Turnabout Is Fair Play: When an Expert Switches Sides on the Eve of Trial

A tactical decision will need to be made whether to set forth expert opinions attacking a co-defendant in the initial report, or to wait to serve a supplemental report on notice of a co-defendant's settlement.

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Imagine this scenario: you are representing a physician in a complex, medical malpractice case. Not unexpectedly, a co-defendant settles with the plaintiff. In your mind, that physician's expert will not be testifying—you certainly do not see the need to call that expert. On the eve of trial, however, the plaintiff announces that she will call the settling defendant's expert on her case. Instinctively, you move to bar the plaintiff from calling the expert, crying foul in the plaintiff's attempt to turn the tables and use what was a defense expert against the defense. Much to your surprise, the trial court denies the motion, and you move for leave to appeal, believing the Appellate Division will right the obvious wrong. However, to your shock, the appellate judges not only affirm, but also praise the plaintiff for employing "sound trial strategy." This is not a nightmare conjured in the mind of a sleepless trial lawyer preparing for a six-week trial; rather, this is the factual background and holding of a recent New Jersey Appellate Division ruling, destined to have a decided impact on the way civil cases are tried for some time.

The decision in *Adams v. Yang*, __ N.J. Super. __, (App. Div. 2023), arose from the following facts: plaintiff's estate brought a medical malpractice action against Dr. Steven Yang, and several others, alleging that the defendants had timely missed a cancerous gastric mass, which ultimately caused the decedent's demise. In his defense, Yang served the expert report of Dr. Andrew Bierhals who opined that Yang's interpretation of the subject CT scan was well within the standard of care, and that "even if a malignant tumor [was] evident on the CT scan, it would have already been at an advanced stage as of that date." Thereafter, the plaintiff settled with Yang, causing the remaining defendants to assert claims for contribution and indemnification against him.

A week before the trial was set to commence, the plaintiff served his pretrial exchange, announcing for the first time that he intended to call Bierhals at trial along with his other identified experts. Prior to the service of the pretrial exchange, the plaintiff had not amended his interrogatory answers to identify Bierhals as a plaintiff's expert, nor had he otherwise apprised the defense of his intentions to call Bierhals at trial. The court adjourned the trial, allowing the defendants to depose Bierhals. Following the deposition, the remaining defendants moved to bar Bierhals' standard of care opinions, relying primarily on the principles of judicial estoppel applied by the New Jersey Supreme Court in *Glassman v.*

Friedel, 249 N.J. 199 (2021). The trial court reasoned that the Glassman holding did not apply in cases involving joint tortfeasors; rather, the rule promulgated in *Glassman* precluding a plaintiff from asserting differing factual positions (e.g., asserting a health care provider was negligent in the complaint and then taking the opposite position at trial) applied only to cases involving successive or divisible tortious conduct. The defendants moved for leave to appeal, which was granted. Praising the "well-reasoned" opinion of the trial judge, the Appellate Division affirmed, framing the issue as purely one of law: "whether judicial estoppel, as applied in Glassman, should also apply to prevent a plaintiff from reversing position as to the negligence of a settling joint tortfeasor at trial."

Glassman involved a very different factual scenario than on the one presented in *Adams*. In *Glassman*, the plaintiff's estate alleged that the decedent was injured in a fall at a restaurant, and subsequently was the victim of medical malpractice committed by the health care providers who treated the decedent following the injury. The gravamen of the decision was the "allocation of damages in cases in which a plaintiff asserts claims against successive tortfeasors and settles with the initial tortfeasors before trial." The high court ruled that "the non-settling defendant alleged to be responsible for the second causative event may present proof of the damages suffered by the plaintiff as a result of the first causative event. Among other evidence, the defendant may rely on the plaintiff's previous assertions in pleadings or discovery about the alleged fault of the initial tortfeasor and the damages resulting from the first causative event. A plaintiff who previously asserted in pleadings or discovery that the initial tortfeasor was negligent may not take the opposite position at trial."

However, in *Adams*, the plaintiff did not allege successive or divisible tortious conduct, but "alleged that two physicians failed to diagnose the decedent's cancer—an indivisible injury—thus making both tortfeasors jointly or severally liable in tort for the same injury to person or property." Despite these factual differences, the defendants argued that the principles of judicial estoppel on which the court relied in *Glassman* applied with equal force in this case involving joint tortfeasors. The Appellate Division disagreed, finding that the Supreme Court was explicit that its ruling was limited to cases involving successive tortfeasors: "We find that 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." Equally important to the court was the fact that joint tortfeasors are not without a remedy against a settling co-defendant: "Whereas *Glassman* expressly prohibits an allocation of fault against an initial tortfeasor, a joint tortfeasor may seek an allocation of liability against the settling co-defendant at trial. Any percentage of fault thus allocate-ed operates as a credit to the remaining defendants." In the final analysis, the Appellate Division did not see any intent to "manipu-late or mislead" in the plaintiff's decision, not-ing that a plaintiff has no obligation to assist a non-settling defendant in establishing that a settling tortfeasor was largely or entirely responsible for the subject injury for allocation purposes.

It is not hard to see the wisdom in the plaintiff's decision to effectively "flip" Bierhals from the defense to the plaintiff's side of the

case. What better way to counter the defense's efforts to push liability to the settling defendant than using that own defendant's expert to establish that the settling defendant met the standard of care and/or was not the cause of the alleged injury? What makes *Adams* so striking was the court's endorsement of the plaintiff's "last-minute" notice of his decision: it would seem that, going forward, such side-switching should only be allowed on adequate notice, with more time to meet the testimony of the "new" expert. Certainly, *Adams* will prompt defense counsel to keep even a sharper eye on co-defendants who might be especially likely to settle pretrial. Equally, the decision will incentivize counsel to have their own experts ready to criticize the care provided by a settling co-defendant. However, a tactical decision will need to be made whether to set forth expert opinions attacking a co-defendant in the initial report, or to wait to serve a supplemental report on notice of a co-defendant's settlement. Without doubt, plaintiffs will argue that such opinions should be expressed in the opening report if for no other reason than to separate and divide the defense. Hopefully, following the lead of the trial judge in *Adams*, courts faced with similar situations will be quick to grant trial adjournments and to allow late supplemental expert reports so as to give the remaining defendants an opportunity to equal what would otherwise be an unleveled playing field.

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