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# DECISIONS

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## SUPREME COURT OF SOUTH CAROLINA RULES THAT IMPRECISE RESERVATION OF RIGHTS LETTER RESULTS IN WAIVER OF COVERAGE DEFENSES

In a decision issued on January 11, 2017, the Supreme Court of South Carolina held that a commercial general liability insurer waived the bulk of its coverage defenses to a $14 million judgment in a construction defect lawsuit due to its issuance of an imprecise "cut and paste" reservation of rights letter. *Harleysville Group Ins. v. Heritage Communities, Inc.*, 2017 WL 105021, — S.E.3d — (S.C. Jan. 14, 2017). In *Harleysville*, two condominium towers built by a general contractor experienced significant water intrusion problems and other construction problems after completion. The property owner associations filed suit and sought damages in several lawsuits for the extensive construction defects under theories of negligent construction, breach of fiduciary duty, and breach of warranty. Harleysville issued several general liability policies to the developer during the time period at issue. After receiving notice of the lawsuits, Harleysville agreed to provide a defense to the lawsuits and sent several "reservation of rights" letters to the insured. In the eyes of the Court, the letters contained "generic statements of potential coverage coupled with furnishing most of the Heritage entities with copies (through a cut-and-paste method) of the insurance policies." General jury verdicts were subsequently issued against the insured and Harleysville filed a declaratory judgment action contending that it had no duty to indemnify the insured for the judgments. Alternatively, the insurer argued that if any


of the damages were covered, they had to be allocated between covered and uncovered claims and that it was liable only for damages that took place during its policy period. The matter was referred to a Special Referee and the Referee found coverage under the policies. The insurer appealed. On appeal, the Supreme Court held that Harleysville waived its right to contest coverage because the reservation of rights letters, despite setting out many pages of policy provisions and other information usually contained in a reservation of rights letter, was ineffective because it failed to adequately inform the insured of the reasons why the insurer may not be obligated to provide coverage. The Court initially noted that reservation of rights letters must "give fair notice to the insured that the insurer intends to assert defenses to coverage or to pursue a declaratory judgment action." The Court, in analyzing the letters at issue, held that although each letter indentified the entity and lawsuit at issue, summarized the allegations in the complaint, identified the policies and included a nine to ten page excerpt of various policy terms (through a cut-and-paste approach), "the letters included no discussion of Harleysville's position as to the various provisions or explanation of its reasons for relying thereon. With the exception of the claim for punitive damages, the letters failed to specify the particular grounds upon which Harleysville did, or might thereafter, dispute coverage." Accordingly, the Court affirmed the Referee's ruling that Harleysville failed to effectively reserve its rights to contest coverage.

## Florida Supreme Court Declines to Adopt *Daubert* Standard for Admissibility of Expert Witness Testimony

*"We decline to adopt the Daubert Amendment to the extent that it is procedural, due to the constitutional concerns raised, which must be left to a proper case or controversy."*

On February 16, 2017, the Florida Supreme Court declined to adopt the so-called "Daubert standard" approved by Florida lawmakers in 2013. *In re Amendments To Florida Evidence* Code, 2017 WL 633770, — So.3d — (Fla. 2017). The legislative changes, which were enacted in 2013, amended the Florida Evidence Code to replace the *Frye* standard with the *Daubert* standard for admitting expert opinion evidence. The legislative change, which sought to bring state court standards for the admissibility of expert witnesses in line with federal and many state courts, dropped the usage of the *Frye* standard. Under the *Frye* standard, the judge is called upon to gauge whether to allow expert testimony based only on whether it represents principles that have gained "general acceptance" in their particular field. The *Daubert* standard, in contrast, provides that a witness may testify as an expert in a particular field only if the testimony "is based upon sufficient facts or data; the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case." Opponents to the law argued that the change escalates costs, further taxes an already overburdened state court system and impedes access to the state courts. Opponents, which included primarily plaintiffs attorneys, argued that the one-factor *Frye* test worked fine. In its opinion, the Supreme Court "declined to adopt the *Daubert* amendment to the extent that it is procedural, due to the constitutional concerns raised, which must be left for a proper case or controversy." In his dissent, Justice Rickey Polston noted that the majority's "grave constitutional concerns" are unfounded since the standard has been routinely applied by federal courts since the United States Supreme Court adopted the standard in 1993. Justice Polston queried whether the entire federal system for the last 23 years as well as 36 states denied parties' rights to a jury trial and access to the courts. The response, he noted, was "of course not." He further noted that a review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. Because the Supreme Court of Florida's decision was not on the merits of the standard, the state law implementing *Daubert* still applies, although the ruling may give litigants the go ahead to challenge the legislation and give the state Supreme Court an opportunity to decide on the constitutional issues raised by opponents of the law.

