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Medical Malpractice
Case Update
September, 2007

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FROM DISCOVERY UNDER THE PEER REVIEW
PROTECTION ACT, 63 P.S. §425.1 ET SEQ.**

In Adriansen v. Marworth, 80 Pa. D.&C. 4th 524 (Lack. Co. 2006), the Common Pleas Court sustained the Special Trial Master's decision to deny the Plaintiff's Motion to Compel Production of nurses' personnel file because the documents contained therein failed to meet the criteria necessary for Peer Review Protection under 63 P.S. §425.1 et seq. Plaintiff filed a Wrongful Death and Survival action against Defendant, Marworth, a licensed alcohol and drug treatment facility, in connection with decedent's "elopement" from the facility resulting in his death.

During the discovery phase of the litigation, Plaintiff's counsel requested the production of documents regarding the personnel file of a nurse employed by Marworth. Specifically, the items requested included performance improvement plans; performance appraisal and development plans; Department of Nursing orientation checklist evaluations; infection control orientation checklists; Marworth telephone reference evaluations; and, Marworth interview sheet evaluating candidates. Marworth responded by asserting the Peer Review Protection Act, 63 P.S. § 425.1 et seq., as a basis for withholding the disclosure of these documents.

The Common Pleas Court held that the Defendant's position lacked any merit or substance and was "continuously disingenuous in its totality." The Court held that the documents that were requested were related to Human Resources, and not Peer Review, and that the Human Resources document could never be construed as Peer Review protected under the statutory scheme.

JUDGMENT CREDITOR IN MEDICAL MALPRACTICE CASE NOT REQUIRED TO SEEK SATISFACTION EXCLUSIVELY FROM SOLVENT INSURER, BUT MAY COLLECT IN THE FIRST INSTANCE AGAINST PPCIGA

In Carrozza v. Greenbaum, et al., 916 A.2d 553 (Pa. 2007), the jury entered a verdict in favor of Lynda Carrozza against defendants Drs. Evers and Greenbaum, both radiologists, in the amount of \$4,000,000, due to the failure of the defendants to diagnose breast cancer. Each defendant was found 50% negligent. Defendant, Greenbaum, had insurance through MIIX in an amount sufficient to cover the entire verdict. The defendant Evers was insured through PHICO, which was insolvent and thus the Pennsylvania Property and Casualty Insurance Guaranty Association (PPCIGA) assumed responsibility, within the limits of the guarantee statute, due to PHICO's insolvency.

Carrozza sought to collect on the judgment against PPCIGA. In response, PPCIGA argued that the non-duplication provision in the statute 40 P.S. §991.1817 required that Carrozza collect against the insurer for Greenbaum, and only if this insured did not have sufficient coverage to pay for the judgment could Carrozza collect against PPCIGA. In effect, PPCIGA argued that it had no liability because MIIX, the insurer for Greenbaum, had more than sufficient coverage to pay for the entire verdict.

The court framed the issue as follows:

Where two defendants are found jointly and severally liable, one defendant has sufficient insurance coverage to satisfy the entire judgment, and the other defendant's insurer is insolvent, may a court direct the judgment creditor to seek satisfaction exclusively from the solvent insurer, thus effectively discharging the Pennsylvania Property & Casualty Insurance Guaranty Association of all liability?

The court answered the question with a qualified "no".

In support of its decision, the court recognized that a holding in favor of PPCIGA could adversely impact the opportunity to settle the case:

That is to say, because multiple defendants increase substantially the likelihood that a judgment will be joint and several, in a multiple-defendant case, PPCIGA will be best advised, in protecting its coffers, to leave resolution of the case to any solvent insurers and the plaintiff, which in turn very likely will substantially increase the cost of settlement (not to mention trial and verdict, should the case go so far) for those solvent insurers whose policies are implicated in the case, and/or lead to a greater proportion of cases going to trial. Contrarily, under an appropriate reading of the law pursuant to which PPCIGA may be jointly and severally for judgments against insureds for whom it takes

responsibility, PPCIGA will have an incentive to participate in negotiations, thus encouraging settlement of claims.

Thus, the Court held that the non-duplication provision did not prohibit Carrozza from collecting the judgment in the first instance against PPCIGA in its capacity as surrogate for Dr. Ever's insolvent insurer.

