

Holley v. Pambianco

Virginia Supreme Court

June 9, 2005

This is a medical malpractice case, the key point being an evidentiary one relating to the introduction of statistical evidence concerning the possible failure of the plaintiff to mitigate his damages.

The plaintiff was scheduled for a routine colonoscopy. He was apprised of the risks of the procedure by, among other things, a video tape. The procedure was done, and while doing it two sessile, or broad based, polyps were discovered and removed with forceps and electric cauterization. Apparently during this procedure the colon was unknowingly perforated, and the plaintiff's standard of care expert testified that the risk of perforation of the colon in this area is so high using that technique that it violated the standard of care. A different way of cutting and removing the broad based polyps, without using electric cauterization is preferred in areas where the colon walls are thin. The plaintiff went home and called the doctor's office the next day describing some symptoms of pain, distended abdomen, and inability to eat, and was given reassurance by a nurse. After a delay of four days he again called, and upon reaching a doctor was told to go to the ER immediately. He was discovered to have a perforated colon and had several surgeries to correct the problem and considerable expense, hospitalization, and discomfort.

Before trial it was agreed by the parties that no evidence or argument on the issue of informed consent would be permitted, and an order was entered to that effect. One reason is that the Virginia Supreme Court has previously held that where informed consent is not an issue the introduction of such evidence is prejudicial because the jury might conclude that consent to the surgery was tantamount to consent to the injury. However the defense here wanted to argue, and was permitted to, that because the plaintiff had been informed of the possible risks that he had a duty to promptly notify the doctors when things didn't go as expected and his failure to do so for four days was a failure to mitigate his damages.

The defense, over the objection of the plaintiff, admitted evidence that there is a risk of 1 in 10,000 of a perforation in a colonoscopy and 13 per 10,000 in polypectomy (polyp removal). The defense then argued in closing argument, again over objection, that these statistics meant that a physician can do everything right and there may still be a perforation. This the Virginia Supreme Court held was error. The Court noted that the statistics did not say that the perforations occurred when there was an absence of negligence but only that they occurred. Indeed, it might be true that each of the perforations was caused by a negligent act and that those negligent acts generated the

statistics. To introduce pure statistics without describing the circumstances under which they were obtained can be misleading or confusing to the jury, and was held error here.

The Court, having decided to reverse for this error, did note that the general proposition of the trial court to allow the defense to introduce evidence that the plaintiff was informed of the possible complications and when they occurred that he failed to promptly notify the doctors was proper. However, a video tape which the defense had admitted which the plaintiff saw and which the defense argued did inform the plaintiff of the possibility of complications the Virginia Supreme Court ruled did no such thing and therefore was not properly admitted.