## Vanderbilt Study Finds that Apology Laws Do Not Reduce Medical Malpractice Lawsuits


Over thirty states have enacted "apology laws" that prohibit a physician's apology to a patient from being admitted into evidence in a subsequent medical malpractice lawsuit. The laws are intended to reduce the number of medical malpractice lawsuits by allowing physicians to freely express their condolences or apologies to patients or their families. A new study conducted by Vanderbilt University, however, suggests that state apology laws aimed at preventing medical malpractice lawsuits are either ineffective or have resulted in an even greater probability for some physicians to be sued. In the report titled "*Sorry Is Never Enough; The Effect of State Apology Laws on Medical Malpractice Liability Risk,*" researchers analyzed eight years of data provided by a national malpractice insurance company that insured ninety percent of doctors in an unnamed specialty from 2004 to 2011. Seventy-five percent of the physicians were surgeons and the review analyzed 3,517 malpractice claims. The Vanderbilt researchers found that apology laws actually increased the risk of a malpractice lawsuit for doctors who do not regularly perform surgery and have no discernible effect on surgeons in terms of lawsuit probability. The study concluded that "[o]verall, the evidence suggests that apology laws do not effectively limit medical malpractice liability risk. "While apology laws may foster increased communication, these laws have not been successful in restraining medical malpractice liability." The report further concluded that "[t]he evidence suggests that claimants are simply substituting formal lawsuits for nonsuit claims, which is problematic given that lawsuits cost, on average, over five times as much to defend."

# New York Peer Review Privilege Applies to More Than Medical Malpractice Claims

In a decision issued on January 5, 2017, the Supreme Court of New York, Appellate Division, Third Department, concluded that New York's peer review privilege, which protects certain healthcare records from disclosure, is not limited to medical malpractice actions. *Diconstanzo v. Schwed*, 45 N.Y.S.3d 625 (N.Y. App. Div. 2017). The case arose from negligent credentialing, deceptive business practice, and false advertising claims brought by the plaintiff against the defendant physician and a hospital to recover for injuries plaintiff allegedly sustained as a result of a laparoscopic sigmoid colectomy performed by the defendant. Shortly after the case was filed, plaintiff issued document requests to the hospital and sought the production of documents relating to its decision to allow the defendant physician to practice at the hospital. The defendants moved for a protective order and the plaintiff moved to compel. The trial court granted the motions for protective orders and denied the plaintiff's motion to compel. The plaintiff appealed the rulings. On appeal, the plaintiff argued that the trial court abused its discretion in issuing a protective order. The appellate division held that many of the requests sought information that is privileged under New York Educ. Law § 6527, which "safeguards information collected as part of a medical review committee's periodic assessment of physicians' credentials and competence in order to encourage frank and objection discussion during the credentialing process." Plaintiff asserted that the application of the law was limited to her medical malpractice claims and that the privilege did not apply to her claims against the hospital for its allegedly deceptive business practices, false advertisement and negligent credentialing claims. The Court disagreed and noted that "it is evident from the plain language of the statutes that the privilege extends to all civil causes of action, not just medical malpractice claims" and that to allow plaintiff to circumvent the provisions of the law simply by asserting claims for negligent credentialing, false advertising or deceptive business practices would undermine the policy underlying those statutes—which is to encourage thorough and candid peer review of physicians, and thereby improve the quality of medical care.

