

IN BRIEF

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Can a Doctor be Sued by a Plaintiff for His/Her Actions in an Independent Medical Examination?

The Independent Medical Examination (“IME”) is a valuable tool for defense attorneys and insurers. An impartial assessment from a licensed health professional, the IME allows attorneys and insurers to better assess many of a claimant’s medical issues, such as clarifying a diagnosis, estimating the need for future treatment, linking impairment to disability, or simply providing a clear summary of the claimant’s condition and prognosis. But what if doctors were reluctant to provide such a service?

In the term that ended in January 2006, the Virginia Supreme Court considered the question of whether a plaintiff has a private cause of action against a doctor who had been ordered to perform an Independent Medical Examination pursuant to Rule 4:10 of the Rules of the Supreme Court of Virginia. Harris v. Kreutzer, 271 Va. 188 (2006). In the original lawsuit, Ms. Harris, the plaintiff, alleged that she suffered a traumatic brain injury during an automobile accident in 1991. In the course of that litigation, the trial court granted the defendant's request for a Rule 4:10 IME. The parties agreed that Dr. Jeffrey Kreutzer would perform the IME.

Plaintiff subsequently claimed that her pre-existing condition, her post-traumatic stress disorder, and her brain injury all deteriorated after the IME. She filed another lawsuit, this time against Dr. Kreutzer, in which she asserted that the doctor knowingly and intentionally aggravated the pre-existing condition and injuries. She claimed that Dr.

Kreutzer failed to comply with the applicable standard of care of his profession by (a) failing to appropriately examine and evaluate the mental status of Plaintiff, and (b) deliberately acting abusive with disregard for the consequences of his conduct. She also alleged that Dr. Kreutzer committed the tort of Intentional infliction of emotional distress. The trial court sustained Dr. Kreutzer's Demurrer as to the medical malpractice claims on the grounds that she had not alleged facts sufficient to establish a *prima facie* case for medical malpractice.

Upon appeal, the Supreme Court of Virginia disagreed with the trial court, reversed the decision, and remanded the case for trial. It held that “the consensual nature of the physician/patient relationship may be express or implied.” *Id.* at 199. The Court reasoned that the doctor has consented to the relationship by agreeing to perform the IME. In a case such as that presented in *Kreutzer*, the consent of Rule 4:10 “patients” may be implied due to the filing of the Motion for Judgment, thereby consenting to the legal process. At that point, a plaintiff has placed her mental and/or physical condition at issue, which would potentially subject her to a Rule 4:10 IME.

The Court went on to examine the various definitions of “malpractice,” “health care,” “health care provider,” and “patient” as defined by the medical malpractice statute, Virginia Code § 8.01-581.1, et seq. The Court concluded that a Rule 4:10 IME is “health care” rendered by a “health care provider” to a “patient.” Importantly, the Court noted that “health care” is defined as “any act... performed... by any health care provider for [or] to... a patient during the patient's medical diagnosis.” *Id.* at 199-200. Although a trial court orders the medical diagnosis for its own benefit and the benefit of the parties to the litigation, neither Rule 4:10 or § 8.01-581.1 limit the acts constituting “health care” to medical diagnoses undertaken only for the patient's benefit.¹

However, this is not to say that doctors will be subjected to liability merely for expressing their opinion. In this decision, the Supreme Court explicitly limited the scope of this cause of action. *Id.* at 200-01. It acknowledged that this decision could create an enormous chilling effect on the availability of doctors willing to perform Independent Medical Examinations if plaintiffs are allowed to intimidate them with the threat of a Rule 4:10 medical malpractice lawsuit. Therefore, the Court explicitly stated that a Rule 4:10 medical malpractice cause of action relates solely to the actual performance of the IME. No liability shall arise from the contents of a report issued by an IME doctor or from a doctor's depositions or testimony at trial.

Indeed, the duty owed by a doctor to an IME patient is quite limited—a doctor simply shall not harm the patient during the course of the IME. For example, in a case arising out of the Supreme Court of Michigan, *Dyer v. Trachtman*, 679 N.W.2d 311 (2004), the IME doctor allegedly rotated the plaintiff's injured shoulder well beyond the prescribed limits of movement and thereby greatly aggravated the injury. That court found that a cause of action accrues when an examining physician fails to follow the applicable standard of care during the examination and such failure results in actual harm to the patient. *Id.* at 314-15, 316.

