March 2006
Volume 6
Issue 2

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Business Law Newsletter

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"Getting It Done"

STATUTE OF LIMITATIONS EXTENDED

By James V. Irving

Because the statute of limitation – the time period during which a legal claim must be filed or will be forever barred – is generally absolute and inviolable, it has bedeviled many a plaintiff's lawyers, and led to some extraordinary efforts to try to run out the clock. The Supreme Court of Virginia heard such a case last year in *Newman v. Walker*.

Newman alleged personal injury after her car was hit by a truck. Within the two year statutory period, Newman filed suit against owner of the truck and the person identified on the police report as the driver, but did not learn until after the statute had expired that the driver had given a false name to the police!

When the true driver's identify was revealed, the Plaintiff asked the Court to substitute the actual driver, Walker, for the innocent party as a defendant in the case. When the trial court was asked to dismiss the suit against the real driver as time bared, the Plaintiff argued that the statute should be tolled (extended) because Walker had affirmatively misrepresented his identify to the police at the accident scene, preventing her from bringing her claim within the two tear period. In an indication of the black and white nature of statutory time limits, the trial court dismissed the claim against Walker, despite the evidence of his fraudulent conduct.

The Supreme Court reversed, holding that code of Virginia §8.01-229 (D) permits extension of the statute when a defendant uses "an affirmative act of misrepresentation" to prevent a Plaintiff for filing suit within the statutory period.

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WORDS OF APOLOGY BY MEDICAL PRACTICIONERS

By James V. Irving

Code of Virginia §8.01-581.20:1 took effect on July 1, 2005. This statute was adopted to permit expressions of benevolence or sympathy by medical practitioners without the risk that they will be used in evidence against them. According to Judge Stanley Klein of the Fairfax Circuit Court, the General Assembly apparently "intended that when tragic circumstances occur... health care professionals and patients, or family members of patients, can share their emotions and feelings without having to worry that" these words may latter be used against them.

In enacting this law, the General Assembly balanced a compelling human need with the realities of jury persuasion. Apologies and similar words can easily be understood by a jury as admissions of liability, and yet it seems inconsistent with the physician-patient relationship to discourage words of frankness and understanding. Clearly words such as "I'm sorry" are inadmissible under the new law. In *Deitsch v. Inova Health Care*, Judge Klein had to decide whether "I am sorry I wasn't there. I didn't hear your name... I didn't hear that it was Rabbi Deitsch" fell within the ambit of the statute.

Rabbi Deitsch's two-year old son sustained serious brain injuries after treatment by Dr. Beinheim and another physician. Dr. Beinheim, who knew Rabbi Deitsch from Jewish community activities, did not come to the hospital to personally assess the child's condition. The question before Judge Klein was whether Dr. Beinheim's comments were expressions of remorse for a perceived interpersonal social failure, or admissions of professional negligence.

Judge Klein appeared to have little trouble in embracing a broad view of the protection afforded a doctor who wishes to apologize. To do otherwise, he wrote, would not only chill the natural impulse to share words of condolence, but possibly "suggest a heightened standard of care for heath care professionals who, by chance, turn out to have a personal relationship with a patient or a patient's family members."

Both the statute and Judge Klein's ruling demonstrates an intention to place personal relationships over the legal advantage gained through the admissibility of potentially damning evidence.

DOCTORS' IMMUNITY REVISITED

By James V. Irving

On November 4, 2005, the Supreme Court of Virginia handed down an opinion with enormous implications to practicing physicians. *Oraee v. Breeding* is also a stunning reversal of the Supreme Court's June, 2005 decision in *Auer v. Miller*. Both cases involved a physician's statutory immunity from civil suit.

The Plaintiff in *Auer v. Miller* died after his doctors – Baker and Miller - failed to review the results of a lab report ordered by Baker. Although the jury found Dr. Baker liable and awarded $400,000 in damages against him, the trial court held that Code of Virginia §8.01-581.18 immunized Dr. Miller from civil liability arising from his alleged failure to review or act upon the lab report ordered by Dr.

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Baker[1]. Part B of the statute states, in pertinent part: "Any physician shall be immune from civil liability for any failure to review, or take action in response to the receipt of any report or… laboratory test…which test the physician neither requested nor authorized in writing, unless such report was provided directly to the physician."

The Supreme Court unanimously held that the plain language of the statute required dismissal of the claim against Miller based upon his failure to read and rely on the results of the test.

Supreme Court precedent, though hardly sacrosanct, is always entitled to great weight, as the reliability of prior court decisions forms the basis of our system of Common Law. For this reason, the Court's express reveal of *Auer*, less than four months later, shocked both doctors and lawyers alike. Writing for 4-3 majority in *Oraee v. Breeding*, Justice Cynthia D. Kinser called *Auer* a "mistake" and expressly overruled it.

When Sherry Breeding sought emergency room treatment for facial drooping, Dr. Oraee diagnosed a stroke and, among other things, requested a consultation with another specialist. That doctor ordered further tests. Thereafter, on January 8, 2003, Dr. Oraee discharged the patient and asked her to follow up on an outpatient basis. The second doctor's test results were available on January 13, but Dr. Oraee had not reviewed them by the time he saw Breeding again on January 17. At that time, he changed Breeding's medication, and she died of a massive stroke twelve days later. Plaintiff's expert testified, in essence, that a review of the second doctor's test results would have resulted in treatment that would have saved Breeding's life.

The jury returned a verdict in favor of the Plaintiff, and the only issue on appeal was whether Dr. Oraee was immune from liability based upon the holding in *Auer* under the theory that he had neither ordered nor been given the second doctor's test results.

It may have appeared even to the Plaintiff that the law of *Auer* required the Supreme Court to overturn the jury verdict. Plaintiff's counsel argued that Oraee's actions were factually distinguishable from Auer's, but the court did not chose the easy way out but instead took *Auer* on directly. After a thorough analysis of the law, the four member majority held that the *Auer* court's mistake had been in looking at part B of the statute in isolation. Reading part B in light of part A, the Court concluded that the immunity only applied "when the report at issue is one generated as a result of an individual's request, as opposed to a physician's request."

In reexamining, and ultimately overturning a recent precedent, particularly in the face of a vigorous dissenting opinion from a minority insisting that the two provisions "did not need to be read together", the Supreme Court made a courageous decision. It does not change the fact that the results of *Oraee* and *Auer* cannot be squared. However the *Auer* court's decision that Auer could not have prevailed against Miller for other reasons allows us to avoid the conclusion that *Auer* was improperly deprived of her protection under the law.

[1]As the trial court also concluded that the Plaintiff had failed to demonstrate that Miller's alleged negligence was proximate cause of Auer's death, the dismissal of the claim on the basis of immunity may have been, ultimately, irrelevant: Auer would have lost anyway.

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Statute of Limitations Extended

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The case was remanded to the Circuit Court with instructions to the Court to take evidence to determination of whether Walker had misrepresented his identify with the intent to prevent the Plaintiff from filing suit, and a determination of how long the concealment lasted.

The trial court's ruling, and even the Supreme Court's reversal demonstrates the general inviolability of the statute of limitations. The trial court failed to extend the statute even in view of obvious fraudulent conduct, and even the Supreme Court, in reversing, conditioned its remedy on an affirmative demonstration of that Walker had the intent to the conceal for the purpose of avoiding suit, and whether nor not that concealment was perpetuated for a long enough period to excuse the failure to file within the statutory period.

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