*"[I]t is evident from the plain language of the statutes that the [peer review] privilege extends to all civil cases, not just medical malpractice claims."*

# Supreme Court of North Carolina Concludes That Improperly Disclosed Arbitration Agreement Is Unenforceable

On January 27, 2017, the Supreme Court of North Carolina ruled that a physician sued in a medical malpractice lawsuit in connection with a hernia procedure breached his fiduciary duty to the plaintiff patient by failing to properly disclose an arbitration agreement and, as a result, the agreement was unenforceable. *King v. Bryant*, 795 S.E.2d 340 (N.C. 2017). The case arose out of a medical malpractice action brought by the patient against a physician and his medical practice. At the patient's first visit, the administrative staff presented the patient with the arbitration agreement among many other documents. The patient was asked to sign all of the documents. The arbitration agreement provided that the patient agreed that any dispute arising out of the healthcare services provided would be subject to binding arbitration. The patient was injured in the course of the hernia repair surgery and subsequently filed suit in superior court. The defendants filed a motion to stay the case and enforce the arbitration agreement. The trial court concluded, for various reasons, that the arbitration agreement was unconscionable and the decision was upheld on appeal. The defendants then sought review by the Supreme Court. The Supreme Court held that a fiduciary relationship existed between the physician and the patient when he signed the agreement without reading it. The Court then concluded that the defendants violated their fiduciary duties "by failing to make full disclosure of the nature and import of the arbitration agreement to him at or before the time that it was presented for his signature." "The arbitration agreement was obtained as the result of a breach of fiduciary duty from which defendants benefited and is, for that reason, unenforceable." In his dissent, Justice Paul Martin Newby noted that the majority invented a new defense to enforcement of an arbitration agreement, not raised by the plaintiff below, in order to mask their disparate treatment of and continued hostility towards arbitration.


**Supreme Court of North Carolina concludes that physician failed to properly disclose arbitration agreement and, thus, the agreement was unenforceable**

*"We decline to accept [plaintiff's] invitation to apply a 'new, and greatly expanded theory of liability in hospital negligence cases.'"*

## Alabama Supreme Court Upholds Dismissal of Malpractice Claims Against Hospital Arising From Acts Of Temporary Physician

In a split decision issued February 10, 2017, the Supreme Court of Alabama affirmed a Circuit Court's grant of summary judgment in favor of Helen Keller Hospital ("the Hospital") holding that the Hospital was not vicariously liable for the care provided by a contract emergency room doctor in a medical malpractice case alleging wrongful death. *Bain v. Colbert Cty. Nw. Alabama Health Care Auth.*, 2017 WL 541912 (Ala. Feb. 10, 2017). The plaintiff brought a lawsuit against the Hospital on behalf of her deceased husband. The decedent went to the emergency room at the Hospital after complaining of a "lump" in his throat that would not go away. At the Hospital, he was evaluated by Dr. Wigfall, a temporary emergency room physician operating as an independent contractor. They discussed his family and medical history, including that his father had an aneurysm. Dr. Wigfall discharged him with an "unspecified" diagnosis. Approximately 20 days after his visit to the Hospital, the decedent died of an aneurysm. The plaintiff brought a lawsuit alleging the Hospital was vicariously liable for Dr. Wigfall's negligence. The Hospital filed a motion for summary judgment on all claims, which was granted by the trial court. The plaintiff appealed to the Supreme Court of Alabama. On appeal, the plaintiff argued that even if Dr. Wigfall was an independent contractor, the Hospital was vicariously liable for his breach of the duty of care on the theory of apparent agency, which is also known as agency by estoppel. The Supreme Court found that the plaintiff did not meet any of the requirements for agency by estoppel. First, the Court found that the mere existence of an emergency department in a hospital was not sufficient evidence of the Hospital holding itself out as employing the doctors who worked in the emergency department. Second, there was no evidence that the decedent was misled into believing Dr. Wigfall was an employee of the Hospital. Third, the decedent did not actually rely on any representation that the emergency room doctor would be an employee of the Hospital because that question never crossed their minds. On a separate issue, the Court rejected plaintiff's argument that the Hospital had a nondelegable duty to provide the decedent with emergency medical physician services within the standard of care based on administrative regulations issued by the Alabama State Board of Health or through an express or implied contract between the Hospital and the decedent.