**PLAINTIFF CAN ONLY AMEND COMPLAINT AFTER THE STATUTE OF
LIMITATIONS HAS RUN TO MORE SPECIFICALLY DEFINE THE CAUSE OF
PATIENT'S DEATH**

In Chaney v. Meadville Medical Center, 912 A.2d 300 (Pa. Super. Ct. 2006), the administratrix of the estate of Jessica Kimple brought a medical malpractice action against Kimple's emergency care physician, Dr. Glenn Bollard, and the Meadville Medical Center (MMC) where she was treated in 2002. Nearly three years after filing the original complaint, the plaintiffs filed a petition to amend the complaint. In partially reversing the trial court, the Superior Court stated that, "[a]n amendment introducing a new cause of action will not be permitted after the statute of limitations has run in favor of a defendant...only if the proposed amendment merely amplifies, as opposed to altering, the cause of action already averred, will it be allowed if the statute of limitations has run."

The amendments plaintiffs sought to make were an additional paragraph that specified the exact cause of Kimple's death to be spontaneous tension pneumothorax, and three additional paragraphs at the end of the complaint that taken together specified that Dr. Bollard's treatment of Kimple's spontaneous tension pneumothorax was negligent.

The Superior Court held that plaintiff was not entitled to amend her complaint so as to include new allegations of negligence, which were contained in the three additional paragraphs regarding Dr. Bolland's treatment of Ms. Kimple. However, in partially reversing the trial court, the Court permitted the plaintiff to amend the complaint to more specifically define the cause of Ms. Kimple's death.

EXPERT, WHOSE LICENSE REVOCATION PROCEEDING IS STAYED AND WHO IS ON PROBATION, FOUND NOT TO HAVE UNRESTRICTED LICENSE TO PRACTICE AND THEREFORE NOT QUALIFIED AS EXPERT UNDER MCARE STATUTE 40 P.S. SECTION 1303.512(B)(1)

The Superior Court of Pennsylvania in Cimino v. Valley Family Medicine, 912 A.2d 851 (Pa. Super. 2006), addressed the question of whether the Allegheny County Court of Common Pleas properly declared Plaintiff's expert's medical license "restricted" within the meaning of Section 1303.512(b)(1) of the MCARE Act. The Administratrix for the Decedent's Estate brought a medical malpractice action against the hospital and physicians alleging negligence in the care and treatment of the decedent prior to his death.

Before trial, the Court of Common Pleas addressed a challenge as to whether the Plaintiffs' expert, Dr. Herbert A. Rubin, was competent to testify as an expert because his medical license had been "restricted" pursuant to the MCARE Act. Dr. Rubin's license was revoked by the Medical Board of California, Division of Medical Quality, but the revocation was stayed and Dr. Rubin was placed on probation for five years. Dr. Rubin had reached an agreement with the State of California whereby his license would be fully restored in three years if he complied with certain requirements during his probationary period.

The Superior Court affirmed the Common Pleas Court's decision to exclude the expert's testimony, and applied a statutory construction analysis and noted that the plain meaning of the term "unrestricted" for purposes of §1303.512(b)(1) means that a medical license is not subject to any limitations or restraints. Consequently, Dr. Rubin's license to practice medicine was not "free" from impediments and restraints within the context of the statute.

Since the Plaintiffs lacked sufficient medical expert testimony, it was determined that they could not establish a Prima Facie case of medical negligence and therefore, the trial court's dismissal of the case was proper.

COURT DENIED PLAINTIFFS' POST-TRIAL MOTIONS TO VACATE THE JURY VERDICT AND GRANT A NEW TRIAL

In Craddock v. Viechnicki, 79 Pa. D. & C.4th 225 (Lehigh Co. 2006), the Court denied plaintiffs' post-trial motions requesting that the Court grant a new trial and vacate the jury verdict in favor of defendant, Dr. Bruce Viechnicki. The plaintiffs' claim alleged that Dr. Viechnicki's prenatal treatment of plaintiff, Jessica Craddock, fell below the appropriate standard of care by failing to measure and record plaintiff's fundal height development. Plaintiffs allege this negligence resulted in the stillbirth of plaintiff's daughter, Madison Craddock, on September 11, 2001. Plaintiffs' motions assert that the Court abused its discretion in several instances with respect to the admissibility of evidence and that the jury was improperly instructed.

