding that a plaintiff's pre-presentment negligence is not to be introduced or compared to the defendant's negligence in a medical malpractice case. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121 (Tenn. 2004) (holding that a plaintiff's pre-presentment negligence that only created the occasion for the health care provider's subsequent negligent treatment may not be compared to the health care provider's negligence); *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459, N.W.2d 178 (1990) (although available in a medical malpractice case where supporting evidence exists, contributory negligence is not an affirmative defense where plaintiff's pre-presentment negligence in not a proximate cause of the plaintiff's injuries and only creates the occasion for the physician's subsequent negligent treatment); *Matthews v. Williford*, 318 So. 2d 480 (Fla. Dist. Ct. App. 1975) (It is "well settled that a remote condition or conduct which furnishes only the occasion for someone else's supervening negligence is not a proximate cause of the result of the subsequent negligence").

Mercer v. Vanderbilt Univ., Inc., held that fault may not be assessed against a patient in a medical malpractice action in which a patient's negligent conduct provides *only the occasion* for the medical attention. 134 S.W.3d 121, 125 (Tenn. 2004). However, as the defendants in *Sengdetka* pointed out, Tennessee, at the time of the *Mercer* case, lacked a comparative fault statute as broad as Arkansas'. Additionally, the *Mercer* case, even in the absence of an Arkansas-type comparative fault statute, should not prevent evidence of the plaintiff's pre-presentment negligence where such

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negligence was not just the "occasion" for the medical treatment, but was also a proximate cause of the injuries for which the plaintiff seeks recovery. This was the defendants' position in *Sengdetka* where several defense experts provided deposition testimony to support the reasonable probability that the injuries for which the plaintiff sought recovery would have occurred regardless of any medical negligence by the defendants. The *Sengdetka* defendants argued strenuously that Arkansas' broad comparative fault statute, applying to *all* actions for personal injury and wrongful death, should be applied to hold that a plaintiff's pre-presentment negligence should be compared to the defendant's negligence.

The enhanced injury or crashworthiness doctrine, to which the Arkansas Court of Appeals has at least twice held the comparative fault statute applies, is similar to pre-presentment negligence in a medical malpractice context. In both instances a plaintiff's own negligence often occurs immediately[1] prior to the defendant's alleged negligence. Despite the fact that the defendant's negligence occurred after that of the plaintiff, and may have enhanced the plaintiff's injuries, the Arkansas Court of Appeals has held that the comparative fault statute required the plaintiff's own negligence be compared to the defendant's under the facts of *Gartman* and *Bishop*. The court noted in *Gartman*, "Arkansas follows the majority view that a plaintiffs fault *is* relevant in a crashworthiness case for the purpose of apportioning the overall responsibility for damages." 2013 Ark. App. at 3, 430 S.W.3d at 220. Arkansas may be in the minority of jurisdictions for pre-presentment evidence in med mal cases, but is in the majority of jurisdictions for such evidence in crashworthiness cases.

Furthermore, the Eighth Circuit, applying Arkansas law, rejected the notion that comparative fault should somehow be limited in a professional negligence case. *See Reliance Nat. Indem. Co. v. Jennings*, 189 F.3d 689 (8th Cir. 1999). There, the plaintiff argued that a client's negligence should only be submitted to the jury in a legal malpractice action when the client has taken some specific action to interfere with the attorney's performance. *Id*. at 693-94. However, the Eighth Circuit opined that Arkansas' comparative fault law "is capable of recognizing and distributing fault between parties whose misconduct contributed to an actionable loss." *Id.* at 694 (quoting *F.D.I.C. v. Deloitte & Touche*, 834 F. Supp. 1129, 1146 (E.D. Ark. 1992)). "Clients who hire professionals should conduct their own affairs reasonably, and comparative fault considers the duties of all parties and can lead to 'an even-handed apportionment of liability for harm' in professional malpractice cases." *Id*. The *Reliance*

[1] Plaintiffs will often raise the specter of the pre-presentment negligence doctrine carried to its ultimate extreme (i.e. a plaintiff's obesity, addiction or other long-standing history of bad habits will be treated as evidence of comparative negligence.) Cases from other jurisdictions have consistently ruled against this expansion of the pre-presentment doctrine and have suggested the alleged pre-presentment negligence cannot be too remote in time to the defendant's alleged negligence.

Nat. Indem. Co. case suggests there is no reason to believe an Arkansas appeals court would limit the applicability of Arkansas' comparative fault statute in any professional negligence context, including medical negligence.

Two Arkansas Court of Appeals cases, an 8th Circuit case and the plain language of Ark. Code Ann. § 16-64-122 seem to indicate that a plaintiff's pre-presentment negligence should be compared to the medical care provider's negligence, even if the plaintiff contends the defendant's negligence enhanced the plaintiff's injuries. While it may be true a majority of jurisdictions bar pre-presentment evidence, especially in med mal cases, Arkansas defense practitioners should not assume so inasmuch as our appellate courts have not spoken definitively on the issue. The Arkansas comparative negligence statute is broader than some jurisdictions and, moreover, as a result of the Civil Justice Reform Act of 2003, the law with respect to multiple tortfeasors was fortified to say fact finders "shall consider the fault of *all persons or entities* who contributed to the alleged injury . . . ." Ark. Code Ann §16-55-202(a) (Repl. 2005) (emphasis added). Finally, the practitioner should also remember a plaintiff's actions, whether negligent or not, may provide the factual basis for a jury instruction on concurring or, less commonly, intervening cause.

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