J-A17039-12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JO ANN FROHNAPFEL

v.

MICHAEL STELTZ, M.D. AND NICHOLAS RORICK, M.D. & NORTH PENN HOSPITAL CORPORATION D/B/A NORTH PENN HOSPITAL, SEYED HASHEMI, M.D., C. WILLIAM HELM AND TEMPLE UNIVERSITY HOSPITAL

APPEAL OF: MICHAEL STELTZ, M.D. AND NICHOLAS RORICK, M.D.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2226 EDA 2011

Appeal from the Order Entered July 19, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): September Term, 2009, No. 3077

JO ANN FROHNAPFEL

v.

NORTH PENN HOSPITAL CORPORATION D/B/A NORTH PENN HOSPITAL, MICHAEL STELZ, M.D., SEYED HASHEMI, M.D., NICHOLAS RORICK, M.D., C. WILLIAM HELM AND TEMPLE UNIVERSITY HOSPITAL

APPEAL OF: SEYED HASHEMI, M.D.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2281 EDA 2011

Appeal from the Order Entered July 19, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): September Term, 2009, No. 3077

JO ANN FROHNAPFEL	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
NORTH PENN HOSPITAL CORPORATION, MICHAEL STELZ, M.D., SEYED HASHEMI, M.D., NICHOLAS RORICK, M.D., C. WILLIAM HELM AND TEMPLE UNIVERSITY HOSPITAL	
APPEAL OF: C. WILLIAM HELM AND TEMPLE UNIVERSITY HOSPITAL	No. 2448 EDA 2011

Appeal from the Order Entered July 19, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): September Term, 2009, No. 3077

BEFORE: STEVENS, P.J., GANTMAN, J., and PANELLA, J.

MEMORANDUM BY PANELLA, J. Filed: April 26, 2013

The limited issue before us is to consider the application of the statute of repose contained in the Medical Care Availability and Reduction of Error (MCARE) Act, 40 PA.CONS.STAT.ANN. § 1303.513, in this medical malpractice case. We are asked to determine, first, whether the trial court's ruling on the statute of repose constitutes a collateral order sufficient to permit interlocutory appeal.[1] If we conclude that it is, we must then decide whether it is appropriate to grant judgment on the pleadings based upon the

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[1] The trial court found that the order at issue did not necessitate either interlocutory or collateral review.

seven-year statute of repose in the MCARE Act, to a claim that a medical professional failed to correctly diagnose a cancerous tumor prior to the effective date of the Act.

Although we find that the order in issue is a collateral order which allows review at this stage, we also find that judgment on the pleadings is inappropriate. As a result, we affirm the trial court's order denying judgment on the pleadings.[2]

The following recitation of the factual history of this matter is taken from the complaint filed by Appellee, Jo Ann Frohnapfel, on September 29, 2009. In light of our standard of review, the properly averred facts in the complaint are of extreme importance.

> A motion for judgment on the pleadings is similar to a demurrer. It may be entered when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. In determining if there is a dispute as to facts, the [trial] court must confine its consideration to the pleadings and relevant documents. On appeal, we accept as true all well-pleaded allegations in the complaint.
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> On appeal, our task is to determine whether the trial court's ruling was based on a clear error of law or whether there were facts disclosed by the pleadings, which should properly be tried before a jury, or by a judge sitting without a jury.

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[2] Appellants have also filed an application for leave to file post-submission communication to this court in the form of a letter. This letter highlighted the recent, published decision of this court in ***Osborne v. Lewis***, 59 A.3d 1109 (Pa. Super. 2012). We hereby grant the application, and Appellants' arguments on ***Osborne*** will be addressed fully in the body of this memorandum.

> Neither party can be deemed to have admitted either conclusions of law or unjustified inferences. Moreover, in conducting its inquiry, the [trial] court should confine itself to the pleadings themselves and any documents or exhibits properly attached to them. It may not consider inadmissible evidence in determining a motion for judgment on the pleadings. Only when the moving party's case is clear and free from doubt such that a trial would prove fruitless will an appellate court affirm a motion for judgment on the pleadings.

