Adams v. Yang: Appellate Division Clarifies Principles of Judicial Estoppel as Applied to Settling Joint Tortfeasor

December 21, 2023

By: Thomas Reilly

In a recently published decision, *Adams v. Yang*, 475 N.J. Super. 1 (2023), the Appellate Division clarified an ambiguity in New Jersey tort law regarding whether judicial estoppel bars a plaintiff from disavowing a settling defendant's negligence in cases involving joint tortfeasors.

The facts are as follows. The plaintiff's decedent entered Robert Wood Johnson University Hospital after complaining of severe stomach pain. The decedent underwent a CT scan of her abdominal region, which was later reviewed by radiologist Dr. Steven Yang. Dr. Yang's report of the scan found no abnormalities. The hospital also placed the decedent under the care of a gastroenterologist, Dr. Boucard. The decedent later was discharged, but continued to see Dr. Boucard for outpatient treatment. Dr. Boucard recommended that the decedent receive both a colonoscopy and endoscopy. The decedent underwent a colonoscopy, the results of which Dr. Boucard determined to be normal. Dr. Boucard also scheduled the decedent for an endoscopy but aborted the procedure due to testing complications. Despite the decedent's continued complaints of severe stomach pain, Dr. Boucard never attempted the procedure again.

Several years after her initial visit with Dr. Boucard, the decedent underwent a gastric biopsy at a different hospital, which revealed late-stage stomach cancer. The decedent passed away several months later. Her estate subsequently brought suit against both Dr. Yang and Dr. Boucard.

During pretrial discovery, the plaintiff produced an expert report which concluded that Dr. Yang deviated from the appropriate standard of care because he should have detected the gastric mass in the decedent's abdominal region. A second report from an additional expert concluded that had Dr. Yang detected the mass, the decedent would have had an 88% chance of survival. Dr. Yang submitted a report from his own expert, radiologist Dr. Andrew Bierhals, which concluded that a CT scan is not the appropriate test for detecting stomach cancer and that the decedent should have undergone a proper endoscopy, which would have revealed the gastric mass. The plaintiff and Dr. Yang later settled, leaving Dr. Boucard and his practice group as the remaining defendants.

On the eve of trial, the plaintiff informed the court that the estate intended to call Dr. Bierhals as an expert witness along with the previous experts plaintiff had retained. Dr. Bierhals would testify, as he had in his original expert report for Dr. Yang, that Dr. Yang did not deviate from the standard of care and that an endoscopy is the proper procedure for identifying stomach cancer. The trial court agreed to allow the expert testimony over Defendants' objection and adjourned the trial for further expert discovery.

Defendants later moved to bar Dr. Bierhal's testimony, arguing that the Supreme Court's decision in *Glassman v. Friedel,* 249 N.J. 199 (2021), applies to bar a plaintiff under the doctrine of judicial estoppel from disavowing the negligence of a

settling joint tortfeasor. The trial court denied the motion, holding that Glassman applies only to successive tortfeasors. Defendants appealed, arguing that Glassman's application of judicial estoppel to successive tortfeasors should apply equally to joint tortfeasors.

The Appellate Division affirmed the trial court's decision in a published opinion. The panel began by introducing the concept of judicial estoppel, which prohibits a party from asserting a position contrary to a prior successful position that it asserted in a previous matter "arising out of the same events." In other words, "[t]he principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." *Kimball Int'l, Inc. v. Northfield Metal Prods*., 334 N.J. Super. 596, 606-07 (App. Div. 2000). Nevertheless, the panel warned that judicial estoppel is an "extraordinary remedy" to be exercised sparingly. Moreover, judicial estoppel traditionally is not applied if the prior action concluded by way of settlement.

In *Glassman*, the New Jersey Supreme Court clarified New Jersey's jurisprudence on the issue, at least in successive tortfeasor cases. The Court there considered "the allocation of damages in cases in which a plaintiff asserts claims against successive tortfeasors and settles with the initial tortfeasors before trial." 249 N.J. at 209. The Court held that "[a] plaintiff who previously asserted in pleadings or discovery that the initial tortfeasor was negligent may not take the opposite position at trial." Id. at 231. Instead, the plaintiff only may "urge the jury" that the initial tortfeasor is a "minor component of the damages." Id. at 231-33.

The appellate panel here determined that *Glassman*'s logic does not extend to joint tortfeasors. The panel explained:

The [Supreme] Court made explicit that the *Glassman* . . . apportionment procedure only applies in "successive-tortfeasor cases" in which the plaintiff "has settled with the initial tortfeasor prior to trial." Id. at 230-32 (emphasis added). Here, plaintiff initially alleged that two physicians failed to diagnose decedent's cancer -- an indivisible injury -- thus making both tortfeasors "jointly or severally liable in tort for the same injury to person or property, . . ." N.J.S.A. 2A:53A-1.

(alteration in original).

Relatedly, the panel further relied on the *Glassman* Court's analysis that the apportionment scheme for successive tortfeasors "is more complex" than the procedure for joint tortfeasors found in the Comparative Negligence Act, thus further distinguishing joint tortfeasors from successive tortfeasors. The panel thus concluded that the "plaintiff is not judicially estopped from reversing position with respect to the negligence of a settling joint tortfeasor at trial because, unlike claims against successive tortfeasors, damages are not divisible between multiple tortious events." Moreover, "unlike a successive tortfeasor, joint tortfeasors are not left without remedies against a settling codefendant."

Finally, in response to the defendants' argument that it would not be fair to allow the plaintiff to change its position, the panel responded that ultimately it was up to the defendants to "prove Yang's negligence for purposes of an allocation," and that the plaintiff did not have to "assist" the defendants in that endeavor. In sum, "[g]iven the remedies available to [the defendants]," the extraordinary remedy of judicial estoppel was unwarranted.

The panel's decision clarifies a latent ambiguity in the Supreme Court's *Glassman* decision and provides plaintiffs with significant leeway to alter or even reverse their theory of liability after settling with a joint tortfeasor. Defense counsel litigating joint tortfeasor cases should be wary of this now expressly permissible tactic.