
HUIE

Alabama Medical Malpractice Appellate Decisions

2018 YEAR IN REVIEW

Table of Contents

$10 Million Failure to Diagnose Meningitis Verdict Reversed

*Baptist Health System v. Cantu, 2018 Ala. LEXIS 50**

A $10 million jury verdict followed claims that a then 3-month-old child suffered physical injuries, visual and hearing impairment, and seizure disorder as a result of failure to diagnose bacterial meningitis. The verdict was against the hospital, which was alleged to be vicariously liable for a pediatrician who attended the child during his admission. Although several issues were raised on appeal, the Court reversed the judgment finding that the trial court had exceeded its discretion in allowing the jury to hear testimony of prior medical malpractice actions brought against Walker Baptist Medical Center.

Again, Plaintiff alleged that the hospital was vicariously liable for the actions of a staff physician. In cross examining the hospital's corporate representative, the hospital's attorney asked the following:

> Q: Let me ask you this: you know what this claim is, this agency claim?
> A: Yes.
> Q: Before you came into this courtroom and heard this claim, have you ever heard it proposed or ever heard of the notion before of the hospital somehow controlling or supervising the actions of independent physicians on staff?
> A: No, I have never heard that before.

By way of background, the agency claim was premised on the assertion that Medicare and Medicaid conditions of participation and other standards made the hospital responsible for all care provided within the facility thereby retaining control over even independent staff physicians. In any event, Plaintiff argued that, based upon the doctrine of curative admissibility, he was entitled to show that the hospital was aware of such claims. The trial court agreed, and Plaintiff's counsel further questioned the corporate representative about the factual claims made in multiple lawsuits filed against the hospital. In reversing the judgment, the Supreme Court of Alabama held that if the "door was opened" it was only to the extent of knowledge of prior lawsuits, not the "inflammatory facts" and "horrific injuries" described in the complaints used to question the witness. The Court also noted that the alleged "curative evidence" failed to establish that the identified prior claims were based upon the same theory of agency presented by Plaintiff Cantu.

Physician Acting as Emergency Department Physician Versus Hospitalist

*Ansley v. Inmed Group, Inc., 2018 Ala. LEXIS 43**

This case, which resulted in a jury verdict in favor of all Defendants, involved the alleged failure to diagnose pulmonary emboli and transfer the patient to a higher level of care. The patient had been seen at Bullock County Hospital by Dr. Ireneo Domingo. This physician initially saw the patient in the emergency room while acting in the capacity of an emergency physician. He was, however, also contracted to provide hospitalist services at Bullock County Hospital. Plaintiff asserted that when Dr. Domingo ordered the patient to be admitted at Bullock County Hospital he ceased functioning as an emergency room physician and began functioning as a hospitalist as emergency physicians could not admit. As Plaintiff obtained standard of care testimony from a hospitalist and Dr. Domingo did not, Plaintiff asserted that the testimony was uncontroverted and that she was entitled to a post-judgment new trial.

Proof submitted at trial confirmed that the patient never left the emergency room before being transferred to a hospital in Montgomery. Similarly, hospital medical bills showed that the patient was only charged for time spent in the emergency room. These facts, as well as Dr. Domingo's testimony regarding his role, led the appellate court to confirm that the Plaintiff had failed to establish there was no jury question regarding whether or not Dr. Domingo acted in his role as a hospitalist in considering whether and when to transfer the patient.

Plaintiff also asserted she was entitled to a new trial because the Defendants presented evidence of the hospital's financial status. Given the fact that Plaintiff questioned hospital personnel regarding the age of the hospital's CT scanner, which was not equipped to obtain studies with contrast material, the Alabama Supreme Court found that the trial court did not exceed its discretion in allowing the hospital representative to testify, for example, that Bullock County Hospital has to "budget monies" and that the hospital administrator has personally had to borrow money to pay hospital employees. The corporate representative further testified that Bullock County Hospital has "people that care" working in the hospital "regardless of if we get any money out of it or not".

Physician Failure to Report an Emergency to a Consulting Physician Still Requires Proof by a Similarly Situated Expert Witness

*Shadrick v. Grana, 2018 Ala. LEXIS 120**

This case involved communications between an internist/hospitalist and a cardiologist regarding the care of a patient who had apparently experienced a non-ST elevation heart attack. Plaintiff's expert witness, a cardiologist, was found to not be similarly situated to the hospitalist. However, Plaintiff alleged that the exception to the general rule requiring expert testimony applying "where want of skill or lack of care is so apparent . . . as to be understood by a layman, and requires only common knowledge and experience to understand it" applied in this case. The Supreme Court of Alabama held that it did not stating:

> In the present case, it would be difficult, if not impossible, for a lay person, in considering the roles, the responsibilities, relationship, and communications of and between Dr. Gronna, a board-certified internist and hospitalist, and Dr. Onyekwere, a board-certified cardiologist, to determine the applicable standard of care, much less whether that standard was breached.

