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Recent Virginia Supreme Court Cases Effect Privilege Analysis and Liability for Accidents to Children

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On June 10, 2010, the Supreme Court of Virginia issued two rulings that could have important impacts on Risk Management clients.

First, in Walton v. Mid-Atlantic Spine Specialists, PC, Record No. 091009, the Court issued an important ruling on safe-guarding documents that should be privileged from disclosure to an opposing party under the "attorney work-product" and "attorney-client" privileges. In this case, the defendant physician in a malpractice case draft a letter to his lawyer, intended to be privileged, which contained certain after-the-fact opinions and admissions about his care of the plaintiff. He claimed that he kept his "litigation documents" separate from his client's medical records, but somehow the letter was inadvertently copied and provided to the plaintiff's lawyer, as part of a larger production of medical records that were being produced in response to a subpoena. The copy service used alleged that the letter was included in the medical records that they were instructed to copy and provide to counsel, while the doctor alleged that the copy service must have accidentally copied his "litigation" folder.

When defense counsel discovered that the document had been produced, it sought a protective order, asserting that the document was privileged, and that the privilege was not "waived" by the disclosure since the disclosure was accidental and not purposeful.

The Virginia Supreme Court held that there was a legal distinction between disclosures of privileged documents that were "involuntary" and those that were "inadvertent" and that an involuntary disclosure (one occurring due to fraud or theft) rarely result in a waiver of the privilege. However, where a disclosure is "inadvertent", the Court adopted a five-part test to determine whether the disclosure "sticks" and the plaintiff gets to use the information. The court looks at (1) the reasonableness of precautions taken to prevent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure,

and (5) whether the party asserting the privilege has used the unavailability of the document to mislead the other side.

Applying these factors, the Court held that the doctor failed to take reasonable measures to protect the letter from disclosure, specifically finding that the letter had to have been contained in the overall file of "medical records" instead of in a separate "litigation" folder as alleged, and that when notified about the plaintiff's receipt of the letter, failed to take reasonably speedy efforts to have it returned and protected.

The lessons from this case are clear….if you have privileged documents that you want to keep privileged, you have to protect them. This should include clearly and effectively segregating the privileged documents from those that are "fair game" and should also include marking them conspicuously which language such as "Privileged—Do Not Disclose". Failure to take such precautions could result in "inadvertent" disclosures which harm your case.

Secondly, in Evans v. Evans, Record No. 091469, the Supreme Court of Virginia examined whether the "seat belt laws" passed several years ago by the General Assembly, and which included a provision that evidence of a failure to use a seat belt system/safety restraint system could result in a ticket, but could not be used as evidence of negligence in a tort case, prevented a mother from suing a child's father for failing to properly secure their infant daughter in his pickup truck, under Virginia common law negligence principles, without reference to the "seat belt laws" in the suit or at trial.

Va. Code § 46.2-1095(C) mandated the use of seat belts and seat restraints, but also held that violations of the law "shall not constitute negligence" or be admissible in civil court in any way. In the mother's lawsuit, she did not cite to the statute, nor did she assert any claim that violating the statute constituted negligence as a matter of law. Instead, she asserted that the father was negligent for failing to secure his infant daughter by placing her in a portable foam seat on the floorboards of his 1972 pickup truck, which she further alleged caused her to suffer serious injuries when the father then got into an accident.

The Court allowed this common law negligence claim to proceed against the father despite the prohibition contained in §46.2-1095(C), noting that the plain language of the law prevented any lawsuit alleging a violation as negligence or negligence per se, and forbade any evidence of the failure to use proper safety restraints in court. Since this lawsuit did not so allege, the Court allowed the mother's lawsuit to go forward, providing that the trial court did not allow evidence of the failure to use a proper safety restraint into evidence.

The Court sent the case back for trial, but also ruled that the trial court must "be mindful" of Virginia law that a four-year old child cannot legally be held to be "contributorily negligent", that a parent's negligence cannot be imputed onto the child, and that a four-year old child was exempt from the normal rule that requires all plaintiff's to take reasonable actions to mitigate injuries and damages.

In short, creative pleading allowed this case to go forward.