[J-57-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BEVERLY WEXLER,	:	No. 29 EAP 2005
	:	
Appellant	:	
	:	Appeal from the Judgment of Superior
	:	Court entered on 4/5/04 at 175 EDA 2003
v.	:	affirming the Order entered on 12/18/02 in
	:	the Court of Common Pleas, Philadelphia
	:	County, Civil Division at 477, November
PAUL J. HECHT, M.D., AND DONALD W.	:	Term 1999.
MAZUR, M.D.,	:	
	:	
Appellees	:	RESUBMITTED: April 13, 2007

DISSENTING OPINION

JUSTICE CASTILLE[1] **DECIDED: June 5, 2007**

As framed by the Majority Opinion, the substantive issue before the Court today is whether, under the Medical Care Availability and Reduction of Error Act, ("MCARE Act" or "Act"), Act of March 20, 2002, P.L. 154, No. 13 (as amended 40 P.S. §§ 1303.101-1303.910), "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." Majority Slip Op. at 1. However, in my view, there is a preliminary and controlling question of retroactivity: *i.e.*, whether the evidentiary issue is governed

[1] For much of this dissent, I am indebted to former Supreme Court Justice Sandra Schultz Newman, who had drafted a proposed dissent prior to her departure from this Court.

by the MCARE Act standard or the common law standard for assessing the qualifications of an expert witness, a standard reflected in Pa.R.E. 702. For the reasons that follow, I believe that application of the MCARE Act standard is unlawfully retroactive as it affects, to a significant extent, the substantive rights of the parties. Moreover, applying the prevailing common law evidentiary standard, I believe that an expert podiatrist plainly is qualified to testify regarding a bunionectomy and post-surgical care. Accordingly, I respectfully dissent.

Rule 702 of this Court's Rules of Evidence states the settled common law standard governing the admissibility of expert testimony, and provides as follows:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa.R.E. 702. This standard is identical to F.R.E. 702, with the single exception of the "beyond that possessed by a layperson" additional restriction. See Pa.R.E. 702 (comment). "Aid to the trier of fact is the basic test for admissibility of expert testimony …" under this standard. STRONG ET AL., 1 MCCORMICK ON EVIDENCE, § 13, 59-60 n.14 (5th ed. 1999) (construing F.R.E. 702). This traditional test for qualification of expert witnesses has been described as a liberal one. See, e.g., Commonwealth v. Marinelli, 810 A.2d 1257, 1267 (Pa. 2002); Miller v. Brass Rail Tavern, 664 A.2d 525, 528 (Pa. 1995).

In extinguishing the plaintiff/appellant's cause of action in this medical malpractice case, both the Superior Court majority and the Majority Opinion rely upon the expert witness qualification standard set forth in the MCARE Act. With respect to expert testimony, the MCARE Act works a very deliberate revolution, in favor of medical

malpractice defendants, adopting a heightened standard of admissibility for medical expert testimony. Thus, Section 1303.512 of the Act reads as follows:

> § 1303.512. Expert qualifications
>
> (a) GENERAL RULE.-- No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.
>
> (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.
>>
>> (2) Be engaged in or retired within the previous five years from active clinical practice or teaching.
>
> Provided, however, the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.
>
> (c) 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).

> (d) CARE OUTSIDE SPECIALTY.-- A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that:
>
> (1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and
>
> (2) the defendant physician provided care for that condition and such care was not within the physician's specialty or competence.
>
> (e) OTHERWISE ADEQUATE TRAINING, EXPERIENCE AND KNOWLEDGE.-- A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

40 P.S. § 1303.512.

Because the MCARE Act did not go into effect until after the alleged malpractice and after commencement of the case *sub judice*, the first issue is whether the Act even applies. Section 512 became effective on May 19, 2002, sixty days after its March 20, 2002 enactment date. The Superior Court upheld the use of the MCARE Act standard, noting that "[c]ertain sections of the MCARE Act apply only to 'causes of action which arise on or after the effective date' of those sections[,] ... [whereas] [n]o such caveat applies to Section 1303.512." Wexler v. Hecht, 847 A.2d 95, 101 (Pa. Super. 2004) (citations omitted).