## Supreme Court of Washington Expands Duty of Physicians to protect Third Parties

In a decision issued on December 22, 2016, the Supreme Court of Washington expanded the duty of physicians by concluding that mental health professionals have a duty of reasonable care to protect the foreseeable victims of his or her patients from harm even in the absence of actual threats against identifiable targets. In the case, the mother of two children sued a psychiatrist and a clinic for medical malpractice and medical negligence after a patient of the defendants murdered her daughter (the girlfriend of the patient) and her younger brother. Prior to the attack, the perpetrator had been an outpatient of the defendants for nine years and had been treated for bipolar and associated disorders. He had expressed suicidal and homicidal ideations but never named the girlfriend or her family as potential victims. Several months before the murders, the defendant psychiatrist noted that the patient's mood was unstable and that he had suicidal ideations but he promised not to act on them. The defendants in the lawsuit moved for summary judgment on the grounds that the patient's attack on the victims was not foreseeable and that the psychiatrist did not owe the victims a duty of care nor did the defendants have a duty to warn because the patient "never communicated an 'actual threat of physical violence against a reasonably identifiable victim.'" The trial court granted the motion. The Supreme Court reversed the decision and held that a duty exists in the outpatient setting, without regard to the ability of the psychiatrist to exert actual control over his or her patient. The Court further noted that the "duty imposed by reasonable care depends on the circumstances" which could require providing further treatment, warnings, or taking other steps to ameliorate the risk posed by the patient. Applying the holding to the facts, the Court held that questions of fact existed that required determination by a jury.

## West Virginia's Highest Court Holds That Fall From Examination Table Qualifies As A Medical Malpractice Claim

In a decision issued on February 9, 2017, the Supreme Court of Appeals of West Virginia upheld a trial court's grant of summary judgment on a premises liability claim filed by the widow of a man who allegedly died after falling off an examination table at the South Charleston MedExpress urgent care center, holding that the claim had to be pursued as a medical malpractice claim. *Minnich v. MedExpress Urgent Care, Inc.*, 2017 WL 563353 (W. Va. Feb. 9, 2017). In *Minnich*, Mr. Minnich sought medical care at MedExpress for complaints of shortness of breath. He spoke with a medical assistant employed by MedExpress, Ms. Hively, in the triage area of the facility. The medial assistant was informed of Mr. Minnich's recent hip surgery. She escorted Mr. Minnich to an examination room and directed him to sit on the examination table. During his attempt to get onto the examination table, Mr. Minnich fell and was injured; he died 90 days later. Mr. Minnich's wife, who was present at the time, filed a lawsuit against MedExpress based on premises liability, loss of consortium, and wrongful death. MedExpress filed a motion for summary judgment as to the premises liability claim that the trial court granted on the grounds that the action constituted a medical malpractice claim arising under the West Virginia Medical Professional Liability Act ("MPLA"). The central issue decided by the Court was whether the services received by Mr. Minnich prior to his fall constituted "health care" under the MPLA. The plaintiff argued that the medical assistant did not qualify as a "health care provider" under the MPLA, so the nurse's instructions could not constitute "health care" to bring the case within the parameters of the MPLA. However, the Court held that the definition of a "health care provider" under the MPLA includes employees of health care facilities like MedExpress. The plaintiff also argued that the services provided by the medical assistant did not qualify as "health care." To determine whether the MPLA applied, the critical question was "whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care." *Id*. at *5. The Court found that the fall occurred while Mr. Minnich was attempting to comply with a directive of the "health care provider" as part of an evaluation, which is an essential aspect of his medical diagnosis and a necessary part of the health care services provided by MedExpress. Even the plaintiff's complaint raised the issue of medical negligence by alleging the medical assistant should have helped Mr. Minnich onto the table given her knowledge of his recent hip surgery. Accordingly, the Court held that the MPLA applied because the plaintiff "pled her case in a manner that requires the introduction of expert evidence to address whether Mr. Minnich should have been permitted to climb onto the examination table unassisted." *Id*. at *6.

