

No Trial Credit in NJ Appellate Decision for Non-Settling Successive Tortfeasors – Must Demonstrate Proof of Initial Tortfeasor Negligence and Proximate Cause

By: Kevin C. Cottone, Robert Wright and Monica Doss

Healthcare Alert

1.4.21

Where an initial tortfeasor settles in a successive negligence case, the non-settling tortfeasors do not get a credit at trial, says the New Jersey Appellate Division. The court held in *Glassman v. Friedel* [1], that non-settling successive tortfeasors are not entitled to a *pro tanto* credit after the initial tortfeasor settles and its negligence is undetermined. Rather, successive tortfeasors have the burden at trial to demonstrate that (1) the initial tortfeasor was negligent, and (2) the initial tortfeasor's negligence was the proximate cause of the second event.

In *Glassman*, the plaintiff, as executor of his deceased wife's estate, sued a restaurant and property owner of the site where his wife fell and fractured her ankle. Afterwards, the plaintiff added defendants including the doctors and the medical center that cared for his wife after she fractured her ankle. The plaintiff alleged that they had been negligent during his wife's surgery, which led to postoperative complications and injuries to his wife's leg, ultimately resulting in a fatal pulmonary embolism.

The plaintiff settled with the restaurant defendants for \$1.15 million, and the medical defendants filed motions seeking *pro tanto* credit against any damages that would be awarded, in accordance with the Appellate Division's decision in *Ciluffo v. Middlesex General Hospital* [2]. A *pro tanto* credit would offset any damages the non-settling tortfeasors would owe if the plaintiff was successful. Although the trial court granted the defendants' requested relief, the Appellate Division reversed.

The Appellate Division held that the application of a *pro tanto* settlement credit in a negligence case has no support in modern jurisprudence, limiting the applicability of its prior holding in *Ciluffo*. The Appellate Division recognized that a non-settling defendant could dispute its negligence and the amount of damages it proximately caused, in addition to presenting proof as to the negligence of the settling tortfeasor and the extent of the original tortfeasor's proximate causation to the subsequent "causative event." Without a *pro tanto* credit, if the settlement is less than the jury's assessment against the settling defendant, the plaintiff reaps the result of a "bad bargain," and the non-settling defendants are only responsible for the damages attributed to their negligence. If the settlement is more than the jury's assessment, the plaintiff will receive a windfall and the non-settling defendants will still only be responsible for the damages attributed to their negligence.

Further, the three-judge panel emphasized that New Jersey's Comparative Negligence Act (CNA), N.J.S.A. 2A:15-5.1, *et seq.* applies to situations involving successive tortfeasors, but not in the same way it applies to joint tortfeasors. For successive tortfeasors, the CNA requires juries to apportion damages between successive events and to apportion fault among the parties responsible for each event. At trial, a non-settling successive tortfeasor may present proof as to the negligence of the settling tortfeasor, and whether the initial tortfeasor's negligence was a proximate cause of the second "causative event." The burden of proof is on the non-settling defendant.

The Appellate Division set forth the steps to determine successive tortfeasor culpability and the apportionment of damages between an original event and a successive event. First, a jury would determine whether some or all successive tortfeasors were negligent. If more than one were found negligent and a proximate cause of the injuries, the jury would assess the comparative fault of those tortfeasors. Then, the jury would assess the total amount of damages, apportioned between those caused by the initial causative event

and the successive causative event.

Thus, rather than seek *pro tanto* credit to offset damages after an initial tortfeasor settles a case, at trial a non-settling successive tortfeasor will have the burden to demonstrate proof of the negligence of the settling tortfeasor, as well as demonstrate that the negligence was a proximate cause of the second causative event. As a result, when an initial tortfeasor settles a case, the successive tortfeasor will be liable for damages in accordance with its fault.

If you have any questions or need more information, contact Kevin C. Cottone (cottonek@whiteandwilliams.com; 215.864.7108), Bob Wright (wrihtr@whiteandwilliams.com; 212.631.4402) or Monica Doss (dossm@whiteandwilliams.com; 212.868.4831).

[1] 2020 N.J. Super. LEXIS 241 (App. Div. Dec. 3, 2020).

[2] 146 N.J. Super. 476 (App. Div. 1977).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.