Section 1926 of the Statutory Construction Act states that no statute is to be construed to be retroactive absent a clearly manifested intent to that effect by the General Assembly. See 1 Pa.C.S. § 1926. The General Assembly did not expressly

state that Section 512 was to apply retroactively. However, this fact does not end the inquiry. Application of the new standard to a trial arising from conduct occurring before the operative date of the Act could be said to be unlawfully retroactive only if it had a prohibited **effect** for retroactivity purposes. As this Court has noted:

> It is manifest, however, that this principle [i.e., the Section 1926 directive respecting retroactivity] becomes pertinent only after it has been determined that a proposed operation of a statute would indeed be retrospective. In this regard, our courts have held that a statute does not operate retrospectively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.
>
> Gehris v. Commonwealth, Dep't of Transp., 471 Pa. 210, 369 A.2d 1271, 1273 (1977). Thus, under this Court's precedent, "Retroactive laws have been defined as those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transaction or consideration already past." Nicholson v. Combs, 550 Pa. 23, 703 A.2d 407, 411 (1997) (citing BLACK'S LAW DICTIONARY 1184 (6th ed.1990)).

Alexander v. Commonwealth, Dep't of Transp., 880 A.2d 552, 559 (Pa. 2005).

Furthermore, this Court has held that statutes affecting purely procedural matters may be applied to litigation existing at the time the statute was enacted, without being deemed unlawfully retroactive, but that an application affecting substantive rights is more problematic. See, e.g., Morabito's Auto Sales v. Commonwealth, Dep't of Transp., 715 A.2d 384, 386 (Pa. 1998); accord Commonwealth v. Estman, 915 A.2d 1191, 1194 (Pa. 2007). Thus, the question of whether a statute violates the proscription against retroactive application often turns on whether the legislation concerns substantive or procedural matters. This question is a difficult one, as the Majority acknowledges in explaining why it elects not to address the question in terms of

substance versus procedure. Majority Slip Op. at 11 n.9. Judge Johnson aptly elaborated upon the difficulty in his dissent below:

> The demarcation between laws bearing on substantive rights and those that are "purely procedural" is notoriously vexing and has fostered disagreement amongst generations of jurists. See Laudenberger v. Port Authority, 496 Pa. 52, 436 A.2d 147, 150 (1981) ("The attempt to devise a universal principle for determining whether a rule is inherently procedural or substantive in nature has met with little success in the history of our jurisprudence."). "'(I)n many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible.'" Laudenberger, 436 A.2d at 150 (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (Rutledge, J., dissenting)). Accordingly, our Supreme Court has been circumspect in adopting static analytical definitions, recognizing that they "would only be useful if 'substance' and 'procedure' were two 'mutually exclusive categories with easily ascertainable contents.'" Laudenberger, 436 A.2d at 150 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 17, 61 S.Ct. 422, 85 L.Ed. 479 (1941) (dissenting opinion of Frankfurter, J., in which Black, Douglas, and Murphy, JJ., concurred)). In attempting to "unravel this Gordian knot," Laudenberger, 436 A.2d at 150, the Court has cautioned against simplistic solutions[.]

Wexler, 847 A.2d at 111 (Johnson, J., dissenting).

This Court has often determined that statutes or rules that seem to be purely procedural on their face nevertheless may affect substantive rights. See, e.g., Payne v. Commonwealth, Dep't of Corr., 871 A.2d 795, 802 (Pa. 2005) (statute that allows court to dismiss prisoner's claim upon conclusion that allegation of indigency is untrue, the action is frivolous or defendant is entitled to raise a valid affirmative defense affects substantive rights of prisoners); Commonwealth v. Morris, 771 A.2d 721, 738 (Pa. 2001) (statute that sets forth circumstances necessary for securing stay of execution affects substantive rights). In my view, this duality plainly exists in the case *sub judice*: although Section 512 purports to address a matter affecting procedural rights, it does so in a way which directly affects, and obviously was intended to affect, the substantive rights of a litigant such as appellant. Indeed, since the General Assembly was well

aware that this Court's procedural rules already addressed and established a test for expert testimony, and assuming the General Assembly did not intend to raise a separation of powers question, the statute no doubt was considered to be one affecting substantive rights. Although the Majority has set forth the opposing viewpoint in persuasive fashion, I would conclude that the statute has an unlawful retroactive effect.

