

**[J-44-2002]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

KEVIN CHOW, A MINOR, BY AND	:	No. 68 MAP 2001
THROUGH HIS PARENTS AND	:	
NATURAL GUARDIANS, CHI CHOW	:	
AND JENNY CHOW, AND IN THEIR	:	Appeal from the Order of the Superior
OWN RIGHT	:	Court entered 5/24/00 at 2552 EDA 1999
	:	which affirmed the order of the Delaware
v.	:	County Court of Common Pleas, Civil
	:	Division, entered on 7/12/99 at 95-13125
BRUCE J. ROSEN, M.D., DEBORAH	:	
BIETER SCHULTZ, M.D., JEROME B.	:	
GOLDSTEIN, M.D., PENN WOMEN'S	:	
HEALTH ASSOCIATES, P.C. AND	:	
PENNSYLVANIA PROPERTY AND	:	
CASUALTY INSURANCE GUARANTY	:	
ASSOCIATION, INTERVENOR	:	
	:	
	:	
APPEAL OF: INDEPENDENCE BLUE	:	
CROSS	:	ARGUED: April 8, 2002

**DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: December 19, 2002**

In Bell v. Slezak, \_\_\_ Pa. \_\_\_, \_\_\_ A.2d \_\_\_ (2002), I have set forth the position that the PPCIGA Act does not bar a medical malpractice plaintiff's claim against a defendant-physician or foreclose liability, and that the non-duplication of recovery provision does not relieve PPCIGA of its payment obligation in relation to the doctor's covered claim. See id. at \_\_\_, \_\_\_ A.2d at \_\_\_, slip op. at 7-9 (Saylor, J., dissenting). The supporting rationale centers upon the nature of the parties' claims under the PPCIGA Act -- PPCIGA possessed a complete defense against direct payment on the plaintiffs' potential third-party claim, see id. (citing 40 P.S. §991.1803(b)(2)); however, it

had no such defense against the doctor's first-party claim predicated upon his insurance contract with PIC. See id.

Applying this reasoning to the present case, the orders of the Superior Court and the common pleas court should not be sustained. The common pleas court simply should not have denied the subrogee, Independence Blue Cross, leave to intervene or approved a settlement that was designed to extinguish the insurer's rights, particularly where the plaintiffs' cause against Dr. Rosen for the medical expenses attributable to Independence Blue Cross should remain viable. See Bell, \_\_\_ Pa. at \_\_\_, \_\_\_ A.2d at \_\_\_, slip op. at 7-9 (Saylor, J., dissenting). While the decision to permit a reduction of settlement proceeds based upon an unsettled legal theory may generally be within the prerogative of the parties to the litigation, Pennsylvania courts frown on attempts to utilize the settlement process as a mechanism to defeat subrogation interests. See, e.g., Thompson v. WCAB, 801 A.2d 635, 639 (Pa. Cmwlth. 2002).

Mr. Justice Nigro joins this dissenting opinion.