a. Medical Expert Not Required To Testify Against His Will As To His Opinion

Plaintiffs first asserted that the Court erred in refusing to require a doctor to testify. After it was determined that Madison Craddock did not have a heartbeat, Dr. Albert Sarno, upon request of the defendant, consulted with the plaintiff to convince her to vaginally deliver the stillborn baby, as opposed to the Caesarian birth method, which Jessica Craddock desired. Plaintiffs' counsel subpoenaed Dr. Sarno to testify as an expert at trial; however Dr. Sarno's attorney filed a motion to quash the subpoena arguing that Dr. Sarno's involvement in the matter began only after the death of Madison Craddock, and accordingly, the doctor had no personal knowledge of the prenatal care that plaintiff alleges fell below the standard of care. The Court granted the motion to quash stating that it is well established in Pennsylvania that an expert witness cannot be compelled to testify against his will as to his opinion. The Court cited Jistarri v. Nappi, 549 A.2d 210, 216 (Pa. Super. Ct. 1988), wherein the Court explained that "[t]he private litigant has no more right to compel a citizen to give up the product of his brain, than he has to compel the giving up of material things."

b. Use Of Authoritative Texts/Learned Treatises

Plaintiffs also contended that the Court's refusal to allow plaintiffs' counsel to read excerpts from "authoritative texts" to the defendant and his expert witnesses during cross-examination was an abuse of discretion because it was an improper limitation of plaintiffs' right to cross-examine the defendant. The Court determined that plaintiff was attempting cross-examination with publications that were not established as authoritative, but instead were regarded as "standard works in the field." The Court stated that through these texts plaintiffs' counsel was simply trying to have plaintiffs' theory of negligence read into the record which would, "...offer, despite the ostensible purpose of the process, an implicit invitation to the jury to view the substance of the material as true...[a]s the appellate courts of this Commonwealth have noted, learned writings which are offered to prove the truth of the matters therein are hearsay and may not properly be admitted into evidence for consideration by the jury."

c. Jury Instructions – No Need To Instruct That There Is No Contributory Negligence

Plaintiffs' counsel further argued that the Court failed to inform the jury that there could be no contributory negligence, and that the jury should determine only the negligence of the defendant. The Court, however, held that Jessica Craddock's conduct was not up for evaluation, and the sole question for the jury was to evaluate the reasonableness of defendant's conduct. The Court stated, "[i]t is hornbook law in this Commonwealth that a trial court should not charge the jury on a concept that is not supported by the evidence." Accordingly, as it was unnecessary to give an instruction precluding the jury from considering contributory negligence on the part of the plaintiff, the Court committed no error.

d. Bifurcation Of Liability And Damages Upheld

Plaintiffs' counsel also objected to the Court's decision to instruct the jury on liability and damages separately, with an instruction to deliberate first as to the defendant's liability. Plaintiffs' counsel argued that a disjoinder of the verdict by the Court promoted the notion that the Court wanted the jury to make a hasty verdict. In rationalizing its decision to disjoin the verdict, the Court noted the complexity of the jury instructions and the extreme emotion that accompanied such a case which could tend to influence the jury unfairly against the defendant because of sympathy for the plaintiffs' loss. Further, the Court stated, "bifurcation should be granted only to promote convenience and avoid prejudice." The Court held that bifurcation was proper in this case because it saved time if the jury found no liability on defendant's behalf, and such bifurcation also may have promoted settlement if it was determined that liability did exist.

