US Court of Appeals Confirms Medical Malpractice During Covid-19 Pandemic not Barred by Federal Immunity Law

Second Circuit rules in favor of Leitner Varughese Warywoda Amicus Brief



"Negligent medical providers have failed to take accountability since day one, instead deflecting and stalling at every opportunity. This is another critical battle won in the war to hold negligent providers accountable to the victims who suffered"

- Brett Leitner of Leitner Varughese Warywoda

NY Hospital Covid Injury Suit Improperly Moved to Federal Court

In the spring of 2020, Zachary Solomon received treatment for COVID-19 at St. Joseph Hospital in New York. During his stay, he developed a severe pressure ulcer, which eventually required multiple surgical procedures. He filed a lawsuit against St. Joseph in New York state court, arguing that the pressure ulcer was the result of the hospital's negligent failure to rotate his position, change his diaper, and care for his skin. St. Joseph removed the case to federal court and moved to dismiss it on the grounds that the PREP Act, a 2005 federal statute that limits liability for injuries caused by certain "covered countermeasures," and the Emergency or Disaster Treatment Protection Act (EDTPA), a New York state law passed early in the COVID pandemic, barred Mr. Solomon's claims.

After the district court denied St. Joseph's motion to dismiss, St. Joseph's appealed to the Second Circuit. After briefing on the merits was complete, the Second Circuit asked for briefing on the questions (1) whether the Second Circuit had jurisdiction to review

the denial of the motion to dismiss and (2) whether the district court had subject-matter jurisdiction over the action at all.

Along with appellate counsel Adam Pulver of Public Citizen, Leitner Varughese Warywoda filed an amicus brief on behalf of Vivian Rivera-Zayas, whom we represent in a case pending in the Second Circuit raising related issues. The amicus brief explains that the district court lacked subject-matter jurisdiction because the PREP Act does not completely preempt claims, like Mr. Solomon's, that they do not arise from injuries caused by pandemic countermeasures identified by the Secretary of Health and Human Services, and because the statute does not completely preempt negligence-based claims like Mr. Solomon's at all. The brief also explains that the "Grable" doctrine did not provide federal jurisdiction as federal law and that the case does not satisfy the requirements of the federal-officer removal statute. Therefore, the brief concludes, the Second Circuit should dismiss the appeal with instructions to the district court to vacate its orders and remand the action to state court.

In March 2023, the Second Circuit issued an opinion agreeing with Leitner Varughese Warywoda and Public Citizen that the district court lacked jurisdiction, and disagreed with briefs filed by:

U.S. Chamber Litigation Center, Washington, DC
American Hospital Association, Washington DC
American Medical Association, Chicago, IL
Chamber of Commerce of the United States of America
American Hospital Association
American Medical Association,
Medical Society of the State of New York
Greater New York Hospital Association
Healthcare Association of New York State, Inc.

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