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NC Panel Doubts COVID Law Saves Doctor From Surgery Suit

By **Travis Bland**

Law360 (October 17, 2023, 8:34 PM EDT) -- The North Carolina Court of Appeals appeared skeptical Tuesday that a doctor and hospital were immune to a medical malpractice lawsuit based on a law passed as COVID-19 set in, with judges indicating the complaint detailed the kind of reckless care needed to bypass the statute's shield against lawsuits.

During oral argument before the state's intermediate appellate court, two judges of a three-judge panel peppered attorney Christopher G. Smith, representing Dr. Kori Whitley and Vidant Medical Center, with questions about why the lawsuit by patient Doris Land doesn't allege the type of gross negligence needed to negate the immunity given to care providers in the law.

Judge April Wood said Land used more than two "magic words" of gross negligence.

"The plaintiff alleges the doctor didn't perform any exam and didn't even touch her" days after Land's operation, Judge Wood said. "In the complaint it seems to allege that the doctor wrote something that wasn't true and that's how you can infer that. And that could be conscious disregard."

At issue is total hysterectomy surgery performed on Land, which the patient alleged left part of the uterus inside, causing an infection, kidney failure, lung blood clots and the removal of part of her bowel. Whitley and Vidant Medical want the appeals court to find that the COVID law passed in May 2020 **grants them immunity** if medical care was affected by the virus and to overturn a trial court's refusal to dismiss the lawsuit outright.

Smith argued gross negligence claims, which negate the immunity provided in the law, can't simply be appended to a complaint and must be backed up with specific details.

"If this court permits the mere conclusory invocation of those two words appended to ordinary claims of negligence, we would then be vaporizing ... the unanimous public policy of this state passed by the General Assembly," Smith said.

Judge Valerie Zachary seemed inclined to believe Land's complaint provided enough grounds for a gross negligence claim.

Judge Zachary asked, didn't the complaint allege that "the failures and violations of the standards of care were negligent, careless, reckless and grossly negligent?"

Beyond questioning Smith's assertions about gross negligence, the judges also indicated that the doctor and hospital have been too general about their care being affected by COVID rather than showing how Land's care was specifically affected by the virus.

One requirement for the statute to grant immunity is that a care provider must show its decisions were affected by COVID.

Smith recited testimony in affidavits by Whitley and another chief doctor about the consequences on care at Vidant Medical's surgery center brought on by COVID.

"That seems like kind of a conclusory statement there and I'm wondering if there are any specific facts related to how Ms. Land's care was affected." Judge Zachary said.

After Smith said that the question of COVID affecting Land's care is like asking if the sky is blue, so the answer has to be yes, Judge Wood jumped in.

"How does that have to be yes?" Judge Wood said. "It's supposed to be this particular individual, this patient. 'How this patient was affected.' Just because COVID existed, we presume that every patient was affected?"

Attorney MaryAnne M. Hamilton, representing Land, seized on what she called "just a laundry list" of general changes the hospital and its affiliates went through because of COVID, which they said applied to Land at the end of affidavits.

"If they have not pleaded specifically that this change due to COVID affected Ms. Land's care in that way, they have done nothing more than present the same conclusory pleading that they have accused of providing," Hamilton said.

Hamilton argued that the doctor and hospital have done little more than say they fulfilled the statutory requirements to be granted immunity without giving specifics to show how they met those requirements.

Hamilton also contended that it was up for dispute if the affidavits by doctors and hospitals were filed with the trial court on time and if the judge considered them.

To be granted immunity from lawsuits with allegations during the pandemic, the act requires that a health care provider show it provided care during the time period of a state COVID emergency order, the virus impacted the provider's decisions, and the provider gave care "in good faith," the act says.

The panel shouldn't reverse the lower court's decisions that immunity doesn't apply to Whitley and Vidant so early in the litigation and should allow the case to go forward, Hamilton said.

Land sued Whitley and Vidant Medical in 2022.

Judges Valerie Zachary, April Wood and Michael Stading sat on the panel.

Land is represented by Bruce W. Berger and MaryAnne Hamilton of Miller Law Group PLLC.

Vidant Medical and Whitley are represented by Christopher G. Smith, Hope C. Garber and David R. Ortiz of Smith Anderson Blount Dorsett Mitchell & Jernigan LLP, W. Gregory Merritt of Harris Creech Ward & Blackerby PA, and Elizabeth P. McCullough and Kelsey Heino of Walker Allen Grice Ammons Foy Klick & McCullough LLP.

The case is Land et al. v. Whitley et al., case number 23-250, in the North Carolina Court of Appeals.

--Editing by Robert Rudinger.