As such, only a similarly situated expert witness could explain to the jury whether the hospitalist failed to convey necessary information to the cardiologist to make an informed judgment regarding the patient's condition and the proper plan of treatment.

Discovery Exceeding the Limitations of the Alabama Medical Liability Act Prohibited

*Ex parte Mobile Infirmary Association, 2018 Ala. LEXIS 55**

Here, the Supreme Court of Alabama granted a petition for writ of mandamus vacating certain discovery rulings made by the trial court. One category involved requests for policies, procedures, training materials, and physician standing orders implemented by the hospital after the dates of service at issue in the case. The Court held that such discovery violated *Ala. Code* § 6-5-551 (1975) which prohibits discovery with regard to other acts and omissions. In addition, the Court vacated the trial court's order requiring production of the hospital's accreditation status and history as well as its receipt of certain The Joint Commission Sentinel Event Alert publications. Based upon the evidence presented by the hospital via an affidavit, the Court agreed that the materials were protected accreditation and/or quality assurance materials. *Ala. Code* § 22-21-8 (1975).

Use of Documents Produced in One Case in Another

Ex parte Mobile Infirmary Association (No. 1170567)

On December 14, 2018, the Supreme Court of Alabama released this decision in which it granted a petition for writ of mandamus striking a portion of a protective order entered by the trial court relative to production of materials by the hospital. The hospital maintained that the materials were confidential though the court's order allowed the materials to be shared within the Plaintiff attorney's law firm with attorneys representing plaintiffs in other cases against Mobile Infirmary. The order further required that if the attorneys in other cases sought to use such information and materials to question witnesses, provide to expert witnesses, and the like, in other cases against Mobile Infirmary, those attorneys must seek approval for such use from the judges presiding over the other cases. In granting the requested relief, the Supreme Court of Alabama noted that the provision of the protective order allowed other medical-malpractice Plaintiffs represented by the same law firm access to confidential information that they would be prohibited from discovering in their own case pursuant to *Ala. Code* § 6-5-551 (1975).

Reemergence of “Better-Position” Doctrine

*Hamilton v. Scott, 2018 Ala. LEXIS 25**

The Supreme Court of Alabama held that the trial court committed reversible error by refusing to give a jury instruction explaining the “better-position” principle in the context of a claim arising from the death of an unviable fetus. Even though the Supreme Court of Alabama has issued opinions rejecting the “loss of chance” doctrine, the Court relied upon its prior *Parker v. Collins*, 605 So.2d 824 (Ala. 1992) decision as supporting Plaintiff’s position. *Parker* involved a claim that while the patient’s cancer would not have been prevented by a prompt diagnosis based upon a clearer x-ray, testimony suggested that her condition worsened as a result of an incorrect diagnosis based upon an inferior radiology study. Here, the Court took a step further and applied this doctrine to a wrongful death action even though there was no claim that the child suffered further physical injury; instead, the child died.

Direct Negligence Claims Against Hospitals Require Independent Standard of Care Testimony

*HealthSouth Rehabilitation Hospital of Gadsden, LLC v. Honts, 2018 Ala. LEXIS 91**

The Supreme Court of Alabama reversed a $20 million wrongful death verdict finding that even though the Plaintiff's expert standard of care testimony related exclusively to the standard of care owed by a nurse, the trial court incorrectly charged the jury on the standard of care applicable to hospitals. This holding was based upon the Alabama Medical Liability Act's requirement that claims of a breach of the standard of care must be supported by testimony of a similarly situated expert witness. In reversing the judgment, the Court confirmed that a claim alleging the breach of a standard of care by a hospital is a separate and distinct claim requiring independent standard of care testimony from an expert similarly situated to the hospital itself.

Honts may be helpful for other reasons. For example, *Honts* should prevent Plaintiffs from surviving summary judgment on, for example, negligent and training supervision claims without qualified expert testimony establishing both the hospital standard of care and a breach thereof. Likewise, in a case of a direct claim against the hospital relating to, by way of example, an administrative function, the expert witness must be similarly situated to the employee whose conduct is at issue.