¹ It should be noted at this time that Virginia Code § 8.01-581.1 could be amended to include such language. Such an amendment would likely have the effect of superseding *Kreutzer*, as Virginia's medical malpractice statute seems to be the turning point of this decision.

Furthermore, the Kreutzer decision clearly states that an IME doctor is under no duty to diagnose or treat the patient. The Court cited a case from the Court of Appeals of Minnesota, Henkemeyer v. Boxall, 465 N.W.2d 437 (1991), which stands for the proposition that a doctor did not have a duty to diagnose or disclose a medical condition of the plaintiff which had until then gone undiscovered. There is no duty to diagnose the plaintiff for the plaintiff's benefit. Kreutzer, 271 Va. at 201.

It is important to note that the plaintiff in Kreutzer had appealed the trial court's dismissal of the case pursuant to a Demurrer. The Kreutzer Court merely stated that the limited allegations contained in the Motion for Judgment were sufficient to make out a prima facie case of medical malpractice, and that the Motion for Judgment was well-pleaded. The Supreme Court was *not* ruling upon evidentiary standards, so there was no determination as to whether the plaintiff had indeed suffered injuries caused by a breach of the standard of care by Dr. Kreutzer. It should also be noted the Supreme Court did affirm the trial court's dismissal of the plaintiff's count for Intentional Infliction of Emotional Distress, as the facts did not meet the high pleading standards set by Virginia case law for such a cause of action.

Upon first blush, Harris v. Kreutzer appears to be a startling decision that could have long-term effects on the availability of doctors to perform Independent Medical Examinations. However, a careful review of this decision reveals that so long as a doctor complies with the applicable standards of care while examining a plaintiff and no actual harm is caused to the plaintiff during the examination, the doctor will not incur any liability. As a result, doctors are not exposed to litigation arising out of Independent Medical Examinations any more than they are with their regular patients. We anticipate that over the long term very few—if *any*—doctors will be reluctant to perform Rule 4:10 Independent Medical Examinations due to this decision.

**DECISIONS BY THE SUPREME COURT OF VIRGINIA
REGARDING INSURANCE INDUSTRY & LITIGATION ISSUES
FEBRUARY 27 – MARCH 3, 2006 SESSION**

The case summaries that follow involve insurance industry and litigation issues. We have downloaded these summaries directly from the Virginia Supreme Court website. We offer them to you without further legal analysis. However, if you would like a brief legal analysis or the full text of any of these cases, please make your request by return e-mail. If you would like to discuss the ramifications of any of the decisions, please call (804) 378-7600: ext. 3304 for Ray; 3305 for Kevin or 3316 for Mark.

[051094](#) **Taboada v. Daly Seven, Inc.** 03/03/2006

In a guest's suit against an innkeeper for injuries resulting from a criminal assault by a third party occurring on the hotel's property, the trial court erred in sustaining demurrers to the guest's common law negligence claims in light of the innkeeper's duty to protect guests against reasonably foreseeable injury arising from third-party criminal acts, but correctly sustained the innkeeper's demurrer to the guest's similar claim under Code § 35.1-28. The judgment is affirmed in part and reversed in part, and the case remanded for a trial on the merits.

[051179](#) **PMA Capital Insurance Co. v. US Airways** 03/03/2006

In an insurance case involving a claim for compensation for business interruption losses in the airline industry arising from the September 11, 2001, terrorist attack on the United States of America, the trial court erred in interpreting and applying the insurance contract with regard to the reduction of claimed losses on account of payments made to the insureds under a federal statute passed to stabilize the airline industry and compensate airlines for losses resulting from such attack. The judgment is reversed, and final judgment is entered in favor of the insurer.

[050702](#) **Berry v. F&S Financial Marketing, Inc.** 03/03/2006

In an action to collect upon a debt contract used to finance the purchase of a motor vehicle, the trial court did not err in granting plaintiff's request for a nonsuit made prior to the defendant's lodging of a motion to dismiss for failure to satisfy the one-year service of process requirement set forth in Rule 3:3(c) and Code § 8.01-275.1. The judgment granting the nonsuit is affirmed.

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