**Fall from Examination Table Qualifies as Medical Malpractice Claim under West Virginia Law**

## House Committee Approves Bill To Cap Med Mal Damages In Federally Funded Care Cases

On February 28, 2017, the House Judiciary Committee advanced a tort reform bill that would put a nationwide cap on noneconomic damages in medical malpractice cases arising our of federally funded health care and would limit the fees plaintiffs' attorneys can receive when prevailing in such cases. H.R. 1215, sponsored by Representative Steve King of Iowa ® and titled "Protecting Access to Care Act of 2017," narrowly passed committee approval. The stated intent of the bill is "to improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system. The bill only applies to claims concerning the provision of goods or services for which coverage is provided in whole or in part by a federal program, subsidy, or tax benefit. According to Rep. King, "whenever federal policy affects the distribution of health care, there is a federal interest in reducing the costs of such federal policies." Under the bill, noneconomic damages (which typically include pain and suffering) would be capped at $250,000. The bill would also allow courts to require periodic payments for future damages instead of lump sum awards, and it would create a "fair share" rule by which damages would be allocated in direct proportion to fault. The bill would also impose a 3 year statute of limitation on medical malpractice claims, cap attorneys' fees to a sliding scale of percentages depending upon the amount of the award, and allow for the introduction of evidence of collateral source benefits. The bill contains a provision that specifically recognizes that it does not preempt any state law that addresses any of the provisions included in the bill.

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Recent Notable Verdicts and Settlements

# Notable Verdicts/Settlements

**Clark County, NV—December, 2016.** After a nine-day trial, a Clark County jury awarded a female plaintiff infant and her parents $14.5 million in a case in which plaintiffs alleged that the defendant neonatologist/pediatrician failed to timely recognize and treat Diamond Blackfan Anemia. As a result of the failure to timely diagnose and treat the anemia, the infant went into anemic shock and suffered a severe brain injury. The award consisted of $1.7 million in past medical expenses, $9.1 million for future medical expenses, and $3.6 million for pain and suffering.

**New London County, CT—September, 2016.** After a two week trial, a New London County jury awarded $1.8 million in damages to a 28-year old female who alleged that the defendant surgeon removed the wrong Fallopian tube resulting in the plaintiff's inability to conceive children. The defendant admitted deviating from the standard of care but disputed plaintiff's allegations of damages. The award consisted of $1.3 million for non-economic damages, $310,000 for loss of consortium, and $190,000 in economic damages.

**Fulton County, GA—February, 2017.** After an 8 day trial, a Fulton County jury awarded a 38-year old woman $45.8 million in damages for a catastrophic brain injury she suffered from a heart attack sustained just days after the birth of her child in 2009. Plaintiff alleged that several obstetricians were negligent in failing to treat her blood pressure problems stemming from preeclampsia and pulmonary edema.

**Eastern District, NC—February, 2017**. A federal jury in the Eastern District of North Carolina awarded more than $5.2 million to the families of three deceased nursing home residents. One resident died in 2011 after his respirator and its alarms were reportedly turned off. The second resident died in 2012 six hours after being admitted to the facility. The third resident died in 2012 after developing issues staying connected to his respirator. Each resident's estate was awarded $1.5 million in punitive damages, and varying amounts of compensatory damages. The jury concluded that the care provided by the facility and its operators was in reckless disregard of the residents' rights.

# Notable Defense Verdicts

**Nassau County, NY—July 2016.** A Nassau County jury found in favor of a defendant chiropractor in a case in which the patient plaintiff alleged that the chiropractor was negligent in causing him to suffer a stroke at the chiropractor's office. The defendant denied the allegations that the stroke was related to the chiropractic care he provided and argued that the stroke would have happened irrespective of his chiropractic visit.

**Miami-Dade County, FL—July, 2016.** A Miami-Dade County jury found in favor of a dermatologist sued by his patient in a case in which the patient alleged that the doctor negligently failed to examine the bottom of his foot during a full body examination and, therefore, caused a delay in diagnosis and treatment of malignant melanoma. The defendant argued that the patient did not have cancer at the time of his examination and that he was under the care of a non-party podiatrist for three months before his cancer was diagnosed.

**Montgomery County, MD—August, 2016.** A Montgomery County jury found that a dentist was not negligent in a dental malpractice case in which the patient alleged the dentist failed to properly align (and then correct the misalignment) of her jaw, gums, teeth, and implants during a mouth restoration process. Plaintiff alleged that she suffered torticollis as a result of the procedure.

**Orange County, NY— July, 2016.** An Orange County jury found in favor of an emergency room physician who was sued by a patient in his 50's for allegedly causing a 13 month delay in the diagnosis of kidney cancer. The jury found that the physician deviated from the standard of care but that the deviation was not the proximate cause of the patient's injuries.

**Arizona—January, 2017.** The Arizona Court of Appeals concluded that a trial court properly instructed a jury that plaintiffs needed to prove the negligence of an ER physician by clear and convincing evidence. The jury had previously returned a verdict in favor of the physician.