It is no accident that the MCARE Act is codified in Title 40, which governs Insurance. Section 102 of the Act, which comprises the General Assembly's overall "Declaration of policy," lists, as one of the apparent purposes of the legislation, the desire to make medical professional liability insurance "obtainable at an affordable and reasonable cost" throughout the Commonwealth which, in turn, should serve the overriding purpose of making available "a comprehensive and high-quality health care system." 40 P.S. § 1303.102(1), (3). Section 512's expert witness provision is found in Chapter 5 of the Act, which is entitled "Medical Professional Liability." The additional legislative "Declaration of policy" attending this chapter notes that "[t]he General Assembly finds and declares that it is the purpose of this chapter to ensure a fair legal process and reasonable compensation for persons injured due to medical negligence in this Commonwealth." Id. § 1303.502. In the General Assembly's judgment, a stricter limitation on expert testimony than that which existed at common law and under judicial rules of procedure, and that which exists with respect to other experts, apparently was part of the envisioned "fair legal process" which would operate, *inter alia*, to lower the cost of medical malpractice insurance. Section 512 operates to lower the cost of insurance by simply extinguishing those causes of action where the plaintiff cannot meet the new, and heightened, standard for assessing expert witness qualifications.

The MCARE Act was a response to a widely publicized perceived health care crisis in Pennsylvania, which included an alleged fear on the part of medical

practitioners that malpractice insurance was becoming unaffordable resulting in some medical doctors opting to leave practice in the Commonwealth. Section 512 is an integral part of the legislative response. To prove a case of medical malpractice, the plaintiff generally must produce expert testimony concerning the tort elements of duty, breach, and causation. Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1070-71 (Pa. 2006) (citation omitted). Section 512 makes the plaintiff's burden more difficult by narrowing the class of experts to whom a plaintiff may turn.[2] The causes of the perceived medical malpractice insurance crisis are complicated and multi-faceted, and the public debates surrounding the issue were heated, with medical practitioners, lawyers, politicians, and insurance companies squaring off and apportioning blame. The issue for decision in the case *sub judice* is not whether the response represented by the MCARE Act properly balanced and resolved the difficult policy issues presented, but whether Section 512 has a substantive effect on existing medical malpractice litigation, such that application to existing cases would be unlawfully retroactive.[3] In my

[2] Cf. Comment, *Double Checking the Doctor's Credentials: The New Medical Expert Qualification Statute of MCARE*, 67 U. PITT. L. REV. 661, 665-66 (2006) ("At the time of [the MCARE Act's] passage, skyrocketing insurance premiums had spawned a widely recognized health care crisis within Pennsylvania. … Section 512 is intended to narrow the field of qualified experts, with the result of limiting the admissibility of expert testimony in medical malpractice actions."). The lower courts that have reviewed sections of the MCARE Act are in significant agreement with the commentator's assessment of the effect of the provision. See, e.g., Gartland v. Rosenthal, 850 A.2d 671, 675 (Pa. Super. 2004); Amato v. Centre Medical and Surgical Associates, P.C., 2004 WL 1987427, *3 (Pa. Com. Pl. 2004); Weiner v. Fisher, 67 Pa. D. & C.4th 1, 10 (Pa. Com. Pl. 2004); Spotts v. Small, 61 Pa. D. & C.4th 225, 235 (Pa. Com. Pl. 2003).

