[J-57-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

BEVERLY WEXLER,	:	No. 29 EAP 2005
	:	
Appellant	:	
	:	Appeal from the Judgment of Superior
	:	Court entered on 4/5/04 at 175 EDA 2003
v.	:	affirming the Order entered on 12/18/02 in
	:	the Court of Common Pleas, Philadelphia
	:	County, Civil Division at 477, November
PAUL J. HECHT, M.D. AND DONALD W. MAZUR, M.D.,	:	Term 1999
	:	
	:	
Appellees	:	RESUBMITTED: April 13, 2007

OPINION

MR. JUSTICE SAYLOR **DECIDED: June 5, 2007**

The dispositive issue in this appeal is whether, under the Medical Care Availability and Reduction of Error Act, a podiatrist is competent to testify as an expert witness concerning the applicable standard of care in a medical malpractice action advanced against an orthopedic surgeon.

The plaintiff, Beverly Wexler ("Appellant"), commenced the present action in 1999 against Paul J. Hecht, M.D., a medical doctor certified by the American Board of Orthopaedic Surgery, and a colleague who was later dismissed from the action. The complaint asserted a claim of medical malpractice occurring during the course of treatment for a bunion. Appellant alleged that she experienced post-operative complications following surgery performed by Dr. Hecht, including pain and swelling on

the top of her foot. Further, she averred that she was unable to walk without crutches, although she was led to believe that this would not be the case. According to the complaint, Appellant ultimately underwent corrective surgery by a podiatrist to repair the continuing problems with her foot, but she continued to experience some residual pain, discomfort, and scarring. Dr. Hecht was alleged to have breached the applicable standard of medical care, and monetary damages were sought.

Pursuant to a pre-trial order, Appellant submitted the curriculum vitae and expert report of Lawrence Lazar, D.P.M. (Doctor of Podiatric Medicine), specializing in podiatric surgery. Dr. Lazar opined that Dr. Hecht deviated from the ordinary standard of care in the surgery; that he provided substandard post-surgical care; and that these alleged deviations were the direct and proximate cause of Appellant's medical complaints.

In November 2002, Dr. Hecht filed a motion in limine seeking to preclude Dr. Lazar from testifying at trial on the ground that, as a podiatric surgeon, he was not competent to testify concerning the standard of care pertaining to an orthopedic surgeon. Dr. Hecht invoked the liberal common law standard governing the qualifications or competency of an expert witness, namely a reasonable pretension to specialized knowledge in the subject matter of the inquiry, see Bennett v. Graham, 552 Pa. 205, 210, 713 A.2d 393, 395 (1998), as well as the more stringent standard set forth in the then-newly-enacted Medical Care Availability and Reduction of Error Act.[1] In response, Appellant advanced the position that Dr. Lazar was competent under the both standards and requested a hearing at which he could elaborate on his basis for knowledge. In the alternative, Appellant requested an opportunity to procure a new

[1] Act of March 20, 2002, P.L. 154, No. 13 (as amended 40 P.S. §§1303.101-1303.910) (the "MCARE Act").

expert because the motion was filed on the eve of trial and invoked a statutory enactment that post-dated the commencement of the malpractice action.

The common pleas court granted Dr. Hecht's motion in limine, initially indicating in an oral ruling that it was applying the common-law standard. See N.T., December 17, 2002, at 22. The court rejected Appellant's argument that, in all pertinent respects, the standard of care pertaining to bunionectomies and/or osteotomies was the same for both podiatrists and orthopedic surgeons, reasoning, instead, that podiatry and orthopedic medicine represented two entirely different schools of thought and practice. The court also denied Appellant's request for a continuance, considering itself bound by a decision previously made by a motions judge.[2] Finally, on Dr. Hecht's motion, the court entered summary judgment in the doctor's favor, as Appellant lacked essential testimony regarding the governing standard of care to support her medical malpractice claims.

