

[J-80-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LORRAINE PATERNASTER,	:	No. 154 MAP 2002
ADMINISTRATRIX OF THE ESTATE OF	:	
DAMON PATERNASTER,	:	Appeal from the Order and Opinion of the
	:	Commonwealth Court dated October 4,
Appellant	:	2002, granting Appellee's Motion for
	:	Summary Judgment
	:	
v.	:	
	:	
	:	ARGUED: May 11, 2004
	:	
DONG P. LEE, M.D., AND THE	:	
COMMONWEALTH OF PENNSYLVANIA	:	
MEDICAL PROFESSIONAL LIABILITY	:	
CATASTROPHE LOSS FUND,	:	
	:	
Appellee	:	

DISSENTING OPINION

MR. JUSTICE BAER

Decided: December 22, 2004

I concur with the Majority's summary of the facts and the relevant law. I further agree with the Majority's conclusion that Section 506 of the Administrative Code¹ and Section 702(a) of the Health Care Services Malpractice Act (the "Act")² did not vest the CAT Fund director with the power to adopt the regulations found at 31 Pa.Code. §§ 242.2, 242.7(a)(2), and 242.17(d)(2) because Sections 506 of the Administrative Code and 702(a) of the Act only authorize the CAT Fund director to adopt regulations addressing the internal

¹ 71 P.S. § 186.

² Act of October 15, 1975, P.L. 390, No. 111 (as amended 40 P.S. §1301.701-1301.1006) (superseded).

administration of the fund and the procedure for reporting claims. I respectfully disagree, however, with the Majority's conclusion that Section 701 of the Act vested the CAT Fund director with authority to issue substantive regulations facially inconsistent with the Act and nullifying CAT Fund liability where, as here, a claim is not covered by primary insurance because the health care provider did not obtain a tail policy after his "claims made policy" expired.

The purpose of the CAT Fund is set forth in 40 P.S. §1301.701(d), which defines the CAT Fund as:

a contingency fund for the purpose of paying all awards, judgments and settlements for loss or damages against a health care provider entitled to participate in the fund...to the extent such health care provider's share exceeds its basic coverage in effect at the time of occurrence...

40 P.S. §1301.701(d). Health care providers must meet two requirements to receive CAT Fund coverage. First, Section 1301.701(a) requires every provider to "insure his professional responsibility...with an insurer...or provide proof of self-insurance." Second, Section 1301.701(e)(1) provides "[t]he fund shall be funded by the levying of an annual surcharge...on all health care providers entitled to participate in the fund." Thus, the CAT Fund is responsible for covering claims against a doctor, such as Dr. Lee, who had primary insurance and had paid all required surcharges at the time of the occurrence.

The director of the CAT Fund, however, promulgated several regulations which relieve the CAT Fund of responsibility for coverage of Appellant's default judgment against Dr. Lee. Specifically, 31 Pa.Code. §§ 242.2 states that "[i]n the case of a claims made policy...the insurance requirements of the act require purchase of the reporting endorsement or prior acts coverage or its substantial equivalent by the health care provider, upon cancellation or termination of the claims made policy." 31 Pa. Code §242.2. In addition, 31 Pa. Code § 242.7(a)(2) provides:

Cancellation or nonrenewal of claims made coverage...without the purchase of the reporting endorsement, prior acts coverage or its substantial equivalent

automatically releases the Fund from liability for claims for injuries or death from services which were rendered or which should have been rendered by the health care provider which occur or which are reported to the basic coverage insurance carrier after the effective date of cancellation or nonrenewal.

Id. at §242.7(a)(2). Finally, 31 Pa. Code § 242.17(d)(2) provides:

if at the time of the occurrence the health care provider is insured on a claims made basis and thereafter fails to purchase the reporting endorsement, prior acts coverage or its substantial equivalent upon cancellation or nonrenewal of the claims made policy, and subsequently a claim is reported to the Fund under section 605 of the act (40 P. S. § 1301.605), the Fund will be relieved of its responsibility to the health care provider to defend and indemnify the claim under section 605 of the act.

31 Pa.Code §242.17(d)(2).

Accordingly, the propriety of the Commonwealth Court's grant of summary judgment in favor of the CAT Fund turns on whether the director had the authority to enact these regulations. The Majority wrongly finds such authority in Section 701(e)(11) of the Act, which provides "[t]he director shall issue rules and regulations consistent with this Section regarding the establishment and operation of the fund including all procedures and the levying, payment and collection of the surcharges ..." 40 P.S. §1301.701(e)(11).

The director's mandate under Section 701(e)(11) is expressly limited to the promulgation of regulations "consistent with" the substantive portions of the statute. I do not view the director's regulations at Sections 242.2, 242.7(a)(2), and 242.17(d)(2) as being consistent with the Act. The legislature created the CAT Fund to pay "awards, judgments and settlements for loss or damages against a health care provider entitled to participate in the fund...to the extent such health care provider's share exceeds its basic coverage insurance *in effect at the time of the occurrence.*" 40 P.S. § 1301.701(1)(d) (emphasis added). Dr. Lee's patients are entitled to the CAT Fund's protection so long as Dr. Lee had appropriate primary coverage at the time of the occurrence and had paid all of the required assessments to the CAT Fund. It is undisputed that these criteria were met. In the

absence of the regulations promulgated by the director, Appellant would have been entitled to coverage by the CAT Fund. The director eliminated this entitlement by enacting regulations inconsistent with the Act, and therefore exceeded the delegation of authority found in Section 701. I would not permit the CAT Fund to avoid liability by passing regulations extrinsic to and inconsistent with the Act.

Furthermore, even if the Act provided for the delegation of substantive rule making powers, such delegation would constitute an unlawful grant of authority. Administrative agencies have the power to promulgate regulations dealing only with procedural matters, not to create substantive rights and duties. The General Assembly may delegate to an administrative agency the authority:

to make rules and regulations to cover mere matters of detail for the implementation of a statute, but where the statute itself is lacking in essential substantive provisions the law does not permit a transfer of the power to supply them, for the legislature cannot delegate its power to make a law.

Ruch v. Wilhelm, 43 A.2d 894, 897 (Pa. 1945); Sullivan v. DOT, Bureau of Driver Licensing, 708 A.2d 481 (Pa. 1998) (“[T]he Legislature may delegate policy making authority to an administrative agency, so long as the Legislature makes the ‘basic policy choices’ and establishes ‘adequate standards which will guide and restrain the exercise of the delegated administrative functions’”).

Because I agree with Appellant that the CAT Fund may not exonerate itself from liability by adopting regulations which change the substantive rights of malpractice victims as adopted by the legislature, I would reverse the Commonwealth Court’s grant of summary judgment in favor of the CAT Fund.