Guerra v. Redevelopment Authority of City of Philadelphia, 27 A.3d 1284, 1288-1289 (Pa. Super. 2011) (citing ***Consolidation Coal Co. v. White***, 875 A.2d 318, 325–326 (Pa. Super. 2005)) (internal citations and quotation marks omitted).

In her complaint, Frohnapfel alleges that she underwent, among other things, a total abdominal hysterectomy due to fibroids and a leiomyosarcoma on May 31, 1996. Post-surgery, Cyril William Helm, M.D., assumed duties for Frohnapfel's follow-up care through Temple University Hospital. On March 26, 1997, Appellant, Michael Steltz, M.D., performed a CT scan of Frohnapfel's chest, abdomen, and pelvis at North Penn Hospital. Dr. Steltz reviewed the scan and noted that Frohnapfel's lungs showed no nodule or effusion.

Shortly thereafter, Seyed Hashemi, M.D., performed another CT scan. Dr. Hashemi's review of the scan led him to opine that there was no evidence of a tumor on Frohnapfel's lung. Frohnapfel then hand-delivered the two scans to Dr. Helm for his review with another, unnamed physician at Temple. Dr. Helm did not alert Frohnapfel to any abnormality in the scans.

On March 10, 1998, Appellant, Nicholas Rorick, M.D., performed another CT scan of Frohnapfel's chest at North Penn Hospital. Dr. Rorick interpreted the scan as showing "no abnormal mass in the chest, abdomen or pelvis with stable appearance compared to the CT scans of July 16, 1997 and March 26, 1997." Frohnapfel brought this scan to Dr. Helm shortly thereafter, and Dr. Helm concluded that there was no evidence of abnormality on Frohnapfel's lung.

In October of 2007, Frohnapfel sustained injuries to her chest and abdomen in a motor vehicle accident. As part of the treatment of her injuries, Sonja Cerra-Gilch, M.D., performed a CT scan without contrast on October 16, 2007, at Central Montgomery Medical Center. Dr. Cerra-Gilch indicated that the study was limited, as the spiral CT scanner was not working at the time. Dr. Cerra-Gilch identified the presence of a 3-mm nodule on Frohnapfel's left lung and prescribed a follow-up CT scan in three months.

Barry Siskind, M.D., performed a CT scan without contrast on January 15, 2008, at Central Montgomery. Dr. Siskind interpreted the scan as revealing that the nodule had grown slightly during the three-month period. Shortly thereafter, Frohnapfel consulted with Pinak S. Acharya, M.D., about the nodule on her lung. After reviewing all of her CT scans, Dr. Acharya opined that he found evidence of a 2-cm mass in her lower left lung. Ultimately, Frohnapfel was diagnosed with primary adenocarcinoma, stage IV.

That spring, Frohnapfel consulted with Joseph Potz, M.D., regarding treatment of the malignant lung tumor. In relevant part, Dr. Potz gave the following summary of Frohnapfel's history:

> CT showed a 2-cm nodule on the left lower lobe of the lung that on retrospect has been present on CT scans and chest X-rays dating back to October 1997.

Dr. Potz further stated that, due to the late stage nature of the tumor, Frohnapfel only had a 10 to 15% probability of successful treatment.

As noted previously, Frohnapfel filed the malpractice complaint in this matter in late 2009, claiming that the defendants collectively had failed to timely diagnose her malignant lung cancer. After the various defendants filed their answers and new matter, all defendants joined in a motion for judgment on the pleadings, asserting that the statute of repose contained in the MCARE Act barred Frohnapfel's claim. The trial court denied the motion, as well as the subsequent motion for reconsideration or certification for appellate review. Dr. Rorick and Dr. Steltz filed this timely appeal.

The MCARE statute of repose states that, subject to exceptions not relevant here, "no cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort . . . ." 40 PA.CONS.STAT.ANN. § 1303.513(a). As stated recently by a panel of this Court, the "implementing provision of the MCARE Act specifically sets forth that the statute of repose applies to causes of action that 'arise on or after' its effective date, March 20, 2002." ***Osborne v. Lewis***, 59 A.3d 1109, 1113 (Pa. Super. 2012).

