

Virginia Supreme Court Emphasizes Importance of Contemporaneous Objections

The recently handed down opinion of the Virginia Supreme Court in Arnold v. Wallace, 2012 Va. LEXIS 80 (April 20, 2012), highlights for personal injury practitioners of all types, including those of us who litigate in the area of medical malpractice, the importance of well-stated, contemporaneous evidentiary objections during the course of trial. Arnold was an automobile liability case in which the plaintiff, Ms. Arnold, alleged negligence against another driver. During Plaintiff's case-in-chief she called one of her treating physicians, Dr. Charles Gardner, to testify about her injuries. On cross-examination, defense counsel showed Dr. Gardner an exhibit that Dr. Gardner identified as the plaintiff's medical records/chart from his group medical practice. Dr. Gardner confirmed that the records were regularly kept in his group's practice. Defense counsel moved to admit the records into evidence; Plaintiff's counsel objected on the ground that a proper foundation had not been laid that Dr. Gardner was the records custodian. Plaintiff's counsel further objected that defense counsel had not laid the foundation for the business records exception to the hearsay rule. Following a renewed cross-examination of Dr. Gardner, defense counsel again offered into evidence the exhibit, and Plaintiff's counsel renewed the objection for lack of foundation. The trial court overruled the objections and admitted the exhibit.

Following the admission into evidence of the full chart of the patient's medical records, defense counsel asked Dr. Gardner about various hearsay entries in the patient's chart. Several of the entries, which were made by other practitioners in Dr. Gardner's group, contained medical observations that the plaintiff-patient suffered from a variety of physical ailments that preceded the car accident (including deteriorating cervical disc disease, extreme stress, dizziness, migraine headaches, blurred vision and pain/numbness in her limbs). Plaintiff's counsel did not object during this testimony. Trial of the case resulted in a plaintiff's verdict for \$9,134.61.

On appeal Ms. Arnold assigned error to the trial court's admission of her entire chart from Dr. Gardner's practice. She argued that defense counsel failed to establish the elements of the business records exception to the hearsay rule. According to her those elements include a showing that the medical records were factual in nature and not medical opinions. The defendant responded that: he established an adequate foundation; the plaintiff failed to inform the trial court that she objected to any medical opinions contained in the chart; and the presence of an opinion in a proffered business record constitutes an independent ground for objection which plaintiff's counsel failed to assert at trial.

The Supreme Court stated:

Our cases do not require that the party offering a document for admission under the business records exception establish that all of the entries therein are factual in nature and contain no opinions. **An objection to the foundation of an entire chart does not encompass an objection to specific opinions in individual documents. Rather, it is incumbent upon the objecting party to identify the passages within a business record offered into evidence that contain inadmissible opinions. We therefore hold that Arnold's objection to 'foundation' did not apprise the circuit court of additional specific objections to opinions in the chart. Thus the objection was waived.**

2012 Va. LEXIS at *7 (emphasis added).

So, the lesson here is: MAKE YOUR CONTEMPORANEOUS OBJECTION(S) AND STATE EACH AND EVERY GROUND FOR OBJECTION WITH PRECISION. Otherwise, the objection(s) will be waived. The Virginia Supreme Court has made clear that it's a stickler for these sorts of procedural requirements. Indeed, Rule 5:25 of the Rules of the Supreme Court of Virginia states that "[n]o ruling of the trial court . . . before which the case was initially heard will be considered as a basis for reversal **unless an objection was stated with reasonable certainty at the time of the ruling**, except for good cause shown or to enable this Court to attain ends of justice." (Emphasis added).

Worth noting is a second holding of the Arnold case. In a nutshell the Arnold court re-stated the rule of Turner v. Thiel, 262 Va. 597, 601-02, 553 S.E.2d 765, 7668 (2001), regarding the standard for disqualifying an expert due to a conflict of interest. Turner v. Thiel requires a party moving for disqualification of a side-switching expert to show actual disclosure of confidential information to that expert, in order for the court to disqualify him or her. The party seeking disqualification bears the burden of offering sufficient evidence that the expert revealed confidential information to the other side. In Arnold, there was no evidence in the record that Ms. Arnold or her counsel shared any confidential information with the expert whose partner later surfaced as an expert for the defendant, or that the two experts shared any confidential information between each other. Thus, the Supreme Court concluded that the circuit court did not abuse its discretion in allowing the expert to testify.

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