Ohio Supreme Court Rejects Attempt to Prosecute
Medical Malpractice Lawsuit Without Expert Testimony

On December 8, 2011, the Ohio Supreme Court released its Opinion in White v. Leimbach, 2011-Ohio-6238. In its decision, authored by Justice Terrence O’Donnell, the Ohio Supreme Court reversed the decision of the Tenth District Court of Appeals, which had held that expert testimony was not required for lack of informed consent claims, when such claims are brought in the context of a medical malpractice lawsuit. The Ohio Supreme Court, in reversing the Tenth District Court of Appeals, held that lack of informed consent claims are considered medical malpractice claims, where such claims arise out of the provision of medical services.

Reminger was very pleased to have handled this appeal. Marty Galvin, co-chair of our appellate team, and Brian Gannon of our medical malpractice team combined to obtain this excellent result.

In its Opinion, the Ohio Supreme Court recognized the need for more clarity on this issue, and in so doing stated that the case previously considered the leading authority on this issue, Nickell v. Gonzalez (1985), 17 Ohio St.3d 136, was not as clear as it could have been. In its syllabus, the Supreme Court indicated that it was not modifying Nickell v. Gonzalez, but that it was “following and explaining” that decision.

Specifically, the Supreme Court held in White v. Leimbach that “the tort of lack of informed consent is a medical claim and therefore expert medical testimony is required.” Additionally, the Supreme Court stated that expert medical testimony is required both to establish 1) the material risk and dangers inherently and potentially involved with a medical procedure, and 2) that an undisclosed risk or danger actually materialized and proximately caused injury to the patient. The Court stated that if a patient fails to present expert medical testimony to the effect that it is more likely than not that an undisclosed risk of a surgical procedure actually materialized and caused injury, then a trial court should grant a directed verdict.

The Opinion is a very positive result for the medical community. The majority opinion, which was joined by six of the seven Justices, is clear and straightforward on this issue, and will serve to clear up any prior ambiguity that may have existed. The seventh Justice, Justice Paul Pfeifer, joined in the Opinion, but wrote separately.

The Tenth District Court of Appeals Opinion holding to the contrary, if it had been affirmed, would have created a significant loophole in the requirement that medical malpractice cases be supported through expert testimony. If that result had occurred, plaintiff lawyers could simply have made a practice of including boilerplate lack of informed consent claim in every medical malpractice lawsuit filed. Thereafter, these lawsuits could have been prosecuted without the benefit of an expert report.

If you have any questions concerning the White v. Leimbach case, or would like a copy of this decision, feel free to call upon any of our Medical Malpractice Group Leaders.