Based upon their interpretation of the above language, the Appellants have appealed the decision of the trial court and raise the following arguments as to why the trial court incorrectly denied their motions:

> - The statute of repose bars this action because the triggering act for the statute, the "alleged tort" occurred more than seven years ago, i.e., between 1997 and 2000, when the Appellees failed to detect the alleged lung abnormality present on the radiology films.
>
> - Furthermore, the *cause of action* accrued after the effective date of the statute, so that the implementation provision does not affect the application of the statute.
>
> - Lastly, the trial court erred when it concluded that the orders in issue were not immediately appealable.

See Appellants' Brief, at 5-6.

Initially, we must address Appellants' arguments which contend that we have jurisdiction to hear this appeal. Before looking at the merits of an appeal, we must determine if the appeal originates from a final order. ***See McCutcheon v. Philadelphia Elec. Co.***, 567 Pa. 470, 478, 788 A.2d 345, 349 (2002) (holding that an appeal lies only from a final order, unless a statute or rule permits an interlocutory appeal). The issue of finality impacts our jurisdiction over the appeal. ***See In re Estate of Cella***, 12 A.3d 374, 377 (Pa. Super. 2010). Appellants concede that they are not appealing from a final order. Rather, they argue that the trial court's order refusing to dismiss the complaint pursuant to the statute of repose is a collateral order appealable as of right.

Rule 313 of the Pennsylvania Rules of Appellate Procedure provides that a litigant has a right to take an immediate appeal from a collateral order. ***See*** Pa.R.A.P., Rule 313(a). A collateral order is defined as an order separable from the main cause of action that involves a right too important to be denied review and that if review is postponed to final judgment, the right will be "irreparably lost." Pa.R.A.P., Rule 313(b). This definition has been interpreted to require three elements before an order is considered collateral.

First, the order must be separable from the underlying cause of action. An order is considered separable from the underlying cause of action if review of the issue does not involve consideration of the merits of the underlying dispute. ***See Slusaw v. Hoffman***, 861 A.2d 269, 272 (Pa. Super. 2004). In the present case, there is no apparent dispute as to when the alleged negligence of Appellants occurred. As such, to determine whether the statute of repose applies, we need not consider any of the underlying claims of negligence; we need merely reference the language of the MCARE Act and apply it to the dates alleged. Thus, we conclude that the first requirement for a collateral order is met.

Next, the issue involved must be too important to be denied review. ***See id***., at 272. The Supreme Court of Pennsylvania has held that comprehensive legislation that includes a statute of repose, motivated by a desire to control the costs of litigation, implicates an important public policy issue. ***See Pridgen v. Parker Hannifin Corp.***, 588 Pa. 405, 422, 905 A.2d

422, 433 (2006). We similarly conclude that the application of the MCARE Act, and its included statute of repose, implicates important public policy concerns sufficient to justify the second requirement for interlocutory review of a collateral order.

Finally, a collateral order must involve a right that would be irreparably lost if review were denied. Once again, we find ***Pridgen*** instructive. The Supreme Court opined in ***Pridgen*** that "the substantial cost that Appellants will incur in defending this complex litigation at a trial on the merits comprises a sufficient loss to support allowing interlocutory appellate review as of right[.]" 588 Pa. at 422, 905 A.2d at 433. It is apparent that if Appellants are required to defend a medical malpractice case at trial on the merits, a significant portion of the benefits of the statute of repose will be lost to them. Accordingly, we conclude that the third requirement for a collateral order has been met.

Since all three requirements have been satisfied, we agree with Appellants that this appeal is properly before us, and turn to the remaining, substantive issues on appeal. ***Accord Osborne***, 59 A.3d at 1111. These all address the propriety of the trial court's decision refusing to apply, at this stage, the statute of repose.

As we have discussed above, the first condition precedent for the statue of repose is that the triggering mechanism, i.e., the "alleged tort," must have occurred more than seven years before the cause of action was commenced. This is easily established by the facts alleged in the complaint.