Appellant appealed the entry of the adverse judgment, and the common pleas court issued an opinion under Rule of Appellate Procedure 1925(a). There, in contrast to its prior ruling, the common pleas court rested its decision primarily upon the MCARE Act. In particular, the court couched its opinion in terms of four provisions of the

[2] The underlying basis for the denial of the continuance is undeveloped as of record, and Appellant has not presented a challenge to the ruling in her statement of matters complained of on appeal under Rule of Appellate Procedure 1925(b), or in her questions presented on appeal as required under Rule 2116. Rather, all questions that she presents are explicitly centered on the correctness of the decision to preclude Dr. Lazar's expert witness testimony. Accordingly, any challenge to the denial of the continuance is waived. See Pa.R.A.P. 2116 ("[O]rdinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby."); Commonwealth v. Castillo, 585 Pa. 395, 401-03, 888 A.2d 775, 779-80 (2005) (reaffirming the rule that questions not raised in a statement of matters complained of on appeal are waived, and explaining that the purpose of a Rule 1925(b) statement is to ensure development of the basis supporting trial court rulings).

enactment's Section 512: 1) Section 512(a), precluding, inter alia, the presentation of an expert medical opinion in a medical professional liability action against a physician unless the witness "possesses sufficient education, training, knowledge and experience to provide credible, competent testimony," 40 P.S. §1303.512(a); 2) Section 512(b)(1), requiring an expert testifying on a medical matter to possess an unrestricted physician's license to practice medicine, 40 P.S. §1303.512(b)(1); 3) Section 512(c)(1), requiring an expert testifying as to a physician's standard of care to be substantially familiar with the applicable standard for the specific care at issue as of the time of the alleged breach, 40 P.S. §1303.512(c)(1); and 4) Section 512(c)(2), requiring an expert testifying as to a physician's standard of care to practice in the same subspecialty as the defendant physician, or in a subspecialty that has a substantially similar standard of care for the specific care at issue, 40 P.S. §1303.512(c)(2).[3]

Of particular relevance to our decision here, with regard to Section 512(b)(1)'s requirement of an unrestricted physician's license to practice medicine, the common pleas court observed that Dr. Lazar never attended a medical school proper, but rather, received his degree from a Pennsylvania school of podiatric medicine, the curriculum of which is limited by statute. See 63 P.S. §42.7 ("The curriculum taught at schools of podiatric medicine and surgery shall be confined to subjects covered by the definition of podiatric medicine as contained in this act."). The court further developed that the practice of podiatric medicine itself is limited to the diagnosis and treatment of the foot and anatomical structures of the leg governing the functions of the foot, including

[3] The requirements of Section 512(b)(1) and (c)(2) are waivable, in the sound discretion of the common pleas court, subject to specified conditions, see 40 P.S. §1303.512(b), (e), except that the statute does not provide for such waiver of the requirement to possess an unrestricted physician's license to practice medicine relative to testimony concerning the applicable standard of care. See 40 P.S. §1303.512(b).

incidental administration and prescription of drugs. See 63 P.S. §42.2(a). Additionally, the court highlighted that podiatrists are licensed through a different regulatory body, the State Board of Podiatry, than medical doctors, who are licensed through the State Board of Medicine. Compare 63 P.S. §42.2(b), with 63 P.S. §422.2. Finally, the court noted that, in its central definition of "health care provider," the MCARE Act separately delineates "physicians" and "podiatrists," thus, from the court's perspective, expressly differentiating between the two categories of professionals. Since the court concluded that Dr. Lazar was not a physician holding an unrestricted license to practice medicine, he was unqualified under Section 512(b)(1) to render an opinion concerning the applicable standard of care pertaining to a medical doctor, such as orthopedic surgeon Dr. Hecht.

The Superior Court affirmed in a divided, published opinion, concluding that the trial court had not abused its discretion by granting Dr. Hecht's motion to exclude Dr. Lazar's testimony under either the common law standard or that pertaining under the MCARE Act. See Wexler v. Hecht, 847 A.2d 95 (Pa. Super. 2004). With regard to the latter, the Superior Court majority credited, inter alia, the common pleas court's position that Dr. Lazar's testimony was foreclosed under the MCARE Act's requirement that a testifying expert must possess an unrestricted physician's license to practice medicine. See id. at 103 (citing 40 P.S. §1303.512(b)(1)). Referencing various statutory definitions defining "physicians" and "medical doctors" and distinguishing them from references to podiatrists, the majority concluded that Dr. Lazar holds no such license.[4]

[4] See Wexler, 847 A.2d at 103 (citing 1 Pa.C.S. §1991 (defining "physician" in relevant part as a person licensed "to engage in the practice of medicine and surgery in all its branches" within the scope of enactments regulating the practice of medicine generally and osteopathic medicine); 63 P.S. §422.2 (defining "physician" as a "medical doctor or doctor of osteopathy" and "medical doctor" as one who is licensed by the State Board of Medicine); 63 P.S. §§ 42.1 - 42.21c (reflecting that podiatrists are licensed by the State (continued. . .)