**JURY FOUND DOCTORS WERE NEGLIGENT BUT NOT A SUBSTANTIAL
FACTOR IN BRINGING ABOUT PLAINTIFFS' HARM AND THEREFORE DOCTORS
WERE NOT LIABLE**

In Estate of McNulty v. Thomas Jefferson University Hospital, 2006 WL 3742164 (Phila. Co. 2006), Plaintiffs alleged that the defendants' were negligent in leaving a 4 inch by 4 inch surgical sponge behind in Sheila McNulty's heart during an emergency surgery resulted in her death approximately ten months after the operation. The sponge was found two days after the emergency surgery was performed and was subsequently removed through an operation by the defendants in November 2000. Approximately ten months after this operation, in September 2001, McNulty was admitted to the hospital again with symptoms suggestive of a transient ischemic attack. McNulty died following a subsequent surgery.

a. Failure To Remove Sponge At Conclusion Of Surgery May Not Be Negligent

The jury found the defendant doctors, who failed to remove the surgical sponge during the initial surgery, to be negligent, but found their negligence was not a substantial factor in bringing about the plaintiffs' harm. The plaintiffs appealed arguing that the verdict was against the weight of the evidence and a new trial was therefore required on causation and damages. Both parties agreed that the sponge had to be removed by the defendants and that the removal operation was necessary:

“In the present case the jury was free to find that the conceded injury—the necessity for the sponge removal operation—although factually caused by the Defendants, was not the result of any negligence by the Defendants. The Defendants are liable only for negligent actions and are not insurers or strictly liable. As Plaintiffs concede, the jury was free to believe Defendants' evidence that, because of the emergent nature of the situation in the ICU, the defendants were not negligent in not pausing to conduct a proper sponge count while trying to prevent Mrs. McNulty from bleeding to death. The jury was also free to find that the Defendants were negligent by not discovering the sponge sooner or that the sponge removal operation should have been performed sooner. Neither of these later acts of negligence, however, caused the injury of which Plaintiffs' complain—the necessity for another operation to remove the sponge. Based on the evidence in this case, the jury could properly have determined that the Defendants' negligence did not cause the necessity for the sponge removal operation.”

b. Specific Identity Of Doctor As Fact Witness Not Required

Plaintiffs also argued that McNulty's treating physician, Dr. Mark Ingerman, was improperly permitted to testify because the defense failed to specifically list Dr. Ingerman as a witness in defendants' pretrial memoranda. The Court allowed Dr. Ingerman's testimony,

however, because defendants did list “all health care providers” at Lankenau Hospital as possible witnesses. Further, plaintiffs argued that Dr. Ingerman’s testimony was subject to the expert witness disclosure requirements of Pa. R.C.P. 4003.5. The Court explained that, “a treating physician’s testimony is generally not subject to the expert witness requirements because his facts and opinions were developed in the normal course of his medical treatment of his patient and were not developed in anticipation of litigation.” The Court did not require disclosure under Rule 4003.5, as Dr. Ingerman’s testimony was based on his treatment of McNulty and was not prepared in anticipation of litigation.

SUPREME COURT TO DECIDE IF NURSE CAN GIVE OPINION ON CAUSATION

There has been significant controversy in the lower courts as to whether a nurse can give opinion testimony on causation. In Freed v. Geisinger Medical Center, (2007 Pa. Lexis 1570), the Supreme Court granted allocatur on the following issue as set forth in the Petition for Allowance for Appeal:

By holding that a nurse is competent to render an opinion that a breach of the standard of care caused plaintiff's medical condition, did the Superior Court render a decision in direct conflict with Flanagan v. Labe, 547 Pa. 254, 690 A.2d 183 (1997), in which this Court held that a nurse is incompetent to render an opinion on causation in a medical malpractice action because it calls for a medical diagnosis which a nurse is statutorily prohibited from rendering?

**DISSENT OPINION BY JUSTICE BAER OF THE SUPREME COURT OF
PENNSYLVANIA OPINES THAT DUE TO MCARE ACT'S FAILURE TO DEFINE
THE WORD "SHARE," THE QUESTION REMAINS AS TO WHETHER A
HEALTHCARE PROVIDER'S LIABILITY IS LIMITED TO THE PERCENTAGE OF
THE VERDICT DESIGNATED BY THE JURY, OR, FOR THE ENTIRE AMOUNT OF
THE VERDICT PURSUANT TO THE UNIFORM CONTRIBUTION AMONG JOINT
TORTFEASORS ACT. 42 PA. C.S.A. §8323.**

In Gabroy, M.D. v. Commonwealth of Pennsylvania Medical Professional Liability Catastrophe Loss Fund, 912 A.2d 768 (Pa. 2006), a jury found Dr. Gabroy and two other physicians jointly and severally liable in the amount of \$665,000.00 and applied delay damages of \$142,467.00 for a total judgment amount of \$807,467.00. The jury found Dr. Gabroy 70% negligent, a co-defendant physician 20% negligent, and co-defendant partnership 10% negligent. Plaintiffs decided to collect the entire judgment from Dr. Gabroy.