The "alleged tort" occurred in 1997 and 1998 when the Appellants allegedly misinterpreted several radiological studies. Clearly, these acts occurred prior to 2002, the effective date of the MCARE Act. To this end, we adopt the discussion from the panel in ***Osborne*** which held that torts which occurred prior to the effective date of the MCARE Act "may be subject to the Act's statute of repose . . . ." 59 A.3d at 1114. Therefore, the first condition is satisfied by the facts averred in the pleadings.

However, the statute may only be applied to *causes of action* that "arise on or after" the March 20, 2002 effective date.[3] Therefore, we must now consider whether Frohnapfel's cause of action arose before the effective date of the MCARE Act; if her cause of action did not, it is barred by the statute of repose.

Frohnapfel argues that the medical treatment at issue giving rise to her medical malpractice claim occurred between 1997 and 2000; consequently, her cause of action arose several years before the enactment of the MCARE Act. Appellants argue that the term "cause of action" as used in the Act refers to the filing of a lawsuit, which here occurred in 2009, well after the effective date of the Act. Appellants further argue that even a

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[3] A statute which extinguishes already existing causes of action is unconstitutional and "violative of the remedies clause of Article I, Section 11 of the Pennsylvania Constitution." ***Johnson v. American Standard***, 607 Pa. 492, 500, 8 A.3d 318, 323 (2010).

broader interpretation of the term "cause of action," one which does not necessarily mean the filing of a lawsuit but nevertheless includes the elements of a civil action for professional negligence, still leads to the conclusion that Frohnapfel's case is barred. Their reasoning is that she cannot demonstrate in her pleadings that any *harm* resulting from the malpractice, a necessary element for the accrual of a "cause of action," occurred before the effective date. The Appellants point to our earlier decision in ***Osborne*** in which we stated that "some physical manifestation of harm resulting from the injury" is necessary in order for a cause of action to accrue. 59 A.3d at 1115.

There is ample case law to guide our decision. As we discuss below, in the context of a negligence action, Pennsylvania courts have consistently utilized the time of the negligent act or omission as the inception date for a "cause of action." ***See***, ***e.g.***, ***Peters v. Sidorov***, 855 A.2d 894, 896 (Pa. Super. 2004).[4] Under the facts of this case, this would mean that the *cause of action* accrued before the effective date of the MCARE Act, and therefore the statute of repose does not apply. Our reasons for adopting this definition follow.

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[4] As is evident from our discussion, the definition of the term "cause of action" is typically raised in cases involving challenges to venue and the application of the statute of limitations. Although these cases, for obvious reasons, address issues very different from herein, the references to "cause of action" are relevant to our consideration of this appeal.

In addressing the construction of the term "cause of action" our Pennsylvania Supreme Court has looked to decisions of the United States Supreme Court:

> This court has repeatedly quoted with approval the following passage from a United States Supreme Court opinion on the various concepts that "cause of action" can encompass:
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> > A "cause of action" may mean one thing for one purpose and something different for another.... *At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty.* At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, *the group of operative facts out of which a grievance has developed.*
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> ***Fisher v. Hill****,* 81 A.2d at 864 (*quoting* ***United States v. Memphis Cotton Oil Co.****,* 288 U.S. 62, 67–68, 53 S.Ct. 278, 77 L.Ed. 619 (1933) (footnotes omitted)).

Ieropoli v. AC&S Corp., 577 Pa. 138, 156 n. 17, 842 A.2d 919, 930 n. 17 (2004) (emphasis added). When called upon to perform their own analysis, the Pennsylvania Supreme Court examined the variations of this sometimes elusive phrase:

> [W]e begin with the meaning of the phrase "cause of action". As we have stated in other cases, the phrase does not have a single definition, and means different things depending on context. ***See Fisher v. Hill****,* 368 Pa. 53, 81 A.2d 860, 863–64 (1951).

Id., 577 Pa. at 155, 842 A.2d at 929-930 (footnote omitted).

