



Ho v. Frye, 880 N.E.2d 1192 (Ind. 2008)

Topics Covered: Professional Liability

Outcome: Very Favorable

Issue

The issue in this case was whether a surgeon who inadvertently left a sponge in his patient should be absolutely liable for the mistake or whether liability should turn on whether he was negligent, a jury question.

AMA Interest

The AMA seeks to contain the burden of medical malpractice liability against physicians by opposing legal arguments that would expand such liability.

Case Summary

After performing surgery on a patient, Dr. Ho requested a sponge count confirming that he had removed all of the sponges used during the procedure. The hospital's surgical nurse and surgical assistant reported to Dr. Ho that the sponge count was correct and that the sponges had been removed. It was later discovered, however, that a sponge had been left in the patient's abdomen. The patient sought to hold Dr. Ho liable for her injuries.

At trial, Dr. Ho argued that he had been entitled to rely on the sponge count of the nurse and surgical assistant, and the jury ruled in his favor. The plaintiffs moved for a new trial, and the trial court granted that motion. Both sides appealed.

The appellate court held Dr. Ho strictly liable for the incorrect sponge count and remanded the case to the trial court for a trial on damages. Dr. Ho then appealed to the Indiana Supreme Court, which on February 21, 2008 reinstated the jury verdict in favor of Dr. Ho. The Indiana Supreme Court held that physicians are not absolutely liable as a matter of law for failure to remove unnecessary sponges used in a patient during surgery. Instead, this is a factual issue for the jury to decide.

Litigation Center Involvement

The Litigation Center and the Indiana State Medical Association filed an amicus brief and an amicus reply brief on Dr. Ho's behalf in the Indiana Supreme Court. The briefs argued that the theory of absolute liability espoused in the Court of Appeals was based on obsolete ideas about surgical practice. Because medicine is a complex, joint enterprise among physicians and other healthcare workers, physicians have a right to rely, at least in some instances, on the sponge count of a nurse and surgical assistant. Accordingly, Dr. Ho's negligence was properly a jury question.

Indiana Supreme Court principal brief

Indiana Supreme Court reply brief