Dr. Gabroy maintained a primary insurance policy of \$1,200,000.00 per occurrence. Dr. Gabroy's primary insurance provider, PIC, was declared insolvent and PIGA was required to pay the \$200,000.00 policy limits to the Plaintiffs and the MCARE Fund paid the Plaintiffs \$334,868.00 which represented an aggregate 70% of the verdict rendered against Dr. Gabroy. The Fund refused to pay the balance of the verdict on behalf of Dr. Gabroy and Dr. Gabroy initiated a lawsuit against the Fund in the Commonwealth Court in an effort to force the Fund to pay the remaining money owed to the Plaintiffs pursuant to the Judgment. MCARE filed a Motion for Summary Judgment based upon its position that the language of the MCARE Act limited its payment to the 70% share of fault as to Dr. Gabroy and its Motion for Summary Judgment was granted.

Dr. Gabroy appealed to the Pennsylvania Supreme Court on the issue of whether the Fund was responsible to pay on behalf of Dr. Gabroy an amount in excess of his basic insurance coverage up to his legal liability as a joint tortfeasor, or whether the fund was only required to pay on Dr. Gabroy's behalf an amount equal to his percentage of causal negligence determined by the jury, thereby exposing Dr. Gabroy to personal liability. Dr. Gabroy argued that the Fund, as an additional insurer, provided insurance for his legal liability, not his percentage of cause of negligence. Thus, Dr. Gabroy argue that because, as a joint tortfeasor, he is legally liable for 100% of the verdict, 42 Pa. C.S.A. § 8323, the Fund was responsible for 100% of the verdict. On the other hand, the Fund argued that its responsibility was limited to these claims that exceeded the primary coverage of the health care provider, which in this case was limited by the 70% share of fault that was assigned to Dr. Gabroy.

Justice Baer found that the legislative intent of the Fund was to indemnify doctors up to their legal liability. Justice Baer concluded that the Court should have granted oral argument to determine whether, in a case of joint and several liability, where the provider is 100% liable for the verdict, the Fund may properly limit its obligation to the percentage of causal negligence found by the jury, where the Fund's statutory maximum is not implicated.

Justice Saylor joined in the dissenting statement.

PENNSYLVANIA SUPERIOR COURT HOLDS THAT (1) ADMISSION OF EVIDENCE DESCRIBING PLAINTIFF AS A JEHOVAH'S WITNESS AND STATEMENT THAT SHE WAS UNCOOPERATIVE WITH PRE-SURGICAL CARE IS ADMISSIBLE; (2) COURTS REFUSAL TO ALLOW PLAINTIFF'S COUNSEL TO CROSS EXAMINE EXPERT ON LEARNED TREATISE IS SUSTAINED; AND, (3) COURT'S REFUSAL TO ALLOW CROSS-EXAMINATION OF DEFENSE MEDICAL EXPERT REGARDING PREVIOUS MEDICAL MALPRACTICE LAWSUITS FILED AGAINST HER IS SUSTAINED.

The Superior Court of Pennsylvania in Jacobs v. Chatwaney, M.D., et al, 992 A.2d 950 (Pa. Super 2007) addressed a Plaintiff's appeal in a medical malpractice case challenging evidentiary rulings made by the trial judge. Plaintiff filed an action alleging that her doctor was negligent in the performance of a hysterectomy claiming an injury to her left ureter during the procedure. Evidence was presented showing that the Plaintiff was a practicing Jehovah's Witness whose religious beliefs ruled out blood transfusions.

1. Court Finds Admissible That Plaintiff Is A Jehovah's Witness

The Superior Court held that evidence regarding the Plaintiff's religious beliefs and her failure to cooperate with pre-surgical treatment were relevant and properly admitted at trial. The Court stated that the testimony was not introduced to stigmatize the Plaintiff or undermine her credibility or competency. Rather, the Court determined that the reference to her being a Jehovah's Witness provided the context of the decision-making process for the defendant doctor with respect to the Plaintiff's course of treatment which was impacted by the fact that she refused blood transfusions for religious reasons.

