



### **National Standard of Care for Experts in DC**

The District of Columbia has once again reiterated the need for a plaintiff to show a violation of a national standard of care in order to proceed against a health care provider in the District of Columbia. Plaintiff's expert opined only that the Defendant violated the standard of care for not doing additional testing. The court entered judgment in favor of the Defendant doctor.

The patient appeared in the Emergency Room with dizziness and chest pain. Testing failed to show a tear in her aorta. Her condition was stabilized and she was discharged. Shortly thereafter, she appeared in another hospital where a tear in the aorta was found. She died in surgery.

In D.C., it is not sufficient for an expert to merely recite the words "national standard of care." The expert must present the foundation for the standard by establishing a specific course of treatment that is followed nationally either by reference to a published standard, discussion of the course of treatment with practitioners outside of D.C. at seminars or conventions, or by the presentation of relevant data. Strickland v. Pinder, M.D.

### **Sovereign Immunity for State Employed Health Care Providers in Virginia**

Virginia extends its sovereign immunity to its employees if it is justified after weighing four factors: 1) the nature of the function performed by the employee; 2) the extent of the state's interest and

involvement in that function; 3) the degree of control exercised by the state over the employee; and 4) whether the alleged negligent act involved the use of judgment and discretion. Immunity is also potentially available to state employed health care providers.

Plaintiff underwent surgery at a state operated teaching hospital. The operating nurses and technicians miscounted the number of sponges used in the procedure and one was left in the plaintiff's abdomen, necessitating another surgery. When the nurses and technicians were sued for malpractice, they plead sovereign immunity. Based upon the factors cited above, the court denied the plea.

While the court found that the state exercised total control over the health care providers, it concluded that Virginia was interested in quality care whether it is provided in a state owned facility or a private facility and its interest as far as sovereign immunity was slight. The counting of sponges was a function of the health care providers whether they were working in a public or private facility, and the counting of sponges is not discretionary at all. There is no exercise of judgment. Therefore, the weighing of the factors was against the grant of immunity and the Plaintiff was allowed to proceed. Marsh v. Medical College of Virginia Hospitals

### **No Duty to Defend Complaint for Only Fraud**

The Maryland Court of Special Appeals affirmed a trial court's ruling that a Medical Malpractice Carrier had no duty to defend or indemnify a psychiatrist sued only for fraud.

PRMS employed Ms. Mulder. On the day before Ms. Mulder's termination was effective, she filed an appeal along with an opinion by her doctor that she was suffering from major depression and not able to work. Therefore, PRMS had to start paying Ms. Mulder disability benefits. When PRMS demanded a psychiatric IME, Ms. Mulder's doctor submitted another opinion that she could return to work in another week.

PRMS sued the psychiatrist for fraud alleging that he conspired with Ms. Mulder to fraudulently diagnose her so she could keep her job and wrongfully collect disability benefits. The doctor's malpractice carrier denied coverage. The doctor brought a DJ Action against the carrier demanding at least a duty to defend.

The court found that the doctor's submission of extrinsic evidence to show that there was negligence and therefore a potentiality of coverage, to be invalid. The law does not allow such evidence to raise another potentially covered claim not set out in the Complaint.

The Court of Appeals has accepted Certiorari on this case and we will report its ruling as well. Moscarillo v. Professional Risk Management Services

These articles are necessarily short descriptions of complex areas of law. If you have any questions or would like additional information, please contact us:  
Phone: 301-306-4300  
Email: [ddsgd@decarodoran.com](mailto:ddsgd@decarodoran.com)  
Website: [www.decarodoran.com](http://www.decarodoran.com)