[3] I should note that appellant does not challenge the authority of the General Assembly to legislate in this area, in the face of the existing structure represented by the Pennsylvania Rules of Evidence and the constitutional prerogative of the Supreme Court to prescribe general rules governing practice, procedure and the conduct of all courts. See Pa. CONST. Art. V, § 10(a).

view, Section 512 has such an effect. As Judge Johnson noted below, retroactive application of Section 512 of the MCARE Act "effectively recasts the standard by which the plaintiffs must prove their entitlement to relief on a vested cause of action" and "effectively 'raises the bar' on the character of proof required of a plaintiff to vindicate a substantive right." See Wexler, 847 A.2d at 109, 112 (Johnson, J., dissenting) (citations omitted). Therefore, like the dissent below, I would conclude that this portion of the legislation is not simply "procedural." The MCARE Act rejects and displaces centuries of common law explicating the standard for assessing expert testimony, and adopts a new standard which has the effect of insulating medical professionals from certain causes of action. In my view, Section 512 has a retroactive effect which, in the absence of legislative authorization for same, cannot be permitted to operate unfairly in this case.

The Majority holds otherwise, agreeing with appellees "that the adjustment of the evidentiary standard at hand relative to a future trial, albeit of an action pending as of the time of the adjustment, should not be construed as a retroactive application." Majority Slip Op. at 9. The Majority elaborates "that the delineation of 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." Id., at 10-11. The Majority continues that Section 512 may apply retroactively because there is no "vested entitlement under Pennsylvania common law to present expert testimony in a malpractice action against a medical doctor from a witness who does not possess an unrestricted physician's license." Id., at 11.

Respectfully, I believe that the significant change in medical malpractice actions effected by Section 512 -- accurately described by the dissent below as a "seismic shift in the evidentiary landscape of medical malpractice cases" and fatal to the plaintiff's

cause here, Wexler, 847 A.2d at 111 (Johnson, J., dissenting) -- is such that retroactive application to existing cases is unduly burdensome. Indeed, the heightened burden was the exact legislative point in reworking the standard. Furthermore, even aside from the general effect of the change upon all malpractice cases, the procedural history of this case shows that the retroactive application of Section 512 here was oppressively burdensome, and unfairly deprived appellant of "adequate time for preparation and adjustment."

Appellant filed her complaint on November 3, 1999, and timely submitted Dr. Lazar's expert witness report in July 2001. A trial date was scheduled for December 16, 2002. On November 27, 2002, less than one month before trial and approximately six months after the effective date of the MCARE Act, appellees filed a motion *in limine*. Following appellees' filing, appellant requested a continuance to secure a new expert, but the request was denied. N.T., 12/17/02, at 3. On December 17, 2002, with a jury already impaneled, the trial court held an *in camera* conference. The court began the conference by granting appellee's motion *in limine*. Following the ruling, counsel was allowed to address the court. Appellant's counsel argued prejudice premised upon "the late filing of the motion [*in limine*], which includes reference to the new MCARE Act, which as Your Honor noticed was enacted in May." Id., at 22. The court responded unequivocally that it was not basing its decision on the MCARE standard: "Let me make the record. I am not basing it upon the legislation enacted known as the MCARE Act, it's based upon common law in this area. … [T]he legislation is not indicative of my decision." Id. The court then granted appellees' motion *in limine* pursuant to the common law expert witness standard, barred Dr. Lazar's expert testimony, and granted appellees' motion for summary judgment due to appellant's failure to offer another competent expert witness.

It was only after appellant appealed, and the trial court issued its Opinion under Pa.R.A.P. Rule 1925, that the trial court attempted to support its decision based primarily on the MCARE Act expert qualification standard. The Superior Court majority charitably described the proceedings in the trial court as marked by "procedural irregularity," Wexler, 847 A.2d at 101, while Judge Johnson more bluntly recognized that the trial court "effectively deprived the parties of any opportunity to develop a record responsive to [the MCARE Act's] provisions." Id. at 109 (Johnson, J., dissenting). Thus, the trial court in this case expelled appellant's expert on the eve of trial, refused her request for a continuance, then later justified the ruling premised upon a standard appellant never had an opportunity to satisfy. On the facts here, insulating the trial judge's ruling premised upon application of the MCARE Act standard is oppressingly burdensome.

