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2009 ALABAMA MEDICAL MALPRACTICE DECISIONS

Expert Testimony Required to Prove Medical Causation

Robinson v. Baptist Health System, Inc., 2009 WL 1494985 (Ala. Civ. App.)

In addition to Alabama's general requirement that a plaintiff in a medical malpractice case must establish a breach of the standard of care through expert testimony, in May of 2009 the Court of Civil Appeals re-affirmed the requirement that the Plaintiff also establish medical causation through testimony from a qualified expert. In *Robinson*, the plaintiff alleged that the hospital breached the standard of care allowing for the development and worsening of bed sores. While plaintiff presented testimony regarding the alleged breach through a nursing expert, that same expert was the only witness who linked the development and worsening of the bed sores to the alleged breach. The court refused to hold that the trial court exceeded its discretion in striking the nursing expert's causation opinion testimony as the nursing expert was not qualified to provide an opinion regarding medical causation. Since the plaintiff then had no expert to establish the required causal link, summary judgment in favor of the hospital was affirmed.

Breach Must Probably Cause Injury

Lyons v. Vaughan Regional Medical Center, 2009 WL 1100928 (Ala.)

In *Lyons*, the plaintiff asserted that she developed Reflex Sympathetic Dystrophy after an infiltration associated with the use of a Hep-lock device. Her treating pain management physician testified that her RSD was most likely related to the IV, though went on to state “[j]ust the process of starting an IV or a problem resulting from an IV infiltration, both traumas can possibly initiate the Reflex Sympathetic Dystrophy”. Noting that a plaintiff in a medical malpractice case must prove that the breach probably, not possibly, caused injury, the court affirmed summary judgment. The court further noted that “a mere possibility or one possibility among others is insufficient to meet the burden of proof”.

Expert Testimony Required to Prove Breach of the Standard of Care

Bibb v. Center for Pain of Montgomery, P.C., 2009 WL 1363634 (Ala.)

Summary judgment was affirmed in a case where the plaintiff asserted that following a cervical epidural steroid injection she allegedly lost and never regained the use of her left hand. Plaintiff did not identify an expert, instead asserted that her claim fell within an exception to the general rule that expert testimony was required. Plaintiff claimed that no expert testimony is required where the injury complained of is in no way connected to the condition for which she sought treatment. The trial court and Supreme Court of Alabama disagreed here finding that the injection and injury were not so distinct so as to fit in to this exception. In addition, the court noted that the administration of the steroidal injection, as well as the risks associated with that procedure, are not subjects within the knowledge of the average person.

Ford v. Stringfellow Memorial Hospital, 2009 WL 3415304 (Ala. Civ. App.)

Ford’s arm was burned during surgery when it was placed on a wrist traction tower which had insufficiently cooled after flash sterilization. The Court of Civil Appeals reversed summary judgment in favor of the hospital, the surgeon, and the surgeon’s medical practice. In doing so, the court determined that the plaintiff met her burden of proof by using the testimony of the defendants which established the standard of care. Troublingly, the court went on to rule that a jury could take the testimony of one of the employees that it would be a breach of the standard of care to fail to appropriately cool all parts of the surgical equipment and determine that there had been a breach in the case of the involved surgery. As regards the claims against the hospital, the court further noted that the *Ford* case also presented one where expert testimony was not needed as the breach could be understood by laymen.

Both the Standard of Care and a Breach Must be Proven

Mosley v. Brookwood Health Services, Inc., 2009 WL 1425999 (Ala.)

This case involved a claim that one patient in the hospital psychiatric department was attacked by another. In support of her claim, the plaintiff relied upon the testimony of a mental-health technician who was an employee of the hospital. In that testimony the worker stated, for example, that the general practice in the unit was to monitor patients every 15 minutes. Other similar, claimed requirements were also noted. Nonetheless, the testimony of this witness did not prove that there had been a breach of the standard of care or, even, a violation of the requirements described by the employee. As such, summary judgment in favor of the hospital was affirmed.

Foreign Object Exception

Cobb v. Fisher, 2009 WL 886512 (Ala.)

The Supreme Court of Alabama has recognized that in certain circumstances if foreign objects or materials are found following surgery the plaintiff need not present expert testimony to support his or her claim. In this case, Cobb's expert witness was stricken because the witness had not been identified within the deadline set by the trial court. As such, plaintiff further argued that her claim should have been allowed to go forward since it involved bone fragments and cement left during knee replacement surgery. The court rejected this argument since the cement was necessarily used in the procedure and was to remain in the patient following the knee-replacement procedure. As a result, the court noted that "[t]he question, therefore, is not whether Dr. Fisher and the hospital staff acted negligently in leaving the cement in Cobb's knee; rather, the question is whether the placement or use of the cement breached the standard of care". Thus, liability associated with discovery of the bone fragments and cement was not "so apparent . . . as to be understood by a layman". As such, the claims did not fall within the foreign instrumentality exception to the general rule requiring expert testimony in medical malpractice cases.

Ivey v. Carraway, 2009 WL 2997501 (Ala.)

In *Ivey*, the Supreme Court of Alabama again addressed the foreign object exception to the requirement for expert testimony. In doing so, the court held that the exception does not apply unless the healthcare provider, here a surgeon, placed the foreign object in the patient's body. *Ivey* involved a claim that Kerlix gauze was left in the patient's leg; however, it was undisputed that the surgeon did not place this material which was used outside of the surgery setting to assist with wound healing. As regards the claim that the surgeon was negligent in failing to discover and remove the gauze, the court stated that the efforts made to examine the wound cavity during the course of surgery is an issue not "so apparent as to be within the comprehension of laymen and to require only common knowledge and experience to understand it". Thus, plaintiff needed to present expert testimony to support this claim, though he did not.

Lack of Consent

Black v. Comer, 2009 WL 1716911 (Ala.)

Black involved a claim of lack of consent, as opposed to lack of informed consent. The plaintiff asserted that the treating surgeon exceeded the scope of his consent when he inadvertently removed an ectopic kidney. The consent signed by the patient permitted the physician to perform additional operations and procedures that he considered therapeutically necessary or advisable in the exercise of his professional judgment. In challenging a \$350,000.00 jury award, the defendant physician argued that since the only claim submitted to the jury was for lack of consent, the plaintiff had failed to present required expert testimony that the removal of a mass (later determined to be the kidney) was not therapeutically necessary or advisable in the physician's professional judgment. The Supreme Court of Alabama disagreed finding that proof that removal of the mass was a deviation from the standard of care likewise established that the removal was not "therapeutically necessary or advisable in the exercise of professional judgment".