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Medical Malpractice: NC General Assembly Considers New Medical Liability Reform Bill & Caps on Noneconomic Damage Awards.

Senate Bill No. 33, introduced in the Senate on February 22, 2011 is headed to the House of Representatives for passage. The Bill, which provides caps of \$500,000 on noneconomic damage awards for medical malpractice suits is part of an effort by local legislators to reform tort and medical malpractice liability within the State.

Section 1 of the proposed bill deals with the standard of care for health care providers. Currently, in malpractice suits against health care providers, the trier of fact must find that the provider acted not in accordance with the standards of practice of similarly trained and experienced practitioners in the same community under similar circumstances before liability would attach.

In the proposed bill, where the provider is treating an emergency medical condition, there must be a finding that the provider's deviation from the standard of care constituted gross negligence, wanton conduct, or an intentional wrongdoing before liability attaches.

Section 3 imposes liability limits of \$500,000 per

plaintiff for noneconomic damages. These include damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, physical impairment, disfigurement, and any other nonpecuniary compensatory damages.

If adopted by the House, North Carolina would join some 25 other states that have passed similar malpractice reform laws; including Texas, Florida, Michigan and Georgia. In many of these states, since reform laws were enacted, they

have seen a dramatic decrease in the number of malpractice suits filed. In Texas, where a \$250,000 cap was imposed, medical malpractice suits dropped by nearly two-thirds.

Although liability limits have been imposed by half the states in the US, they have received mixed reviews. In Georgia, the \$350,000 cap was struck down as unconstitutional by Georgia's Supreme Court, and seven other states have followed.

Senate Bill No. 33 was sent to the House on March 22nd.

Spotlight at BFYBW



BFYBW Partner, **Demetrius Worley Berry** was recently appointed to the Task Force to Determine the Method of Compensation for Victims of North Carolina's Eugenics Board by Governor Bev Perdue.

Demetrius joins four other professionals on the Task Force, all charged with recommending methods of compensation for victims of the State's sterilization program that ended in 1974. Other members include:

Lenwood Davis, historian and WSSU Professor; Laura Gerald, physician & Director of NC Health & Wellness Trust Fund; Fetzner Mills, former Superior Court Judge; and Phoebe Zerwick, Professor of English at Wake Forest University.

Worker's Compensation: NC Supreme Court Remands Case for Determining the Applicability of the "Going & Coming Rule."

February 4, 2011. In a per curiam decision by the North Carolina Supreme Court, the Industrial Commission's denial of Judy Cardwell's worker's compensation claim against her employer was reversed and remanded for additional factual findings on whether she was in fact on her employer's premises at the time of her injury.

Cardwell v. Jenkins Cleaners was first heard by the Industrial Commission in March of 2009, after Ms. Cardwell filed for benefits following a slip and fall outside her employer's building as she was arriving for work. The Deputy Commissioner found Ms. Cardwell ineligible for benefits. She appealed and the Court of Appeals affirmed.

Under the Worker's Compensation Act, an employee is entitled to benefits from injuries sustained in accidents arising out of and in the course of employment. While this rule generally excludes injuries occurring while traveling to and

from work, if the employer owns or controls the premises where the employee was injured, the injuries are considered to arise out of and in the course of employment, and are therefore compensable. This "coming and going" rule was a key issue in the Cardwell case.

Cardwell broke her wrist on January 23, 2008 after she slipped and fell on black ice outside the building where she worked. Cardwell claimed she was injured after she slipped on the cement area outside the back door of Jenkins Cleaners while attempting to unlock the door, a requirement of her job. Jenkins claimed that because they had no ownership or control over the parking lot where they allege Cardwell actually fell, they were not liable.

The Commission found, and the Appellate Court affirmed that since Cardwell had not yet reached the back door, she had not actually begun her job duties. She was found to have been injured in the

parking lot and not in the cement area, and as such, Jenkins' was not liable.



In its decision, the Supreme Court rejected the Court of Appeals findings regarding the location of Cardwell's fall and the ownership of the premises: "[T]he Industrial Commission failed to find facts about precisely where plaintiff fell . . . [The Commission] found facts only regarding the degree of ownership or control defendant-employer exercised over the parking lot, not the cement area . . . We are unable to determine whether it is 'in such proximity and relation as to be in practical effect a part of the employer's premises, such that the 'going and coming rule' would not apply.

New Updates from the Industrial Commission

- Effective February 21, 2011, Hugh A. Harris is the new Director of Claims Administration for the North Carolina Industrial Commission.
- Effective February 28, 2011, Meredith R. Henderson is the new Executive Secretary the Commission.

Practice Areas

Our practice covers a range of services for professional clients, the insurance industry, businesses and individuals.

