**INCREASED EXPOSURE FOR NON-SETTLING TORTFEASORS FOLLOWING NEW JERSEY APPELLATE DIVISION’S DECISION IN KRANZ V. SCHUSS**

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A basic principle in tort litigation is that a personal injury plaintiff should not be entitled to a double recovery for the same injury. This equitable rule stems from the notion that while the damaged party should be made whole for the harm suffered, he is not entitled to a windfall.

This premise was recently disregarded in the New Jersey Appellate Division decision *Kranz v. Schuss*, wherein the court held that a defendant pediatrician was not entitled to a $2 million credit for a settlement obtained by the same plaintiff, for the same injury, in a prior lawsuit. The case has now been remanded back to the trial court. Therefore, if the jury later returns a verdict against the defendant pediatrician at trial, the plaintiff may be entitled to full recovery for her injury, plus a windfall for the prior settlement.

The factual background of *Kranz v. Schuss* involves two separate lawsuits brought by Mr. and Mrs. Kranz for an alleged failure to diagnose and treat a hip dysplasia in their daughter. In December 2005, the parents moved from New York to New Jersey and transferred their two-year old infant-plaintiff’s care to the defendant pediatrician, Dr. Schuss. At a check-up in January 2006, Dr. Schuss suspected that the child suffered from a hip dysplasia. His diagnosis was confirmed, and she subsequently underwent two corrective surgeries.

In July 2007, the first medical professional liability action was commenced in New York State Supreme Court (Queens County) against the infant-plaintiff’s three New York pediatricians and the hospital where the child was born. Martin Clearwater & Bell LLP successfully obtained a discontinuance of the claims against our client hospital. In April 2011, the co-defendant New York pediatricians each contributed to a $2 million structured settlement.

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Not satisfied with the monetary recovery, in March 2012, plaintiffs retained another law firm and commenced a second lawsuit, this time against Dr. Schuss, the New Jersey pediatrician who correctly diagnosed the hip dysplasia. After discovery concluded in December 2013, Dr. Schuss filed a motion...
seeking a “set-off” of $2 million against any judgment returned in favor of the plaintiffs. The defense logically argued that plaintiffs should not be entitled to a “double recovery,” because the plaintiffs were seeking damages for “the exact same harm” as in the New York litigation.

The Kranz v. Schuss decision was a case of first impression in New Jersey. While the lower courts agreed with Dr. Schuss and relied upon principles of fairness and equity to determine that plaintiffs should not be able to recover twice for the same injury, the Appellate Division interpreted New Jersey’s apportionment statutes and reached a different conclusion. The Joint Tortfeasors Contribution Law and Comparative Negligence Act delineate “the statutory framework for allocation of fault when multiple parties are alleged to have contributed to the plaintiff’s harm.” These statutes provide a credit to tortfeasor, but only for the degree of fault allocated by the jury to the settling tortfeasor. In other words, the monetary amount of the settlement is not considered and is irrelevant. Should the settling defendant-tortfeasor pay more than his fair share of the liability, the non-settling defendant does not get an increased set-off. Therefore, the Court determined that Dr. Schuss would be entitled to a reduction of any judgment for the plaintiff based on percentage of fault attributed to the New York pediatricians. That percentage of fault would be considered and calculated by the jury based upon the evidence presented at trial.

A problematic ruling
While the courts in Kranz technically reached the correct decision based on a plain reading of the current New Jersey statutory law, the ruling is problematic for physician defendants and their professional liability insurers, as it may increase the recoverable damages for a plaintiff in certain situations. This decision may encourage plaintiff’s lawyers to litigate cases in stages, resulting in a waste of judicial resources and increased litigation cost. As an example, in a case where an injured party has sought treatment from multiple specialists, a plaintiff’s lawyer could increase his client’s potential recovery by commencing separate lawsuits suing physicians in the order of treatment, instead of litigating the cases together.

Moreover, Kranz may result in increased exposure for cases involving neurologically impaired infants, which already expose the defendant healthcare provider and his insurer to multi-million dollar awards. A typical birth injury case will allege multiple theories against various healthcare providers in different specialties, i.e., that the obstetrician failed to perform a timely Cesarean section, that the hospital’s nurses or residents failed to alert the obstetrician to changes in the fetal heart monitor tracings, and that the neonatologists’ management of the newborn infant contributed to the injury. As the New Jersey statute of limitations for cases involving a birth injury is tolled until the child’s thirteenth birthday, potential plaintiffs can bring a case for negligent obstetrical care and then bring a new action against other providers once the initial claim is resolved. When dealing with multi-million dollar awards, this increased exposure is substantial and unjust.

The Kranz court technically reached the correct decision based on New Jersey statutory law. While the current law allows a non-settling defendant to ask the jury to apportion liability against the settling defendant, this still provides a windfall in instances where the settling defendant pays more than his percentage of the total damages and where, for strategic reasons, it may not be the best defense to blame a prior treating physician for the injuries.

It may be time for the New Jersey Legislature to amend its apportionment statutes to mirror that of New York’s General Obligations Law 15-108, which provides a set-off for the percentage fault of the settling defendant or the actual amount of the settlement, whichever is greater.

References
7. N.J.S.A. 2A:14-21. If the child was born prior to June 2004, the plaintiff has until age 20 to commence suit. Id.