Turning to the question of the admissibility of appellant's expert testimony under the common law, a question I would reach given my conclusion that the MCARE standard cannot lawfully apply here, I would find that appellant is entitled to relief. At common law, expert testimony is admissible as "an aid to the jury when the subject matter is distinctly related to a science, skill or occupation beyond the knowledge or experience of the average layman." Commonwealth v. Auker, 681 A.2d 1305, 1317 (Pa. 1996) (citation omitted). When expert testimony is appropriate (as it certainly is in this case), a witness is qualified to testify if he has any reasonable pretension to specialized knowledge on the subject under investigation. Miller v. Brass Rail Tavern, 664 A.2d at 528 ("It is not a necessary prerequisite that the expert be possessed of all of the knowledge in a given field, only that he possess more knowledge than is otherwise within the ordinary range of training, knowledge, intelligence or experience.") (internal quotation marks and citations omitted).

Judge Johnson cites numerous cases in which the Superior Court has ruled that an expert witness in a medical malpractice case testifying to the proper standard of care need not have the precise qualifications of the care provider whose conduct is in question, if the expert witness has substantial familiarity with that conduct. See Wexler, 847 A.2d at 106-07 (Johnson, J., dissenting). Thus, the Superior Court has approved allowing a pediatrician to testify as an expert witness against an emergency room physician,[4] a physician not licensed in the United States to testify against an orthopedist,[5] and a physiatrist to testify on the appropriate standard of care for a post-operative wound by an orthopedic surgeon.[6] In my view, under the common law standard, a podiatrist clearly is qualified to testify as an expert witness in a lawsuit, such as this one, concerning a bunionectomy. A podiatrist testifying with respect to foot surgery and care is substantially similar to those cases allowing an expert to testify regarding a different specialty or subspecialty. Given the broad latitude afforded by the common law standard and the consistency of prior Superior Court rulings on the subject, I would hold that Dr. Lazar has sufficient credentials to testify about a procedure that he legally and expertly performs.[7] See generally Miller, 664 A.2d 525

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[4] See B.K. ex.rel. S.K. v. Chambersburg Hosp., 834 A.2d 1178, 1182 (Pa. Super. 2003).

[5] See George v. Ellis, 820 A.2d 815, 818-19 (Pa. Super. 2003).

[6] See Poleri v. Salkind, 683 A.2d 649, 655 (Pa. Super. 1996).

[7] Other jurisdictions have permitted podiatrists to testify in matters concerning orthopedic surgery, and permitted orthopedic surgeons to testify in matters concerning podiatry. See Chadock v. Cohn, 157 Cal. Rptr. 640 (Cal. Ct. App. 1979) (podiatrist may testify as to standard of care of orthopedic surgeon performing foot surgery); Marshall v. Yale Podiatry Group, 496 A.2d 529 (Conn. App. Ct. 1985) (orthopedist may testify as to standard of care of podiatrist performing foot surgery); Sandford v. Howard, 288 S.E.2d 739 (Ga. Ct. App. 1982) (orthopedic surgeon may testify in action against podiatrist for negligence in treatment); Escobar v. Allen, 774 N.Y.S.2d 28, 29 (NY App. Div. 2004); accord Steinbuch v. Stern, 770 N.Y.S.2d 106, 107-08 (NY App. Div. 2003) (podiatrist (continued…)

(non-M.D. medical examiner and mortician may testify to cause of death); Commonwealth v. Davenport, 295 A.2d 596 (Pa. 1972) (intern may testify as medical expert); Commonwealth v. Henry, 569 A.2d 929 (Pa. 1990) (dentist, not forensic pathologist, may adequately testify regarding bite marks). The jury, of course, may assign what weight it chooses to the various expert witnesses based upon their competing credentials, and the medical defendant may highlight the differences between the specialties. But, it is an abuse of discretion to bar the testimony outright.

For the foregoing reasons, I respectfully dissent.

Mr. Justice Baer and Madame Justice Baldwin join this opinion.

(…continued)
may give expert opinion that physician departed from applicable standard of care in performing bunionectomy upon foundation showing sufficient knowledge of procedure).