

SUPREME COURT OF VIRGINIA – RAISING THE THRESHOLD FOR THE CONTRIBUTORY NEGLIGENCE DEFENSE?

The Supreme Court of Virginia recently reversed and remanded a jury's verdict in favor of a physician accused of medical malpractice in Sawyer v. Comerci, Case No. 011741, decided June 7, 2002. The bases of the Court's reversal have significant consequences for future defendants in personal injury cases, particularly medical malpractice.

The underlying facts of the case are as follows. A male patient presented to Stonewall Jackson Hospital with complaints of abdominal soreness and generally not feeling well. He was seen and evaluated by the physician on-call in the emergency room at the time. Based upon findings of blood in the stool, an elevated white blood cell count, and a probable mass in the colon causing an obstruction, the physician decided that the patient needed to be admitted to the hospital for further evaluation and surgical intervention. The physician had a telephone consultation with the surgeon on-call who advised that he did not believe the patient had an "acute abdomen" necessitating admission. The physician disagreed with the assessment of the surgeon on-call and recommended admission. The patient and his wife refused admission, apparently because the wife had obligations in Roanoke the following day. The physician testified at the trial that she tried to persuade the patient to remain at the hospital but, despite repeated explanation, the patient's wife did not appear to comprehend the serious nature of her husband's condition. The husband and wife left the hospital, but agreed to follow-up with the husband's primary physician. The patient did not follow-up with his primary physician but returned to the hospital three days later with complaints of a sore throat. He was, again, seen by the same physician in the emergency room. The physician evaluated his abdomen and diagnosed his throat as either oral candidiasis or oral thrush. The patient was discharged with instructions to make an appointment with his primary physician, which he failed to do. Two days later, he returned to the emergency room with signs of shock and died the next day.

The patient's wife alleged that the physician deviated from the standard of care in the care and treatment of her husband and that the alleged deviations proximately caused her husband's death. At the conclusion of the trial, the jury returned a verdict in favor of the physician, and this appeal followed.

On appeal, the wife contended that the trial court erred in instructing the jury, over appellant's objection, that they could consider whether the patient was contributorily negligent based upon the evidence presented at the trial. The Supreme Court agreed, holding that there was insufficient evidence to support a finding of contributory negligence. In so doing, the Court observed that the burden is upon the defendant to establish a prima facie case of contributory

negligence by a preponderance of the evidence in order to be entitled to a jury instruction on contributory negligence. The Court further observed that, in a medical malpractice action, the defendant must show that the plaintiff's negligence was "concurrent" with the defendant's negligence, that is, the plaintiff's act must be contemporaneous with the negligent act or omission of the physician.

Applying these principles to the facts in this case, the Court found that there was no evidence that the patient understood the severity of his condition or the consequences that might ensue if he were not admitted to the hospital or evidence that the physician specifically explained to him that if he chose to leave the hospital, he could die. For these reasons, the Court concluded that the physician failed to establish a prima facie defense of contributory negligence. Curiously, however, the Court upheld the granting of an instruction on failure to mitigate damages on the basis that the jury could find that the patient neglected his own health by failing to follow-up with his primary physician as instructed and that, had he done so, he would have survived.

The wife also contended that the trial court abused its discretion in prohibiting her from eliciting testimony from one of the physician's expert witnesses that he had previously testified as an expert witness on behalf of the physician in an unrelated case. The Court agreed with the wife on this point as well, holding that the amount of compensation given to the expert witness in the prior case was relevant to the issue of bias. Further, without providing explanation, the Court noted that the probative value concerning this potential bias outweighed any prejudice to the physician resulting from the jury's knowledge that she had been a defendant in an unrelated case.

Importantly, the Supreme Court's holdings in this case may raise considerably the threshold for the contributory negligence defense in the Commonwealth and might also discourage defendants from re-hiring otherwise highly-qualified and effective expert witnesses.