Therefore, it agreed with the common pleas court's holding that his testimony was inadmissible.

The Superior Court majority also rejected an argument advanced by Appellant that the MCARE Act should not apply in light of its having taken effect after the filing of her complaint. The majority reasoned that the Act by its terms became effective on or about May 20, 2002 and, therefore, was in effect for approximately seven months before the common pleas court's ruling excluding Dr. Lazar's testimony. Further, the court observed that Section 512 contains no limitations suggesting that it should be applied only to causes of action arising after the effective date of the MCARE Act, as are attached to various other provisions of the enactment. See id. at 101 (citing 40 P.S. §1303.513, Historical and Statutory Note; 40 P.S. §1303.516, Historical and Statutory Note).

Finally, the Superior Court majority rejected Appellant's argument that the common pleas court should have entertained testimony from Dr. Lazar before ruling on the admissibility of his opinion testimony. In this regard, the majority stressed that it did not condone the practice of relying upon an expert's curriculum vitae in determining competency, and that the better practice was for trial courts to take evidence directly from the expert before ruling. See Wexler, 847 A.2d at 105 n.7. Nevertheless, the majority reasoned that Dr. Lazar's report suggested that he had only remote familiarity with the standard of care governing orthopedic medical practice, and he failed to disclose any basis for rendering an opinion concerning the standard relative to the post-

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(. . . continued)
Board of Podiatry); 40 P.S. §1303.103 (separately delineating the categorizations of "physician" and "podiatrist" within the definition of "health care provider")).

operative treatment. See id. at 104-05. In the circumstances, the majority concluded that the common pleas court did not abuse its discretion.

Judge Johnson authored the dissent, taking the position that Dr. Lazar possessed sufficient qualifications to meet the common law requirements for expert testimony. See Wexler, 847 A.2d at 106 (Johnson, J., dissenting). Further, the dissent differed with the majority's application of the MCARE Act's standards, indicating that such retroactive application to a case instituted prior to the Act's effective date is prohibited by both statute and common law. In this regard, Judge Johnson observed that the Statutory Construction Act provides that "no statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa.C.S. §1926. While Judge Johnson acknowledged that "legislation concerning purely procedural matters will be applied not only to litigation commenced after its passage, but also to litigation existing at the time of passage," Morabito's Auto Sales v. Commonwealth, Dep't of Transp., 552 Pa. 291, 295, 715 A.2d 384, 386 (1998), he reasoned that Section 512 cannot be considered purely procedural, and, therefore, concluded that it could not be applied retroactively to this case. See Wexler, 847 A.2d at 112 (Johnson, J., dissenting) (positing that Section 512, "works a seismic shift in the evidentiary landscape of medical malpractice cases" by "'rais[ing] the bar' on the character of proof required of a plaintiff to vindicate a substantive right" and thus, cannot be considered "procedural, purely or otherwise"). Finally, the dissent took the position that the trial court erred by refusing to permit Dr. Lazar to testify at the in limine hearing, and in doing so, "refused the only testimony offered to determine what, if any, overlap exists between the respective doctors' expertise and practice," making it impossible to "properly conclude that the proffered expert witness was not qualified to testify against the defendant." Id. at 105.

Our review in the present matter, entailing the interpretation of various statutes and the application of legal principles, is plenary.

I. Applicability of the MCARE Act

Regarding the applicability of the MCARE Act, as in the Superior Court, Appellant presently advances the position that application of the competency standard under the MCARE Act to her action against Dr. Hecht would represent an impermissible, retroactive application of new law. In this regard, like Judge Johnson, Appellant references the admonition in Section 1926 of the Statutory Construction Act that no statute is to be construed to be retroactive unless clearly and manifestly so intended by the General Assembly. See 1 Pa.C.S. §1926.