2. Learned Treatise

The Plaintiff also argued that the trial court erred by not allowing her to cross-examine the defense expert with a learned text because the expert (1) acknowledged that the treatise was a standard work in the field, and (2) testified to a standard of care that was contrary to that set forth in the treatise. The Superior Court sustained the trial court's decision reasoning that a treatise is properly admitted "not for the truth of the matter asserted, but only to challenge the credibility of the witness's opinion and the weight accorded to the opinion of the witness." Notwithstanding its decision, the Court stated that "although the trial court may have erred . . . by refusing to allow Plaintiff to use the treatise to attack the credibility of [the expert's] testimony on the standard of care, Plaintiff completely fails to establish how the trial court's refusal resulted in prejudice, in that Plaintiff does not even explain what the two allegedly conflicting standards are." It appears as though the Superior Court would have reversed had a more complete record been made to establish that the defense expert's testimony was inconsistent with the texts the expert deemed authoritative.

3. Evidence of Malpractice Claims Against Defense Expert Not Admissible

The Superior Court also sustained the trial court's ruling that precluded the Plaintiff from cross-examining the Defendant's expert with respect to previous malpractice lawsuits against the

expert. Although the Court noted that "an expert witness can be cross-examined as to any facts that tend to show partiality on the part of the expert," the Plaintiff failed to establish that any error with regard to the evidentiary ruling resulted in prejudice that would warrant a new trial. The opinion of the court does leave open the possible admission of such testimony to show bias where an adequate foundation is established.

MENTAL HEALTH PROCEDURES ACT PROVIDES IMMUNITY UNLESS ALLEGATIONS AMOUNT TO GROSS NEGLIGENCE

In Miller v. Geisinger Medical Center, 78 Pa. D. & C.4th 467 (Montour Co. 2006), the Court granted defendant doctors' motion in limine to preclude any evidence against them at the time of trial on the ground that plaintiffs' claims were barred by the Pennsylvania Mental Health Procedures Act (MHPA), 50 P.S. § 7114.

Plaintiffs are the representatives of decedent Mark Miller's estate, a mentally ill patient that was admitted to Geisinger Medical Center for inpatient mental health treatment. He was treated primarily with medication; however, he died three days after he was admitted to the hospital. Plaintiffs allege Miller died as a result of overmedication. The main issue in the case was whether or not as a matter of law, defendants' acts or omissions constituted gross negligence.

a. Immunity Statute And Definition Of Gross Negligence

The immunity provision of the MHPA, 50 P.S. § 7114, provides in pertinent part:

“(a) In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act...shall not be civilly or criminally liable for such decision or for any of its consequences.”

The Supreme Court further determined that the immunity provided by the MHPA extends to institutions, as well as natural persons, that provide care to mentally ill patients. Farago v. Sacred Heart General Hospital, 562 A.2d 300 (Pa. 1989).

The Supreme Court adopted a definition of gross negligence in Albright v. Abington Memorial Hospital, 696 A.2d 1159 (Pa. 1997): “[T]he legislature intended the term gross negligence to mean a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference...The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care.” Id. at 1164.

b. Gross Negligence May Be Decided As A Matter Of Law

On the issue of whether or not the jury has the sole right to determine gross negligence, in the Albright opinion, Justice Cappy declared: “While it is generally true that the issue of whether a given set of facts satisfies the definition of gross negligence is a question of fact to be determined by a jury, a court may take the issue from a jury, and decide the issue as a matter of law, if the conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence.” Id. at 1164-5.

**c. Negligence Of Multiple Defendants Cannot Be Combined To Establish
Gross Negligence**

In Miller, the plaintiffs argued that even if the acts or omissions of each individual defendant amounts to negligence, not gross negligence, their combined negligence amounts to gross negligence. Plaintiffs argued that the resulting gross negligence of the “group” of individuals renders the individual defendants grossly negligent, even though their individual acts constituted ordinary negligence. The Court held that such a legal theory held no authority and in order to hold a defendant liable in light of the MHPA, a prima facie case for gross negligence must be established for each individual person, otherwise the immunity of the MHPA applies.