Our services include:

- Insurance Defense Litigation, Medical and Dental Malpractice, Commercial Litigation Workers' Compensation, Insurance Law , Trucking and Transportation, Professional Negligence, Premises Liability, Products Liability, & Appellate Law.

Medical Malpractice: Health Courts & Federal Reforms Coming to NC?

The new federal budget plan proposed by the White House could change the way medical malpractice cases are handled and heard in courts around the country. With \$250 million in grants from the Department of Justice, states will be encouraged to reform their medical malpractice guidelines and will receive incentive funds to do so.

Prompted by President Obama, who advocated for med-mal reforms in his 2010 State of the Union address and included \$50 million in the new health care law to study various reforms, the DOJ grants would assist states in implementing these reforms by providing resources and funds. To implement these new reforms, the DOJ has made three recommendations, which will likely be included in the grants: the creation of health courts; safe harbor & fair shares for physicians; and tort reforms.

Health Courts. The idea of creating specialized health courts to decide medical malpractice cases, has been sparking lively debate between lawyers, physicians, and

plaintiffs for some time. The key feature of such courts is a judge or panel of experts who are dedicated to ruling on medical claims in place of a jury trial. Advocates of health courts claim this new administrative process would eliminate the unpredictability of jury trials while also decreasing litigation costs. Critics discredit the health court process as expensive, ineffective, and an unconstitutional infringement of a plaintiff's right to a jury trial.

Safe Harbors & Fair Shares. If a state opts to implement the safe harbor, physicians and other health-care providers could be protected from liability by following certain guidelines. If the guidelines are adhered to, the physician could escape liability, while conduct falling short of those guidelines could mean liability. This idea has been widely criticized by all sides, seen as a potential disadvantage for both plaintiffs and defendants.

Additionally, states could consider adopting a "fair share rule" to eliminate joint and several liability for health-care defendants. This idea has received criti-

cism mainly from plaintiff's lawyers who claim this recommendation would be unfair to patients who may be forced to shoulder the expenses if one of the wrongdoers is unable to pay.

Tort reforms. Lastly, recommendations for major tort reforms have been suggested, including a \$250,000 damages cap; a requirement that plaintiff's show reasonable alternative designs before winning in products liability; the adoption of the Law-suit Abuse Reduction Act, which would impose sanctions on attorneys who file frivolous lawsuits; and various laws to shorten statutes of limitation, and preempt state laws on joint and several liability.

For some, these recommendations and reforms barely scratch the surface of medical malpractice concerns, while others believe the proposals go too far in addressing the issues at the sake of plaintiffs and defendants alike.

General Liability: Recent Rulings in Negligence/Tort & Civil Liability

Beaver v. Fountain, 701 S.E.2d 384 (2010), the North Carolina Court of Appeals affirmed a lower court's grant of partial summary judgment for plaintiffs finding that the tolling provision of the Servicemembers' Civil Relief Act (SCRA) applies to civilians as well as servicemen.

In *Beaver*, plaintiffs Joseph and Ann Beaver were involved in a car accident with defendant-driver Grant Fountain, a reservist with the US Air Force. The accident took place on March 25, 2006, but the plaintiffs suit for personal injury and damages was not filed until over three years later. In his answer, Fountain claimed that the suit was barred by the three year statute of limitations which had run the day before suit was filed. Plaintiffs countered that since

Fountain was on active duty the months preceding the filing of the suit, the statute of limitations was tolled for the duration of the defendant's active service, pursuant to the SCRA. Defendant contended that the SCRA was enacted solely for the benefit of servicemen and should not apply to toll a civilian's statute of limitations. The Court of Appeals disagreed. "[D]efendant's argument that the benefit of the tolling provision should not be afforded to a civilian who has an action pending against a servicemember [is] without merit."

In *Kennedy v. Polumbo*, 704 S.E.2d 916, the Court of Appeals upheld the grant of defendant's motion for summary judgment, finding that the plaintiff's decedent's contributory negligence in riding in a vehicle with a drunk driver was a total bar to recovery.

In 2007, Emily May was killed when a vehicle operated by Danielle Polumbo crashed into a utility pole causing the red-light camera mounted on the pole to crash into the car's roof. The administrators of her estate filed a wrongful death suit against ACS State & Local Solutions, the operator of the red-light camera, the nightclub where Polumbo had been drinking, the bartender who served her, and the city of Fayetteville.

The Court affirmed defendant-city & defendant ACS' motions for summary judgment on the grounds that Ms. May was contributorily negligent in riding as a passenger with Polumbo because Ms. May knew, or should have known, that Polumbo was drunk at the time.

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