Dr. Hecht relies on the MCARE Act's prescription that Section 512 was to become effective sixty days after its enactment, see Act of March 20, 2002, P.L. 154, No. 13 §5108, couching this specification as an express statutory directive to apply the statute to pending litigation.[5] Further, Dr. Hecht observes that the Superior Court has regularly so applied the enactment. See, e.g., Weiner v. Fisher, 871 A.2d 1283, 1284-85 (Pa. Super. 2005); Bethea v. Philadelphia AFL-CIO Hosp. Ass'n, 871 A.2d 223, 225-26 (Pa. Super. 2005) (citing Wexler, 847 A.2d at 101). Dr. Hecht also notes that, in determining whether the issue of retroactivity is truly involved, courts have concentrated on whether the new law gives a previous transaction a different legal effect than ascribed under the prior law. See, e.g., Creighton v. City of Pittsburgh, 389 Pa. 569,

[5] Dr. Hecht's amici also note that a number of other provisions of the MCARE Act were expressly made applicable only to causes of action arising on or after the date of the MCARE Act's enactment. See Act of March 20, 2002, P.L. 154, No. 13 §5105(b) ("Sections 504(d)(2), 505(e), 508, 509, 510, 513 and 516 shall apply to causes of action which arise on or after the effective date of this section.").

575-76, 132 A.2d 867, 871 (1957) ("[A] statute is not regarded as operating retroactively because of the mere fact that it relates to antecedent events, or draws upon antecedent facts for its operation.") (citation omitted); McMahon v. McMahon, 417 Pa. Super. 592, 601, 612 A.2d 1360, 1364 (1992). According to Dr. Hecht, the application of the MCARE Act's expert competency standard to pending litigation should be regarded as prospective, as it does not alter a plaintiff's substantive burden of proof or entitlement to relief, but rather, merely regulates the manner of proof.[6] Dr. Hecht's position in this regard is developed in greater detail by his amici, the Pennsylvania Medical Society, Donald Maron, DPM, AFL-CIO Hospital Association, and John T. Irwin, MD.[7]

Certainly, this Court adheres to the rule of statutory construction highlighted by Appellant requiring a finding of clear and manifest intent by the Legislature to support retrospective application of an enactment. We agree, however, with Dr. Hecht that the adjustment of the evidentiary standard at hand relative to a future trial, albeit of an action pending as of the time of the adjustment, should not be construed as a retroactive application. In this regard, we find that Judge Beck's explanation set forth in Warren v. Folk, 886 A.2d 305 (Pa. Super. 2005), provides an apt clarification of the governing principles.

In Warren, the plaintiff in a medical malpractice action challenged the constitutionality of the requirement of the filing of a certificate of merit under Rule of Civil

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[6] Dr. Hecht also contends that Appellant's argument concerning retroactive application is waived as it is underveloped in Appellant's brief. While Appellant's argument is brief, however, she does expressly invoke Section 1926 of the Statutory Construction Act and Judge Johnson's dissenting opinion in support of an argument that Section 512 of the MCARE Act should not be applied to her action. We find this argument sufficient to warrant our review of the matter.

[7] Appellant's amicus, the Pennsylvania Trial Lawyer's Association, does not advance a position on this issue.

Procedure 1042.3, when the alleged malpractice occurred prior to the 2003 effective date of the rule. The Superior Court disagreed with the plaintiff's assertion that such application represented an impermissible, retroactive one. Judge Beck reasoned that a rule or statute does not operate retrospectively merely because it is applied in a case that arises from conduct that preceded its promulgation or alters expectations deriving from prior laws. See Warren, 886 A.2d at 308 (citing Landgraf v. U.S.I. Film Products, 511 U.S. 244, 269-70, 114 S. Ct. 1483, 1499 (1994)). Rather, she indicated, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." Id. (quoting Landgraf, 511 U.S. at 269-70, 114 S. Ct. at 1499). Judge Beck observed that this Court has expressly considered the issue of retroactivity in terms of whether or not the rule or statute in question affects vested rights, or rights that "so completely and definitely belong to a person that [they] cannot be impaired or taken away without the person's consent." Id. (quoting In re R.T., 778 A.2d 670, 679 (Pa. Super. 2001) (quoting BLACK'S LAW DICTIONARY 1324 (7th ed. 1999))). She reasoned that Rule 1042.3 merely added a procedural requirement for going forward with a suit, designed to provide some assurance that the claims are based on arguably meritorious assertions, and did not infringe on any vested right. See id. at 309 ("To be a retroactive application to appellant's suit, Rule 1042.3 would have to give the alleged incidents of malpractice a new legal effect -- i.e., one that is different from their legal effect under the rules existing at the time the incidents occurred. This is not the case." (citations omitted)).