The same year that ***Ieropoli*** was decided, the Superior Court was charged with interpreting the definition of "cause of action" in the MCARE Act, 42 PA.CONS.STAT.ANN. § 5101.1, which requires a medical professional liability action to be brought against a health care provider for a medical professional liability claim only in a county in which the cause of action arose. ***See Olshan v. Tenet Health System City Avenue, LLC***, 849 A.2d 1214 (Pa. Super. 2004), ***appeal denied***, 581 Pa. 692, 864 A.2d 530 (2004).[5] With facts particularly similar to the case before us now, we determined in ***Olshan*** that where a plaintiff was misdiagnosed by health care providers in one county but filed suit in another, the "cause of action"

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[5] In pertinent part, Section 5101.1 of the MCARE Act provides:

> **§ 5101.1. Venue in medical professional liability actions**
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> . . .
>
> **(b) General rule.--**Notwithstanding any other provision to the contrary, a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in the county in which the cause of action arose.
>
> **(c) Definitions.--**As used in this section, the following words and phrases shall have the meanings given to them in this subsection:
>
> > "Medical professional liability action." Any proceeding in which a medical professional liability claim is asserted, including an action in a court of law or an arbitration proceeding.

42 PA.CONS.STAT.ANN. § 5101.1.

arose in the county of misdiagnosis, i.e., the place of the negligent act or omission, for venue purposes. 849 A.2d at 1216-1217.

A year after ***Olshan***, the Superior Court was presented with an opportunity to review "cause of action" again in the context of a medical malpractice case, albeit in a matter once more involving the issue of proper venue:

> Pennsylvania courts have defined the phrase "cause of action" in cases involving claims based upon negligence to mean "the negligent act or omission, as opposed to the injury which flows from the tortious conduct." ***Peters v. Sidorov***, 855 A.2d 894, 896 (Pa. Super. 2004) *citing* ***Sunderland v. R.A. Barlow Homebuilders***, 791 A.2d 384, 390 (Pa. Super. 2002).

Bilotti-Kerrick v. St. Luke's Hospital, 873 A.2d 728, 731 (Pa. Super. 2005). The ***Bilotti-Kerrick*** decision was consistent with a prior opinion of this Court in which we held that "cause of action" means the negligent act or omission:

> "W]hile no comprehensive definition for the phrase "cause of action" has been formulated, Pennsylvania courts have defined it to mean the negligent act or omission, as opposed to the injury which flows from the tortious conduct, in cases involving claims based upon negligence. ***Kuisis v. Baldwin-Lima-Hamilton Corp.***, 457 Pa. 321, 325-26 and n. 7, 319 A.2d 914, 918 and n. 7 (1974).

Sunderland v. R.A. Barlow Homebuilders, 791 A.2d 384, 391 (Pa. Super. 2002), ***affirmed***, 576 Pa. 22, 838 A.2d 662 (2003).

Writing for the Court in ***Sunderland***, Judge Joseph Hudock, now retired, defined "cause of action" in a wrongful death case as occurring in the county where the negligence took place, rather than the county where

the injury which flowed from the negligence, i.e., the death, occurred. Similarly, in ***Peters***, we emphasized the distinction between the inception of the cause of action and the elements of a successful civil action:

> [O]ur law is clear that "[t]he primary element in any negligence action is that the defendant owes a duty of care to the plaintiff. It has long been hornbook law that a duty arises only *when one engages in conduct* which foreseeably creates an unreasonable risk of harm to others." ***R.W. v. Manzek***, 838 A.2d 801, 807 (Pa. Super. 2003) (emphasis supplied, citations omitted). Accordingly, although we recognize that the complainant must suffer actual loss or damage in order to sustain a cause of action for negligence, it is logical that the basis of a cause of action in negligence is also the primary element necessary in order to sustain a cause of action, i.e. the tortious act of the wrongdoer, and not the consequence.

Peters, 855 A.2d at 898-899 (emphasis in original).

Therefore, we find that our decision to utilize the time that the misdiagnosis took place, i.e., the time that the negligent act or omission occurred, is entirely consistent with prior decisions of this court under the MCARE Act.

