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WITNESS TAMPERING IN MEDICAL MALPRACTICE CASES
by Ted Babbitt

It is no secret that doctors don't like to be sued. In an effort to avoid that, they recognize that the key to a medical malpractice victory for the plaintiff is the testimony of a competent expert witness. The Florida Medical Association, along with many other state and national physician groups, have instituted procedures designed to punish physicians who testify on behalf of plaintiffs in medical malpractice actions. In the case of Fullerton v. Florida Medical Assoc., Inc., 31 Fla. L. Weekly D1852 (Fla. 1st DCA 2006), the appellate court found that there was potential liability against such an association when they go too far.

Dr. Fullerton appeared as an expert witness in a medical malpractice case in Florida. Subsequent to his appearance, the defendant physicians sent a letter to the FMA complaining that Dr. Fullerton's testimony was below reasonable professional standards, supported a frivolous lawsuit and requested that the FMA issue an opinion to that effect and report its findings to the Board of Medicine. Dr. Fullerton filed a complaint against both the doctors and the FMA alleging the statements were defamatory and that the FMA's expert witness committee was designed simply to intimidate persons appearing as an expert witness on behalf of plaintiffs in medical malpractice cases.

The defendants were successful in convincing the trial judge to dismiss the claims based upon the statutory immunity privilege in both state and federal law that is granted to physician peer review groups. The Florida peer review

statute, 766.101(3)(a), precludes suit against any member of a duly appointed medical review committee unless the plaintiff can show intentional fraud.

In reversing the trial court, the District Court reviewed the law of witness immunity as it relates to Dr. Fullerton's testimony in the malpractice case. At

Page D1853, the Court states:

“By virtue of this immunity, defamatory statements made in the course of judicial proceedings by parties, witnesses and counsel are absolutely privileged, no matter how false or malicious those statements might be, provided the statements are relevant to the subject of the inquiry.’ The consequence of the rule is that ‘[t]orts such as perjury, libel, slander, and other actions based on statements made in connection with a judicial proceeding are not actionable.”

In discussing the Federal law, the Court reviewed the Congressional findings supporting the enactment of that law pointing out that the Federal law was designed to improve the quality of medical care and prevent treatment by incompetent physicians.

The issue which proved to be the turning point which resulted in a reversal and a reinstatement of the claim against both the FMA and the physicians was that the immunity statutes protected committees who were evaluating the treatment rendered by physicians and was not designed to permit those committees to evaluate the testimony of witnesses. At Page 1853, the Court held:

“We find no clear legislative expression that the testimonial privilege long accorded to witnesses was intended to be modified by the language of

section 766.101, which was expressly created for the purpose of evaluating and improving the quality of health care *rendered* by providers of health service. The term 'render' is defined, among other things, as doing a service for another. *Merriam-Webster's Collegiate Dictionary* 990 (10th ed. 1998). A physician who renders a medical service is ordinarily considered to be providing medical care to his or her patient. . . .

Based upon our examination of all pertinent provisions of the statute, we agree with appellant that it fails to immunize the FMA from liability when that body acts to evaluate the testimony of a medical expert given in a medical-malpractice action.”

This opinion was rendered notwithstanding the dicta contained within Austin v. American Association of Neurological Surgeons, 253 F. 3d 967 (7th Cir. 2001) in which the Federal Circuit Court of Appeals approved a decision of a federal trial judge granting a summary judgment against a neurosurgeon suspended from membership by the American Association of Neurological Surgeons because of his willingness to testify as an expert witness for the plaintiff in medical malpractice cases. The Fourth District's opinion in Fullerton guts the attempt of the Florida Medical Association to immunize physicians in medical malpractice cases by disciplining physicians who dare to testify against its members.

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