



Semsker v. Lockshin, 987 A.2d 18 (Md. 2010)

Topics Covered: Professional Liability

Outcome: Very Favorable

Issue

The issue in this case is whether the Maryland tort reform statute applied to all suits for medical malpractice or only to malpractice cases that follow a pre-trial arbitration.

AMA Interest

Medical liability reform is the AMA's highest legislative priority.

Case Summary

Michael R. Albert, MD, a dermatologist, misdiagnosed a growth on Richard Semsker's back. The growth turned out to be cancerous, and Mr. Semsker died. Mr. Semsker's estate sued Dr. Albert and his two medical practice partners, as did Mr. Semsker's widow and daughters. One of the partners settled, but the case proceeded against Dr. Albert and the remaining partner, Norman A. Lockshin, MD.

Under Maryland law, medical malpractice cases are ordinarily referred to a Health Care Alternative Dispute Resolution Office, which then arbitrates the case. However, a party can waive arbitration, and in this case the arbitration was waived.

The case was tried to a jury, which returned a verdict against Drs. Albert and Lockshin, jointly and severally, for a total of \$5,805,000 for all of the plaintiffs. Of this sum, \$3,000,000 was for non-economic damages. Also, \$500,000 was awarded for previously incurred medical expenses, some of which had been paid by Mr. Semsker's insurance company.

The parties made various post-trial motions, some of which invoked Md. Ann. Code, Courts and Judicial Proceedings, § 3-2A-09. This statute caps non-economic damages and also eliminates recovery of damages for which the plaintiff has already been reimbursed under a "collateral source" (typically, the plaintiff's insurance company). The court had to determine whether § 3-2A-09 applied in this case.

Section 3-2A-09 states that it applies to "an award under § 3-2A-05 of this subtitle or a verdict under § 3-2A-06 of this subtitle". Both § 3-2A-05 and § 3-2A-06 refer to arbitration proceedings. However, § 3-2A-09 does not state that it should apply to a judicial award, such as the one in the present case, that resulted from proceedings in which arbitration was waived.

The trial court found that § 3-2A-09 applies only to proceedings that follow from an arbitration. The court acknowledged that such interpretation might lead to an emasculation of the statute, as plaintiffs might choose to waive arbitration to avoid its effect. Nevertheless, it found the statutory wording unambiguous and that it could not be changed through judicial interpretation. Thus, the court held that § 3-2A-09 would not apply to the instant case.

The defendants appealed to the Maryland Court of Appeals, the highest court in the state. The Maryland Supreme Court reversed, finding that the cap on damages, § 3-2A-09, applies to all judgments, including judgments arising out of proceedings in which arbitration has been waived. If arbitration is waived and the case proceeds to verdict, then the verdict must be entered under § 3-2A-06.

Litigation Center Involvement

The Litigation Center and MedChi filed an *amicus curiae* brief in the Maryland Court of Appeals to argue that § 3-2A-09 should apply to all judicial proceedings, not just those that follow from an arbitration.

Court of Appeal of Maryland brief