PENNSYLVANIA LAW DOES NOT RECOGNIZE CAUSE OF ACTION FOR CORPORATE NEGLIGENCE AGAINST A PHYSICIAN'S PRACTICE GROUP

In Rarrick v. Silbert, 78 Pa. D. & C. 4th 129 (Lack. Co. 2005), the defendant filed Preliminary Objections challenging the Plaintiff's Corporate Negligence counts asserted against a physician's practice group. The Plaintiff's asserted that the physician's group was negligent for failing to know of husband's clear and present danger posed to his family as a result of his mental condition and failed to take any action to defuse an explosive situation.

The Lackawanna County Court of Common Pleas held that the Plaintiff's Complaint failed to state a claim for Corporate Negligence under Pennsylvania Law. In reaching its decision, the Court discussed the Doctrine of Corporate Negligence and whether it should be expanded beyond hospitals and applied to private physician's groups specializing in a specific discipline. Noting that the rationale of Thompson v. Nason Hospital, 527 Pa. 330 (1991) was to eliminate hospital immunity based upon modern hospitals' evolved role of coordinated health care for its patients, the Common Pleas Court distinguished the limited role of private physician's group's in its treatment of patients.

Because the Plaintiff's Complaint asserted claims that the physician's group's treatment was limited to providing psychiatric health services to the Plaintiff's husband, the private group's role was not "central, total or comprehensive." Accordingly, the rationale of Thompson, supra., was held to be confined to hospitals and not other healthcare organizations generally.

**PLAINTIFF'S MOTION IN LIMINE TO ALLOW AN AMENDMENT TO THE
COMPLAINT OR HAVE THE COURT SUBMIT THE ISSUE OF PUNITIVE
DAMAGES TO THE JURY IS DENIED**

The Lackawanna County Court of Common Pleas in Wagner v. Onofrey, M.D., et al., 2006 WL 3704801 (Lack. Co. 11/30/06) addressed the Plaintiff's pre-trial Motion in Limine to Amend the Complaint to add a punitive damages count. The Plaintiff's medical malpractice claims arose from allegations of negligence in connection with the development of sepsis and bacterial endocarditis subsequent to a pyloroplasty performed on January 9, 2001. The Plaintiff claimed that the Defendants engaged in both surgical negligence and post-operative malpractice.

The Plaintiff filed a Motion in Limine in an effort to amend the Complaint to include a punitive damages count to be submitted to the jury on the grounds that Dr. Onofrey did not become aware of a nurse's note of February 21, 2001 until either October, 2003 or November, 2003; and therefore, his failure to issue new physician orders pursuant to the information contained within the nursing note constituted willful, wanton, malicious, or reckless conduct warranting an award of punitive damages under section 505 of the MCARE Act, 40 P.S. §1303.505.

Although the Defendants argued that the Plaintiff's Motion was untimely because he did not seek to Amend the Complaint within two (2) years of the date that the Plaintiff first learned of the nurse's note, the Court did not decide the Motion on those grounds. Rather, the Court held that the Plaintiff's malpractice allegations "amount to nothing more than ordinary negligence and are insufficient to support an award of punitive damages." The Court reasoned that a showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed, but that a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed, and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk. Recognizing that the Pennsylvania Legislature codified this punitive damages standard in the MCARE Act, it noted that the MCARE Act also states that "[a] showing of gross negligence is insufficient to support an award of punitive damages." 40 P.S. §1303.505(b). The Court recognized that a healthcare provider is not vicariously liable for exemplary damages unless it had actual knowledge of the wrongful conduct of its agent and nevertheless allowed it to occur. 40 P.S. §1303.505(c).

DEFENDANT'S CLAIM THAT JURY SELECTION IN MEDICAL MALPRACTICE SUIT WAS TAINTED BY RACE DISMISSED

In Waliyuddin v. University of Pennsylvania Health System, 80 Pa. D. & C.4th 443 (Phila. Co. 2006), the Court issued an opinion affirming the jury's verdict for the plaintiff despite the defendant's claim that the Court committed error by allowing plaintiffs' counsel to use four peremptory challenges to strike white jurors from hearing a medical malpractice suit.

