



**HDJN**

## 2014 Review of Medical Malpractice Issues on Appeal

Hancock, Daniel, Johnson and Nagle, P.C. is a full-service healthcare law firm that defends clients in trial and appellate courts.

*The Supreme Court of Virginia is the court of last resort for civil litigants in the Commonwealth, including for medical malpractice plaintiffs and defendants. Each year, the Court hears several medical malpractice cases. The Court's decisions reach beyond those particular disputes and often impact medical malpractice litigation moving forward. Indeed, the decisions can affect litigants years down the road.*

*A strong appellate team should be a critical element of a health care provider's defense strategy. At HDJN, our trial and appellate practices work hand-in-hand not only to effectively prosecute and resist appeals, but also to identify trends that allow clients to benefit from the Court's rulings in future litigation. Below, find some important lessons for health care providers, relevant decisions handed down by the Court in 2014, and notable achievements earned by our firm.*

### Prevailing At Last: The Prescription for Appellate Success

*Like treating patients on referral, litigating cases on appeal requires teamwork, an attention to detail, and specialized knowledge of the particular challenges faced. At HDJN, we emphasize these themes when advancing or resisting an appeal. And although no two appeals are the same, our appellate specialists come to each appeal with a deep understanding of the following complexities inherent in appellate advocacy:*

**Preservation.** Properly preserving issues for appeal is one of the most important tasks for trial counsel. If an error is not properly preserved at the trial court, you will lose on appeal 100% of the time. The experience and collaboration of counsel at HDJN positions us well to ensure rapid, sound, and accurate preservation of error.

**Procedure.** The Rules of Supreme Court of Virginia set forth nearly seventy pages of rules applicable to appellate procedure. Failing to take proper procedural steps during appeal can doom a litigant's effort. HDJN's trial litigators have ready access to our appellate attorneys (and vice versa), permitting strategic consultation to integrate aspects of trial practice with appellate procedure.

**Assigning Error.** When bringing an appeal, identifying with specificity the errors made by a trial court is critically important. Assuming errors are properly preserved and procedural hurdles are overcome, our attorneys must still convince the Supreme Court that the case is either worth taking, or not, as appellate review is not guaranteed for medical malpractice defendants. Our attorneys know that a surgical approach often yields the best results when considering the limited time to persuade the Court. Beyond arguing that the Court should (or should not) hear a case, we recognize that the justices also consider the broader implications of legal principles argued in a particular case. Dividing fair attention between the issues in front of the Court and those that may arise down the road affords a greater likelihood for earning an appeal--where, once earned, the odds of success increase significantly.

**Advocacy.** Oral argument is the last opportunity to persuade an appellate court to take a case or find in our client's favor; fifteen minutes can define years of effort. Our appellate team has litigated cases before the U.S. Supreme Court, various federal appellate courts, and the Supreme Court of Virginia, in addition to having clerkship experience with the latter. We refine our approach in each case through rigorous preparation and consideration of a case's strengths, weaknesses, and unknowns to mesh facts with intangible qualities that jurists favor.

## Notable Appellate Decisions in 2014

Last year the Supreme Court of Virginia handed down several decisions of relevance to health care providers. These were:

### Medical Malpractice Verdict Cap

- In *Simpson v. Roberts*, the Supreme Court of Virginia affirmed that an individual born alive—as the plaintiff was—is a person, and therefore a patient under the Medical Malpractice Act, and subject to the medical malpractice cap
- HDJN's appellate team authored an *Amicus Curiae* brief in the *Simpson* appeal. The Court adopted our arguments in full and granted the relief we sought.
- The Court heard argument on whether to grant an appeal in *Shoukas v. Rizk*, a medical malpractice case where a jury awarded \$4,000,000 to the plaintiffs. The Court reduced the verdict to the applicable cap. Plaintiffs challenged the application of the cap as violation of the Equal Protection Clause and 14<sup>th</sup> Amendment, but the Court refused the appeal.

### Informed Consent

- In *Fiorucci v. Chinn*, the Supreme Court of Virginia ruled that evidence of informed consent cannot be introduced in claims premised on pre-operative negligent treatment, including those alleging negligent diagnosis.
- Looking forward, there appears to be a narrower window to admit evidence of informed consent discussions.

### Procedural Challenges

- In *Temple v. Mary Washington*, the Supreme Court of Virginia ruled that a medical malpractice plaintiff could not challenge the denial of her discovery request for defendant health care provider's policies and procedures. Plaintiff sought these policies in her first lawsuit, which she later nonsuited.
- HDJN's appellate specialists drafted an *Amicus Curiae* brief in *Temple* arguing that the plaintiff's challenge was improper because she did not adequately preserve the error alleged. The Supreme Court agreed with our argument and affirmed the trial court's decision on that ground.
- The Court also heard argument on the merits in *McFadden v. Kiernan*, which concerned whether a trial court erred when it allowed a medical malpractice defendant to testify as an expert in a matter that allegedly exceeded his expert designation. The Court affirmed by unpublished order the trial court's ruling in favor of the defendant health care providers permitting the testimony.

## HDJN Appellate Accomplishments in 2014

At HDJN, our appellate specialists are experienced in representing health care providers before appellate courts, including the Supreme Court of Virginia. They are well-versed in the unique and complex rules inherent in appellate litigation and stay abreast of recent decisions from these courts. Below are a few of our teams' notable compliments in 2014:

- Successfully resisted plaintiff's appeal after earning a defense verdict for a client at trial. At the same trial, plaintiff earned a \$2,000,000 verdict against the co-defendant (not represented by HDJN).
- Successfully resisted plaintiff's appeal on statute of limitations grounds. Our trial team obtained a dismissal with prejudice of the case from the lower court on the same grounds.
- Authored an *Amicus Curiae* brief on behalf of a state-wide professional association arguing for application of the statutory cap on medical malpractice verdicts to fetuses who are injured in utero. The Supreme Court of Virginia subsequently unanimously upheld application of cap to the case.
- Authored an *Amicus Curiae* brief on behalf of a state-wide legal association arguing plaintiff's appeal should be rejected on procedural grounds. The Supreme Court of Virginia subsequently unanimously upheld the jury's verdict in favor of the health care facility.

Please do not hesitate to contact us with questions regarding appellate law or practice in Virginia. We appreciate the opportunity to serve you.

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**Healthcare companies must preserve years of effort invested in medical malpractice litigation by securing an experienced, successful appellate department.**

**By turning to HDJN attorneys for assistance in developing and implementing appellate strategies, healthcare companies position themselves to successfully prosecute and defend against high-stakes medical malpractice claims. Leave nothing to chance. Let HDJN serve as your last line of defense.**

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