

[J-132A&B-2012][M.O. – Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LISA KINNEY-LINDSTROM AS PARENT : No. 54 MAP 2011
AND NATURAL GUARDIAN OF :
SAMANTHA LINDSTROM, A MINOR, : Appeal from the Order of
AND ALEC LINDSTROM, A MINOR, AND : Commonwealth Court entered on 5/6/11
AS THE ASSIGNEE OF DR. S., : at No. 18 MD 2007

Appellant

v.

MEDICAL CARE AVAILABILITY AND :
REDUCTION OF ERROR FUND, :
SUCCESSOR IN INTEREST TO THE :
MEDICAL PROFESSIONAL LIABILITY :
CATASTROPHE LOSS FUND, :

Appellee

LISA KINNEY-LINDSTROM AS PARENT : No. 59 MAP 2011
AND NATURAL GUARDIAN OF :
SAMANTHA LINDSTROM, A MINOR, : Appeal from the Order of
AND ALEC LINDSTROM, A MINOR, AND : Commonwealth Court entered on 5/6/11
AS THE ASSIGNEE OF DR. S., : at No. 18 MD 2007

Appellee

v.

MEDICAL CARE AVAILABILITY AND :
REDUCTION OF ERROR FUND, :
SUCCESSOR IN INTEREST TO THE :
MEDICAL PROFESSIONAL LIABILITY :
CATASTROPHE LOSS FUND, :

Cross-Appellant

ARGUED: November 27, 2012

CONCURRING OPINION

I join the majority opinion with only the following comments and reservations.

In terms of the cross-appeal issue, see Majority Opinion, slip op. at 21-22 & n.12, although I support the majority’s approach, I have set down my own tentative thoughts concerning protective cross-appeals in Basile v. H & R Block, Inc., 601 Pa. 392, 973 A.2d 417 (2009). See id. at 402-04, 973 A.2d at 423-25 (Saylor, J., concurring). Certainly, the practice remains in need of clarification, whether via rule or decision.

Respecting Part III(A) of the majority opinion, see Majority Opinion, slip op. at 24-27 -- pertaining to the availability of delay damages based on common-law indemnity theory -- there would seem to me to be some potential ambiguities, which I would address as follows.

First, the majority indicates that Section 714(h) “allocates the payment of delay damages and post-judgment interest on a plaintiff’s medical professional liability claim between the health care provider’s basic coverage carrier and the MCARE Fund[.]” Majority Opinion, slip op. at 27. I do not believe, however, that this language should be read as signifying that all delay damages and post-judgment interest are allocated between primary insurers and the MCARE Fund. In this regard, Section 714(h) addresses only such delay-damages/interest assessments as are allocable to primary insurers’ and the Fund’s respective liabilities. See 40 P.S. §1303.714(h).

Second, I believe that it would be useful, conceptually, to respond further to the MCARE Fund’s argument that the Walsh Court’s footnoted allusion to the alteration worked by Section 714(h)’s predecessor signified that the availability of common-law indemnification against the CAT Fund (and, by extension of the reasoning, the MCARE Fund) was superseded. See Brief for Appellee/Cross-Appellant at 40 (citing Walsh v. CAT Fund, 576 Pa. 72, 77 n.8, 838 A.2d 692, 695 n.8 (2003)). Contrary to the Fund’s

position, it seems reasonably clear to me that the Walsh footnote concerned the same subject as the text to which it was appended, *i.e.*, the general rule which had limited total payment by the Fund (including any delay-damages component) according to the statutory cap. *See Walsh*, 576 Pa. at 77, 838 A.2d at 695.¹ I believe that the Court was observing (albeit somewhat obliquely) that the Legislature, via Section 714(h)'s materially-identical predecessor, had altered this rule to require payment of delay damages allocable to the Fund's statutory liability above and beyond such cap. *See id.* at 77 n.8, 838 A.2d at 695 n.8. Indeed, the subject of claims against the Fund grounded upon common-law indemnity does not surface in the Walsh Court's discussion until after the salient footnote and the text to which it bears relevance.

Finally, with regard to the majority's comments that Section 714(h) does not supersede the holdings of Walsh, *see* Majority Opinion, slip op. at 27, 32, I would merely clarify that the statute does supplant Walsh's recognition, derived from Lahav, that delay damages were subject to the statutory cap on the Fund's liability, under a predecessor scheme.

¹ In this regard, the decision in Lahav v. Main Line Ob/Gyn Associates, P.C., 556 Pa. 245, 727 A.2d 1104 (1999), applying an early version of the CAT Fund's enabling legislation, was to the effect that the statutory cap on the Fund's liability extends to delay damages. *See id.* at 252, 727 A.2d at 1107; *see also Walsh v. CAT Fund.*, 576 Pa. 72, 77, 838 A.2d 692, 695 (2003) (citing Lahav for the proposition that the MCARE Fund's predecessor "will not be liable to the extent that [delay damages] exceed the \$1,000,000 statutory cap.").