[J-112B-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

LORI A. ANDERSON, AS ADMINISTRATRIX OF THE ESTATE OF MILDRED L. ANDERSON, DECEASED, AND RICHARD C. ANDERSON, INDIVIDUALLY,	:	No. 9 WAP 2011
	:	Appeal from the Order of the Superior Court entered March 19, 2010 at No. 356 WDA 2009, affirming the Order of the Court of Common Pleas of Warren County entered January 23, 2009 at No. A.D. 80 of 2002.
Appellants	:	
v.	:	
GARY L. MCAFOOS, M.D., INDIVIDUALLY AND WARREN SURGEONS, INC.,	:	
Appellees	:	ARGUED: November 30, 2011

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: DECEMBER 18, 2012**

I join the majority opinion in its entirety, and write separately to express my personal view on the second issue in the case, *i.e.*, whether the defendant's objection to the competency of the plaintiffs' expert witness should have been deemed waived because it was first asserted at trial, rather than by way of a pre-trial motion *in limine*. I agree with the majority that the current state of the law sets forth no prevailing legal requirement that an objection to the proposed expert's qualifications, as measured

pursuant to the MCARE Act,[1] must be made prior to *voir dire.* The facts of this case, however, illustrate why modification of the current practice should be examined. Here, by lying-in-wait, the defendant was able to secure a judgment on non-merit grounds, notwithstanding two years' notice of the lack of symmetry between the qualifications of the defendant doctor and the plaintiffs' expert. It is always preferable to decide a case on the merits, and requiring a defendant to object through a motion *in limine,* which provides the plaintiff with an opportunity to cure any defect, would further that goal.

The record establishes that in 2005, the plaintiffs submitted the curriculum vitae and report of their proposed expert witness, William L. Manion, M.D., a pathologist and medical examiner. On July 31, 2007, the trial court entered a case management order directing all pretrial motions to be filed on or before January 26, 2008. Rather than filing

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[1] The Medical Care Availability and Reduction of Error Act, Act of March 20, 2002, P.L. 154, No. 13 (as amended 40 P.S. §§ 1303.101 -1303.1115) ("the MCARE Act"). The primary provision of the MCARE Act at issue here is Section 512(c), which provides as follows:

> STANDARD OF CARE.-- In addition to the requirements set forth in subsections (a) and (b), an expert testifying as to a physician's standard of care also must meet the following qualifications:
>
> > (1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.
> >
> > (2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).
> >
> > (3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).

40 P.S. § 1303.512(c).

a pretrial motion to address the issue of the pathologist's competency under Section 512 of the MCARE Act, the defendant waited until trial commenced in September of 2008, to lodge an objection to the pathologist's competency to testify under the MCARE Act.

Admittedly, such litigation strategy is in accord with extant law[2] and was successful, as it resulted in the trial court's entry of a nonsuit. Nonetheless, I question whether it serves the residents of Pennsylvania to permit this confluence of at-trial challenges to an expert's competency and the resulting fatal consequences of expert witness disqualification. Accordingly, I would refer this matter to the Civil Procedural Rules Committee for it to consider revising the rules to require pretrial notice to the plaintiff of objections to a proposed expert's qualifications under the MCARE Act, and to afford the plaintiff an opportunity to substitute a new expert before finding himself out of court.

This Court adopted a similar approach regarding the civil procedural rules that require plaintiffs to file a certificate of merit ("COM") in any professional liability action in which it is alleged that a licensed professional deviated from the acceptable standard of care. In Womer v. Hilliker, 908 A.2d 269 (Pa. 2006), the plaintiff did not file a COM with his civil complaint as required by Pa.R.C.P. 1042.3, but rather served the defendant with the expert report in discovery within the time-frame set forth for the filing of a COM. This Court held that the plaintiff's failure to adhere to the rule by filing a COM was fatal to his claim, and that, therefore, the trial court properly declined to open the judgment of *non pros*. I dissented, opining that the submission of the expert report to the defendant

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[2] This law developed under the far more liberal common law standards for the admission of expert testimony, and now is being employed uncritically in the MCARE Act scenario, where there is a far greater likelihood that the plaintiff's expert may be disqualified as incompetent.

constituted substantial compliance with Pa.R.C.P. 1042.3, as it disclosed more than merely a certificate attesting to the fact that a licensed professional supplied a statement in which he opined that the defendant's care fell outside the acceptable professional standards - it disclosed the actual expert report itself.

The dissent in Womer cited substantial case law recognizing that snap judgments taken without notice should be avoided. See Queen City Elec. Supply Co., Inc. v. Soltis Elec. Co., Inc., 421 A.2d 174, 177-78 (Pa. 1980) ("[W]e note that snap judgments taken without notice are strongly disfavored by the courts"); Kraynick v. Hertz, 277 A.2d 144, 147 (Pa. 1971) (considering the equities and viewing the totality of the circumstances we hold that justice demanded opening the default judgment entered at 8:39 on the morning of the twenty-first day); Fox v. Mellon, 264 A.2d 623, 627 (Pa. 1970) ("No one is happy with 'snap' judgments, probably including the lawyer who takes one"); Grone v. Northern Ins. Co. of New York, 130 A.2d 452 (Pa. 1957) (upholding the striking of judgments that bore the stigma of being "snap"); Reilly Assocs. v. Duryea Borough Sewer Auth., 631 A.2d 621, 624 (Pa. Super. 1993) (noting that snap judgments entered without notice are disfavored); Safeguard Inv. Co. v. Energy Service Assocs., Inc., 393 A.2d 476, 477 (Pa. Super. 1978) ("Snap judgments taken without notice are strongly disfavored by the courts").

While my personal sentiments did not carry the day in Womer, the injustice sought to be remedied was accomplished via a subsequent amendment to the civil procedural rules requiring a defendant to give a plaintiff a thirty-day written notice of intention to file a praecipe for a judgment of *non pros* for failure to file a COM. See Pa.R.C.P. 1042.6(a). Once notice was provided, the amended rules afforded the plaintiff an opportunity to seek a determination by the court as to the necessity of filing a

COM. See Pa.R.C.P. 1042.6(a), (c). Thus, the harsh consequence arising from a plaintiff's failure to file a COM was ameliorated with a fair rule of process.

An analogous procedure affording adequate notice to the plaintiff and an opportunity to cure any defects in competency by obtaining another expert should be adopted to the same end. This would diminish the potential of an unexpected procedural dismissal, and result in a more evenhanded and deliberate process. As the Civil Procedural Rules Committee is the appropriate entity to examine the propriety and contours of amended procedures, I would refer this matter so that the inequitable, but "legal" result occurring herein is avoided in the future.

Madame Justice Todd and Mr. Justice McCaffery join the opinion.