We must point out that we find this case to be distinguishable from ***Osborne***. In ***Osborne***, a case involving the implications of the statute of repose contained in the MCARE Act, a panel of this Court held, on a summary judgment motion, that a cause of action "accrues" for purposes of determining if it predates the effective date of the Act when a plaintiff could have first maintained the action to successful completion. ***See id***., 59 A.3d at 1114. In that case, the plaintiff's lawsuit identified eye surgery performed

in 2000 as the basis for a medical malpractice action instituted in 2007. Although the allegedly negligent LASIK surgery was performed well before the effective date of the MCARE Act, this Court held that the "cause of action" arose in late 2003 or 2004, when the plaintiff first suffered an alleged deterioration of his eyesight. ***Id***. The defining date for the "cause of action" was when the "physical manifestation of **harm** resulting from the injury" occurred. ***Id***., at 1115 (emphasis in original). The foundation for the Court's determination that the harm occurred in 2003 or 2004 was the deposition testimony of the plaintiff.

Unlike the record before the Court in ***Osborne***, we do not have the benefit of discovery testimony or other evidence, as would be the case in a summary judgment disposition. In ***Osborne***, we stated:

> Pursuant to Pennsylvania law, a cause of action accrues when a plaintiff could first maintain the action to successful conclusion…. [D]istinguishing between "injury" and "harm," our Court has held that even if a plaintiff has been injured, that plaintiff may not pursue a claim for damages until he or she exhibited some physical manifestation of harm resulting from the injury.
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> …
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> [W]e hold that, while the LASIK surgery which allegedly set in motion the ultimate decline of Mr. Osborne's vision occurred on June 1, 2000, Mr. Osborne's cause of action did not arise until he suffered ascertainable negative effects of the LASIK surgery. On that issue, it is significant to note that none of the medical testimony relied upon by Mr. Osborne in opposition to summary judgment opines when Mr. Osborne first suffered and/or noticed the effects of his declining sight. Rather, the only evidence presented on the issue is the testimony of Mr. Osborne and his mother, explaining that he first noticed

> his declining vision in late 2003 or 2004. Mr. Osborne offers no evidence to dispute that timeframe. Consequently, there is no disputed issue of material fact that Mr. Osborne was unable to maintain his action to successful conclusion until late 2003 or 2004.

59 A.3d at 1115 (citations omitted). Accordingly, under ***Osborne***, the Court must look to the date when a plaintiff suffers injury or harm from the alleged malpractice. This is very different from the analysis from ***Peters***, as discussed above, that a cause of action in a medical malpractice case is based upon the date of the tortious act, and not the consequences, whether they are labeled as resultant injury or harm. However, we are bound to follow ***Osborne*** as established precedent.

Again, it is important to note that the order at issue in ***Osborne*** was an order denying summary judgment. Thus, as demonstrated by the above passage, the plaintiff was given the opportunity to provide testimonial and expert evidence on the issue of when the relevant injury or harm occurred. In contrast, the current case involves a motion for judgment on the pleadings in a case involving misdiagnosis, where the plaintiff has had no opportunity to present expert evidence on the issues of injury or harm.

In this case, Frohnapfel has not been afforded the opportunity to present evidence on when she suffered "harm" as defined in ***Osborne***, or from an increased risk of metastasis from the undiagnosed tumor on her

lung.[6] We therefore conclude that the trial court properly denied judgment on the pleadings, as the issue was not yet ripe. Appellants are free to raise the issue again at summary judgment, should they believe that Frohnapfel has failed to adduce evidence sufficient to establish that she suffered a legally cognizable injury prior to the effective date of the MCARE Act.[7]

Order affirmed. Petition to grant post-submission communication granted. Jurisdiction relinquished.

Stevens, P.J., concurs in the result, and Gantman, J., notes dissent.

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[6] Pennsylvania courts have long held that evidence of an increased risk of metastasis of cancer is admissible as evidence of an injury to a medical malpractice plaintiff. ***See Gradel v. Inouye***, 491 Pa. 534, 421 A.2d 674 (1980); ***Zieber v. Bogert***, 565 Pa. 376, 773 A.2d 758 (2001).

[7] A Petition for Allowance of Appeal to the Pennsylvania Supreme Court was filed in ***Osborne*** on January 18, 2013, and an Answer thereto was filed on February 4, 2013.