No. 33459 – *Dr. Danny Ray Westmoreland v. Shrikant K. Vaidya, M.D.*

Starcher, J., concurring:

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OF WEST VIRGINIA

I concur with majority's decision, but I write separately to point out that the underlying facts of this case demonstrate, once again, the absurd results likely to be reached by application of the Medical Professional Liability Act ("the MPLA").

The plaintiff in this case, Dr. Danny Westmoreland, is a certified family practitioner with staff privileges at two hospitals. On June 13, 2003, Dr. Westmoreland went to the emergency room of Pleasant Valley Hospital, and the defendant, Dr. Shrikant K. Vaidya, was assigned to remove a kidney stone and implant a temporary stent in Dr. Westmoreland's uterer to relieve an obstruction in the left kidney. The procedure was conducted in a hospital operating room while Dr. Westmoreland was sedated under anesthesia.

The removal of a stent requires that a cystoscopy be performed – a procedure involving passing a small, pencil-thick scope into the patient's urethra – that generally takes less than a minute. The plaintiff alleges that, for health insurance billing purposes, Dr. Vaidya preferred to do this second procedure in his office *without* general anesthesia. Apparently, Dr. Vaidya could not bill for the second procedure to remove the stent if it was done in the hospital operating room within 30 days of the first procedure to implant the stent.

On June 16, 2003, Dr. Westmoreland went to Dr. Vaidya's office to have the stent removed. Dr. Westmoreland contends that he was familiar with the details of the cystoscopy procedure – he had performed some 40 or 50 cystoscopies himself – and that he objected to having the procedure done without anesthesia. At Dr. Vaidya's instruction, a nurse attempted to start intravenous anesthesia but was unsuccessful; Dr. Vaidya then tried briefly and was similarly unsuccessful. Dr. Westmoreland asserts that Dr. Vaidya then reassured him that the removal of the stent would be a painless procedure, would be over in a matter of seconds, and said that Dr. Westmoreland should "quit being a baby."

Dr. Westmoreland laid on his back on a table for the procedure. Within seconds of beginning the procedure, Dr. Westmoreland alleges that Dr. Vaidya caused him substantial pain. Dr. Westmoreland further alleges that he objected to Dr. Vaidya continuing the procedure, and says he verbally withdrew his consent to the procedure by demanding Dr. Vaidya stop. When Dr. Westmoreland attempted to get up off of the table, Dr. Vaidya is alleged to have instructed an assistant to lay on Dr. Westmoreland's chest for the next 15 to 20 minutes while Dr. Vaidya completed the procedure.

As a result of the procedure, Dr. Westmoreland suffers from Peyronie's disease, which is characterized by the formation of hardened tissue (fibrosis) in the penis that causes pain, curvature and distortion, usually during erection. This disease causes sexual intercourse to be very painful and/or impossible. Further, Dr. Westmoreland contends that he lost about 80 pounds and nearly died from renal failure as a result of Dr. Vaidya's actions.

Because of Dr. Vaidya's alleged malpractice and/or battery, Dr. Westmoreland claims that he can now only urinate about once every three days.

Assuming these facts, as alleged by Dr. Westmoreland, are true, what is the point of applying the MPLA in this case?

First, the majority opinion concludes that Dr. Westmoreland should have filed a "pre-suit notice of claim" under the MPLA, and remands the case to allow Dr. Westmoreland to do so. My question is, other than racking up additional fees for the defendant's lawyers and additional costs for the plaintiff's lawyers, what is the point? This lawsuit was filed in May 2005, some three years ago. Isn't it reasonable to conclude that Dr. Vaidya is on notice by now that Dr. Westmoreland intends to sue him? Remanding this case to require Dr. Westmoreland to serve a "pre-suit" notice of claim upon Dr. Vaidya is to make procedure more important than the underlying substance.

Second, the majority opinion concludes that Dr. Westmoreland should have filed a screening certificate of merit, and remands the case to allow Dr. Westmoreland to do so. I am troubled by the imposition of this procedural "speed bump" in this case for three reasons. First, the record suggests that Dr. Westmoreland was familiar with the cystoscopy procedure used by Dr. Vaidya, yet the majority opinion finds that he is required by the MPLA to hire an outside, "independent" doctor to write out an opinion saying his lawsuit is meritorious. Second, Dr. Westmoreland asserts that two urologists were willing to consider

signing a certificate of merit – but only in exchange for a fee of $40,000.00.[1] If true, then requiring Dr. Westmoreland to comply with the MPLA is, essentially, to impose upon him a filing fee substantially different from that in every other type of lawsuit. And third, the alleged facts in this case suggest a brutal assault and battery occurred; an expert's nuanced opinion would seem to be unnecessary under such circumstances.

It is my assessment that the MPLA is a procedural monster that is wholly contrary to the common law. As such, it is entitled to little deference and must be strictly and narrowly construed to do as little harm to the common law as possible. Pre-suit notices and screening certificates of merit have some meritorious public policy goals, but these procedural humps should not be interpreted to restrict, delay, or deny citizens' access to the courts.

I therefore concur.

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[1]There is nothing in the record, aside from Dr. Westmoreland's assertions, that specifically supports this contention. However, if a record were developed showing that the MPLA imposed a prohibitively high cost upon lawyers and litigants that impaired the fair administration of justice, a substantive case could better be made that the pre-suit certificate of merit provisions of the MPLA violate constitutional due process, equal protection and open court protections. *See Blankenship v. Ethicon, Inc.*, 221 W.Va. 700, 704 n.2, 656 S.E.2d 451, 454 n.2 (2007) and cases cited therein.