Plaintiffs were the representatives of the estate of an African-American decedent, Constance Collier, who died after suffering from complications from toxic epidermal necrolysis. The jury found that the defendant, Dr. Maron, a caucasian, failed to stop the administration of Dilantin after decedent developed an allergic reaction to the medication. This failure to diagnose decedent's Dilantin hypersensitivity reaction led to decedent's fatal condition of toxic epidermal necrolysis, also known as Stevens-Johnson Syndrome.

Dr. Maron appealed on the basis of race discrimination in the jury selection. Dr. Maron claimed that plaintiff failed to give any neutral justification for striking four Caucasian jurors, and that the Court permitted race-based exclusion of potential jurors. The Court denied Maron's claims, stating that a careful consideration of the occupations and relationships of the potential jurors were explored during jury selection. The Caucasian jurors dismissed had the following occupations: (1) a hospital clerk employed where two major defense witnesses worked; (2) a student who cared for Alzheimer patients; (3) an assistant underwriter for an insurance company; and (4) a hospital employee involved in hospital administration for the last ten years. The Court was satisfied that, "a plethora of race-neutral reasons existed for plaintiffs' counsel's peremptory challenges of these four potential jurors."

MCARE PROVISIONS GOVERNING EXPERT TESTIMONY

- a. **May Be Applied Retroactively**
- b. **Provide That Podiatrist Not Qualified To Testify Against Orthopedic Surgeon**

In Wexler v. Hecht, (2007 Pa. Lexis, 6/5/07), the Supreme Court stated the issue as follows:

The dispositive issue in this appeal is whether, under the Medical Care Availability and Reduction of Error Act, a podiatrist is competent to testify as an expert witness concerning the applicable standard of care in a medical malpractice action advanced against an orthopedic surgeon.

Plaintiff alleged that Dr. Hecht, a medical doctor certified by the American Board of Orthopedic Surgery, committed malpractice during the course of treatment for a bunion. Plaintiff submitted the expert report of Dr. Lazar, D.P.M. (Doctor of Podiatric Medicine). Defendant claimed that Dr. Hecht did not meet the criteria under 40 P.S. § 1303.512(b)(1) and thus was not qualified to testify. Plaintiff claimed that the MCARE statute governing expert qualifications should not be applied retroactively.

Retroactivity

On the issue of retroactivity, the court cited §1926 of the Statutory Construction Act which provides that no statute is to be construed to be retroactive unless clearly and manifestly so intended by the General Assembly. 1 Pa. C.S. §1926. Further, the court noted that the question of retroactivity requires an analysis as to whether or not the rule or statute in question affects vested rights, or rights that so completely and definitely belong to a person that they cannot be impaired or taken away without the person's consent. Notwithstanding these principles, the court held as follows:

Similarly, we conclude that the delineation of the requirements governing the presentation of expert witness testimony that are not unduly burdensome does not alter vested rights of the parties or give material antecedent events a different legal effect, assuming the affordance of adequate time for preparation and adjustment.

Unrestricted Physician's License

Section 1303.512(b)(1) provides as follows:

- (b) **MEDICAL TESTIMONY:** An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:

- (1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.

In concluding that Dr. Lazar did not have an "unrestricted physician's license", the court observed that Dr. Lazar never attended a medical school proper, but rather received his degree from a Pennsylvania School of Podiatric Medicine, the curriculum which is limited by statute. 63 P.S. §42.7. The court further observed that the practice of podiatric medicine is limited to the diagnosis and treatment of the foot and anatomical structures of the leg governing the functions of the foot including incidental administration of prescription drugs. 63 P.S. §42.2(a). Additionally, the court observed that podiatrists are licensed through a different regulatory Board, the State Board of Podiatry, than medical doctors, who are licensed through the State Board of Medicine. Compare 63 P.S. §42.2(b) with 63 P.S. §422.2. Finally, the court observed that in its central definition of "healthcare provider", the MCARE Act separately delineates "physicians" and "podiatrists".

Thus, the Supreme Court held that the Common Pleas Court appropriately granted summary judgment against the plaintiff on the ground that Dr. Lazar was unqualified under the MCARE Act to provide evidence essential to support plaintiff's claim against an orthopedic surgeon.