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MEDICAL MALPRACTICE NEWSLETTER

Winter 2015 Issue

Tennessee Supreme Court Clarifies Scope of Admissible Evidence in Informed Consent Cases

In order for informed consent to be effectively obtained, medical providers must notify patients of the nature, risks, benefits, and alternatives of proposed medical treatment before the treatment is performed. In Tennessee, if a medical provider fails to do so and harm results to the patient, then the provider may be liable for failure to obtain informed consent.

Informed consent is a statutory action in Tennessee. In an action alleging that a medical provider failed to obtained informed consent, a plaintiff must prove that the defendant did not supply "appropriate information" to the patient in obtaining informed consent in accordance with "the recognized standard of acceptable professional practice" in the profession and in the specialty, if any, that the defendant practices in the community in which the defendant practices and in similar communities." Thus, the information that the medical provider must provide a patient is based upon the medical specialty, procedure, and community at issue. Essentially, the information that must be given is that which would normally be given by providers in the same medical specialty in the community in which the provider practices or a similar community. A typical claim of failure to obtain informed consent is established when a medical provider fails to disclose a particular risk of a procedure that the standard of care required the provider to disclose, the specific risk occurs, and the medical provider's failure to disclose the risk is found to be the cause of the patient's consent to the procedure.

The Tennessee Supreme Court recently expanded the scope of information that the jury can consider in informed consent cases. In White v. Beeks, 469 S.W.3d 517 (Tenn. 2015), the Supreme Court held that evidence regarding undisclosed medical risks that do not materialize is nevertheless admissible. In White, the plaintiff underwent a disc fusion procedure in which the defendant used a bone-grafting product called InFuse. While the patient's condition initially improved, his low-back pain returned approximately six weeks after the operation. Later tests indicated that ectopic bone growth had formed near the fusion site. The plaintiff filed a health care liability action, alleging that the defendant failed to obtain his informed consent before the surgery. The basis of his informed consent claim was that the defendant did not advise the patient that he would use InFuse, how it would be used, or the risks associated with the product. The plaintiff's theory was that the InFuse caused the ectopic bone growth, which led to pressure being placed on a nerve in his back, allegedly causing the plaintiff's back pain.

To support his informed consent claim, the plaintiff disclosed one medical expert, Melvin Law, M.D. In his deposition, Dr. Law testified that based on his experience, the use of InFuse had caused various complications in patients. Specifically, Dr. Law testified that InFuse had caused ectopic bone growth in one case, a cystic lesion in ten cases, and postoperative radiculitis in 15 to 20 percent of patients. The defendant moved to limit Dr. Law's trial testimony regarding the risks of surgery that should have been disclosed to only those risks that materialized—i.e., the ectopic bone growth. The defendant sought to exclude any testimony about the potential risks that did not occur, including cystic lesions and other conditions. The trial court agreed and limited Dr. Law's testimony to only the risk that did occur. The Court of Appeals affirmed.

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The Tennessee Supreme Court reversed, holding that it was improper for the trial court to limit the expert's testimony to only the risks that materialized. The Court had previously held that a patient needs to be informed of "all perils bearing significance" in order to give informed consent. According to the Court, those perils necessarily include those that caused harm, as well as those that did not, and the fact that a risk did not materialize does not make it less of a risk. The Court reasoned that when a patient is making a decision whether to undergo a medical procedure, the patient needs to know "all" the risks he is facing, not just those risks that in hindsight materialized and caused harm. Under the Court's view, in informed consent cases, the fact that a risk did not materialize is not determinative of whether it should have been disclosed to a patient before a procedure. Consequently, the Court held that the jury should have been allowed to hear Dr. Law's complete testimony regarding the risks of InFuse, which would have been relevant to the jury's determination of whether a prudent person would have decided to undergo the procedure if informed of "all" of the significant risks.

In light of White, providers should be aware that the jury's assessment of a patient's consent is not limited to the specific risks that allegedly caused injury. In an informed consent case, a patient's expert will be able to testify about "all" the significant risks of the procedure at issue, regardless of whether the undisclosed risks actually occurred. Thus, the expert testimony that the jury will hear in assessing whether the medical provider adequately obtained the patient's informed consent is now broadened and is not determined by the specific injuries at issue. Medical providers who propose treatment should continue to ensure that patients are provided adequate information. Providers should err on the side of providing too much information regarding different risks, rather than the alternative of limiting the disclosed information to the risks most likely to materialize. If circumstances change or new information becomes available, then providers should obtain additional informed consent if at all possible. Information provided to the patient should also be documented in the patient's record.

Medical Malpractice News at Rainey ▪ Kizer ▪ Reviere & Bell PLC

We are pleased to announce that Marty R. Phillips, the Group Leader of the Firm's Malpractice Practice Group, was recently inducted into the American College of Trial Lawyers as a Fellow. The induction ceremony at which Marty became a Fellow took place during the 2015 Spring Annual Meeting of the College in Key Biscayne, Florida. Founded in 1950, the College is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only and only after careful investigation to experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Membership in the College cannot exceed one percent of the total lawyer population of any state or province.

We are also pleased to announce that Brandon J. Stout has joined the Firm as an associate attorney in the Firm's Jackson office. Brandon focuses his practice in the defense of medical providers, including physicians, dentists, nurses, hospitals, and clinics in medical malpractice litigation. Brandon is a 2014 *summa cum laude* graduate of the University of Memphis, Cecil C. Humphreys School of Law. He obtained his undergraduate degree in Business Administration from the University of Tennessee-Knoxville.