

Professional Liability Case Law Update

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Over the previous six months, the Supreme Court of Georgia issued two noteworthy opinions that significantly alter the manner in which medical malpractice cases are defended at trial. In *Smith v. Finch*, the supreme court altered the use of the “hindsight” charge, a suggested pattern charge that has long been uniformly relied upon by defense counsel, particularly in closing arguments.

Simultaneous with the pronouncement of *Smith*, the supreme court issued an opinion in *Condra v. Atlanta Orthopaedic Group*, overruling previous case law and holding that evidence regarding an expert’s personal practices is admissible both as substantive evidence and to impeach the expert’s opinions regarding the applicable standard of care.

Smith v. Finch **285 Ga. 709, June 29, 2009**

In *Smith*, the Supreme Court of Georgia disapproved of a portion of the “hindsight” pattern charge which is often given in medical malpractice trials. *Smith*, 285 Ga. at 710. The suggested pattern charge provides:

In a medical malpractice action such as this, a defendant cannot be found negligent on the basis of an assessment of a patient’s condition which only later, in hindsight, proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care. In other words, the concept of negligence does not include hindsight. Negligence consists of not foreseeing and guarding

against that which is probable and likely to happen, not against that which is only remotely or slightly possible.

Suggested Pattern Jury Instructions, Vol. I; Civil Cases (4th ed.) § 62.311. The supreme court stated:

We now hold that the hindsight instruction, as currently conceived, is not a correct statement of Georgia law as to the standard of care in medical malpractice cases. Specifically, the final sentence of the instruction is plainly inconsistent with the medical decision-making process, which often requires the consideration of unlikely but serious consequences in the diagnosis and treatment of disease, and is

generally inconsistent with the standard for foreseeability in our negligence law.

Smith, 285 Ga. at 710; see also *Gilley v. Hudson*, 299 Ga. App. 306 (2009). In addition to disapproving the use of the third sentence of the hindsight charge, the court also held that the second sentence is duplicative, although facially accurate, and further disapproved its use as well. *Smith*, 285 Ga. at 712. The court did not disapprove of the entire charge. In fact, the court held that the first sentence of the hindsight charge is appropriate in any medical malpractice case in which the facts warrant it, i.e., where the negligence claim is based in whole or in part on the assertion that the physician made an incorrect assessment of a patient's condition. *Id.* at 711, n.3.

Finally, the court also disapproved the use of the "later acquired knowledge" standard of evaluating the giving of this charge, in which this court has permitted the charge if the evidence raises an issue as to whether the negligence claim is based on later-acquired knowledge not known to the physician when care was rendered. *Id.* at 713, n.5.

Condra v. Atlanta Orthopaedic Group, P.C.
285 Ga. 667, June 29, 2009

In *Condra*, the Supreme Court of Georgia overruled *Johnson v. Riverdale Anesthesia Assocs.*, 275 Ga. 240 (2002), and held that evidence regarding an expert witness' personal practices, unless subject to exclusion on other evidentiary grounds, is admissible both as substantive evidence and to impeach the expert's opinion regarding the applicable standard of care. *Condra*, 285 Ga. at 669. In overruling *Johnson*, the court pointed to the recent enactment of O.C.G.A. § 24-9-67.1, which governs the admissibility of expert testimony in civil actions. Because the admissibility of expert testimony under application of O.C.G.A. § 24-9-67.1 is partially dependent on the expert's personal experience and practice, "it would defy logic to find such [personal practice] experience categorically irrelevant in assessing the credibility of the expert's testi-

mony." *Condra*, 285 Ga. at 670. Citing language from an Arizona appellate case, the court stated, "[T]he jury is entitled to fully evaluate the credibility of the testifying expert, and the fact that an expert testifies that the standard of care does not require what that expert personally does in a similar situation may be a critical piece of information for the jury's consideration." *Id.* (citing *Smethers v. Champion*, 210 Ariz. 167, 108 P.3d 946 (Ariz. Ct. App. 2005)).

The potential that the presentation of this additional testimony could confuse the jury "may be remedied through the careful use of jury instructions," including pronouncement of the principle that a mere difference in views between physicians does not by itself prove malpractice. A party whose expert has been cross-examined will have the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care. *Condra*, 285 Ga. at 672.

The court acknowledged that the growing body of case law from other jurisdictions supportive of the admissibility of expert personal practices testimony was important in its decision to shift course on this issue. *Id.* at 671.

Application of *Condra* will certainly require defense counsel to think long and hard before bringing an expert to trial whose personal practices differ from the medical treatment at issue in the case. While the holding in *Condra* may make finding experts more difficult for counsel who are hesitant to identify experts whose opinions differ from the treatment provided by the defendant physician, it may also ensure that the experts who are ultimately presented to the jury on behalf of either party are more credible and better capable of supporting their opinions on the relevant medical care at issue.

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