[J-225-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

PHYSICIANS INSURANCE COMPANY AND PROFESSIONAL ADJUSTMENT SERVICES, INC.,	: No. 33 M.D. Appeal Docket 1997
	: Appeal from the Order of the Superior Court Order at No. 134PHL96 entered August 27, 1996 affirming the judgment
v.	: of the Court of Common Pleas of Schuylkill County, at No. S-494 1995 entered December 5, 1995
FRANCIS J. PISTONE, MD, ASSOCIATED SURGEONS, LTD. ANNETTE YAWORSKY and JOHN YAWORSKY	: ARGUED: December 10, 1997
APPEAL OF: ANNETTE YAWORSKY and JOHN YAWORSKY	

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: FEBRUARY 26, 1999**

I respectfully dissent from the majority opinion because I believe the definition of professional health care services that the majority derives from Marx v. Hartford Accident and Indemnity Co., 183 Neb. 12, 157 N.W. 2d 870 (1968), is far too narrow. Marx finds that "a 'professional' act or service is one arising out of a vocation, calling, occupation or employment involving specialized knowledge, labor or skill and the skill involved is predominantly mental or intellectual rather than physical or manual . . ." Id., at 13-14, 157 N.W. 2d at 871-72. From this the majority finds that, for an act to

constitute professional health care services, it must comprise a medical skill associated with specialized training.[1]

Rather, I would find a more expansive definition of professional health care services which incorporates the conduct contemplated by Marx while also considering the context and circumstances of the physician's ministrations. However, this conduct, whether negligent or intentional, need not be confined to a "medical skill associated with specialized training." Thus, in such circumstances where the patient is in a vulnerable position, by virtue of appearing before the physician for diagnosis and/or treatment, any act the physician performs in the context of the doctor-patient relationship should be deemed professional health care services and be covered by professional liability insurance.

In the case before us, the record shows that Mrs. Yaworsky was hospitalized following gall bladder surgery. On the day in question, Mrs. Yaworsky could not yet take food by mouth and was being fed intravenously. The hospital had run post-operative tests on her to determine the problem and she was awaiting the results when Dr. Pistone entered her semi-private room and drew the privacy curtain around her bed. No one else was in the room. Pistone placed a folded towel over Mrs. Yaworsky's face and eyes, leaving only her mouth exposed, and proceeded to open her dressing gown and conduct a physical examination of her, all the while urging her to "relax."[2] He

[1] Marx is too narrow, in part, because it ignores that an integral part of a professional's specialized training is a code of professional ethics without which a person cannot legitimately represent him- or herself as a professional in a given vocation or calling.

[2] Mrs. Yaworsky reports being worried because she expected Pistone to have the results of her tests and, while she kept asking him what was wrong during the physical examination, he made no effort to reply, which heightened her distress as she assumed the findings were bad.

palpated her abdomen for about five minutes and Mrs. Yaworsky reported some tenderness. During the examination, he began to fondle her nipple and, when the towel slipped from her eyes, she saw that he had exposed his genitals and was masturbating.[3]

Thus, because Mrs. Yaworsky was in a vulnerable position and this inappropriate behavior occurred during her examination, I would hold that Pistone's acts constitute professional health care services and that the trial court improperly granted summary judgment in favor of Physicians Insurance Company.

Furthermore, I disagree with the majority's wholesale rejection of the Asbury standard which finds that only conduct "intertwined with and inseparable from the [medical] services provided" is covered conduct. St. Paul Fire & Marine Ins. Co. v. Asbury, 149 Ariz. 565, 720 P.2d 540 (Ct. App. 1986). The majority finds that, because this standard places focus on the part of the body legitimately being examined, it leads to illogical results. Thus, the majority's example that a urologist's abuse of a patient's genitalia is "intertwined with and inseparable from" the legitimate medical examination and would be covered, but a cardiologist's abuse of the patient's genitalia is not and would be denied, forces it to dismiss this standard. I disagree and believe that where a patient undergoes an examination by a physician of any ilk, the totality of the physician's conduct in and around the examination is intertwined with and inseparable from the examination, and that both the urologist's and the cardiologist's conduct are covered.

[3] At this point, Mrs. Yaworsky reports, she became "frozen" and couldn't move or speak until Pistone palpated a tender abdominal spot which jolted her out of her shock. She threw the towel at him but was unable to call out because the bile duct test she had undergone required a tube down her throat and left her hoarse. She therefore rang for the nurse.

Moreover, I disagree with the majority's dismissal of the Chunmuang standard which finds professional health care services where "a substantial nexus exists between the context in which the acts complained of occurred and the professional services sought." Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 97, 698 A.2d 9, 18 (1997). The substantial nexus test, in essence, merely requires that the inappropriate act "arise out of" the medical activity. Viewing the present circumstances under this standard, I would find that Pistone's untoward behavior has a substantial nexus with the administration of professional health care services simply by virtue of the fact that such behavior took place in the hospital in the context of a physical examination for diagnostic and treatment purposes.

Additionally, the issue before us is one of first impression as this Court has not previously defined professional health care services. The competing interpretations given the phrase by persuasive authorities from other jurisdictions demonstrate that the term is ambiguous. As ambiguous language in an insurance policy should be resolved in favor of the insured and against the drafter, Riccio v. American Republic Ins. Co., 550 Pa. 254, 264, 705 A.2d 422, 426 (1997), Dr. Pistone's actions in this instance should have been covered by the Physicians Insurance Company policy.

For all the aforementioned reasons, I respectfully dissent.