

AMCNO Scores a Victory with Ohio Supreme Court Decision

By Bret C. Perry, Esq.

The Academy of Medicine of Cleveland and Northern Ohio (AMCNO) is pleased to announce that on December 9, 2011, the Supreme Court of Ohio reversed a decision by the Tenth District Court of Appeals which had held that expert testimony was not required in order to maintain an action for lack of informed consent when such claims are brought in the context of a medical malpractice lawsuit. On behalf of AMCNO, Bret C. Perry and Jennifer Becker, with the firm of Bonezzi Switzer Murphy Polito & Hupp, Co., LPA, authored an *amicus brief* (friend of the Court) urging that the Supreme Court of Ohio reverse the decision of the Tenth District Court of Appeals. In *White v. Leimbach*, 2011-Ohio-6238, the Supreme Court of Ohio confirmed that the tort of lack of informed consent constitutes a medical claim and that a plaintiff must produce expert medical testimony establishing: 1) the material risks or dangers inherent in a procedure, and 2) that an undisclosed risk or danger actually materialized and proximately caused injury.

This case arose from a medical malpractice suit filed where the plaintiff alleged that the doctor performed a second discectomy back surgery without adequately disclosing that there was a higher risk of negative results from a follow-up discectomy than from his first operation, and therefore, failed to obtain the plaintiff's informed consent before performing the second surgery. The trial court directed a verdict in the doctor's favor, finding that the plaintiff failed to present expert testimony concerning whether the material risks and dangers of the second surgery actually materialized and proximately caused injury.

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HHS Secretary Sebelius Highlights Regional and State EHR Progress

AMCNO representatives were pleased to attend a panel discussion held at Cuyahoga Community College where U.S. Secretary of Health and Human Services (HHS) Kathleen Sebelius announced that HHS plans to make it simpler to adopt health IT allowing doctors and hospitals to adopt health IT this year, without meeting the new standards until 2014. Dr. Farzad Mostashari, the National Coordinator for Health Information Technology also participated in the event and expanded on this point by noting that HHS has extended the compliance date for Stage 2 meaningful use for those hospitals, physicians and other eligible professionals that qualify as Stage 1 meaningful users in 2011 to 2014. Under the current requirements, eligible doctors and hospitals that begin participating in the Medicare electronic health records incentive programs this year would have to meet new standards for the program in 2013. If they did not participate in the program until 2012, they could wait to meet these new standards until 2014 and still be eligible for the same incentive payment.

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Secretary Sebelius responds to a question during the panel discussion.

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On review, the Tenth District Court of Appeals vacated the directed verdict and remanded the case for further proceedings in the trial court. In reversing the decision of the trial court, the Tenth District Court of Appeals undermined long-standing Ohio law finding that a claim for lack of "informed consent" constituted nothing more than a common-law claim for battery. In doing so, the Tenth District Court of Appeals effectively established that physicians in Ohio could now be sued for battery in failing to provide adequate informed consent. This decision, if left undisturbed, would have undoubtedly resulted in an increase in the number of lawsuits filed against physicians which otherwise would lack the necessary and essential prerequisite requirement of expert medical review. Likewise, these claims were subject to the tort-reform protections such as monetary caps on non-economic damages. The Tenth District's decision potentially had the effect of subjecting physicians to increased exposure in that claims for "battery" arguably fall outside the tort-reform protections now afforded defendants in actions alleging medical malpractice.

The *amicus brief* filed on behalf of the Academy of Medicine of Cleveland & Northern Ohio urged reversal of the decision of the Tenth District Court of Appeals and sought a declaration that claims alleging lack of "informed consent" constituted "medical claims" requiring plaintiffs to produce competent expert medical testimony establishing what a reasonable medical practitioner would have disclosed to his patient about the risks incident to a proposed treatment in order to establish a *prima facie* claim. In urging reversal, the AMCNO sought to ensure that physicians and medical providers throughout Ohio are guaranteed the tort-reform protections afforded by way of legislative enactment

In reaching its decision, Justice O'Donnell, writing for the majority, confirmed that the tort of lack of informed consent constituted a medical claim, and as such, it requires medical expert testimony. "In general, when a medical claim questions the professional skill and judgment of a physician, expert testimony is required to prove the relevant

standard of conduct." The decision in this case is significant in that if the decision of the Tenth District Court of Appeals was left undisturbed, plaintiffs would have been permitted to evade expert testimony requirements by framing straightforward medical malpractice claims as 'lack of informed consent' claims and permitting prosecution without the benefit of an expert report. Most importantly, if left undisturbed, the Tenth District's decision would have subjected physicians to increased exposure in that claims for "battery" would arguably fall outside the tort-reform protections now afforded defendants in actions alleging medical malpractice, and malpractice insurance coverage denial. ■

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