Similarly, we conclude that the delineation of requirements governing the presentation of expert witness testimony that are not unduly burdensome does not alter vested rights of the parties or give material antecedent events a different legal effect,

assuming the affordance of adequate time for preparation and adjustment.[8] Moreover, in relation to Section 512(b)(1) of the MCARE Act, there was no vested entitlement under Pennsylvania common law to present expert testimony in a malpractice action against a medical doctor from a witness who does not possess an unrestricted physician's license; rather, matters involving the competency of an expert witness traditionally have been committed to the sound discretion of the trial courts.[9]

In his dissenting opinion, Mr. Justice Castille describes the present application of Section 512 of the MCARE Act as "unlawfully retroactive." See, e.g., Dissenting Opinion, slip op. at 2. The dissent posits that Section 512 reflects a purposeful effort on

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[8] Certainly, we would consider the application of new evidentiary standards to a trial that has been concluded a retrospective application. Here, however, the Legislature made Section 512 effective sixty days after its enactment. See Act of March 20, 2002, P.L. 154, No. 13 §5108. Where, as here, there is no challenge relating to the timing of the effective date establishing unfairness as applied in the circumstances presented in a particular instance of litigation, see supra note 2, we consider the sixty-day grace period to provide reasonable opportunity for adjustment and preparation.

[9] Along these lines, the entire Rules of Evidence promulgated by this Court are generally applicable to "trials, hearings and proceedings covered by the Pennsylvania Rules of Evidence which begin on or after . . . the effective date of said rules," Pa.R.E. 101, Historical Notes, and not merely to actions that were commenced after the effective date.

Parenthetically, the determination concerning whether a statute is being retroactively applied has been sometimes couched in terms of whether or not the statute addresses "purely procedural" matters. See, e.g., Morabito's Auto Sales, 552 Pa. at 295, 715 A.2d at 386. The Court has recognized, however, that the line of demarcation between procedural and substantive matters is frequently difficult to discern. See id. ("The demarcation between substantive and procedural laws is . . . at times shadowy and difficult to determine."); cf. City of Philadelphia v. Civil Serv. Comm'n, 583 Pa. 413, 422, 879 A.2d 146, 151-52 (2005) ("The attempt to devise a universal principle for determining whether a rule is inherently procedural or substantive in nature has met with little success in the history of our jurisprudence."). We therefore believe that consideration of the nature and degree of impact on vested rights as discussed above offers the more useful frame of reference in this setting.

the part of the General Assembly to extinguish some subset of legitimate causes of action (as presumably the dissent would agree that there is no vested entitlement to a particular modalities for advancing frivolous ones), by imposing a stricter set of evidentiary requirements, which the corresponding subset of plaintiffs will be unable to meet. See id. at 7. In fact, however, as the dissent otherwise acknowledges, the Legislature has made manifest in the MCARE Act its intention to "ensure a fair legal process and reasonable compensation for persons injured due to medical negligence in this Commonwealth." 40 P.S. §1303.102. Further, there is simply no argument or proffer in this case that would suggest that there is a dearth of orthopedic surgeons in Pennsylvania willing to testify in support of legitimate causes of action pursued by plaintiffs suffering injury or loss on account of medical negligence in such field. In any event, Appellant has never asserted that she could not have obtained an expert witness qualified under the MCARE Act. Therefore, even if the class of plaintiffs suggested by the dissent existed, there would be no basis to support a conclusion that Appellant is within that suggested class.[10]

The dissent also supports its position that application of Section 512 of the MCARE Act to pending cases is unduly burdensome with a timeline of this case as it unfolded in the common pleas court. See Dissenting Opinion, slip op. at 10-11.

[10] The dissent also endorses Judge Johnson's position that Section 512 "effectively recasts the standard by which the plaintiffs must prove their entitlement to relief on a vested cause of action[.]" Dissenting Opinion, slip op. at 9 (quoting Wexler, 847 A.2d at 109 (Johnson, J., dissenting)). We disagree. None of the provisions of the MCARE Act set out the applicable standard of care governing negligence claims. Therefore, a plaintiff must still demonstrate precisely what is required by the common law, i.e., that the defendant failed to exercise that degree of skill, learning and care normally possessed and exercised by the average physician who devotes special study and attention to the diagnosis and treatment of diseases within the specialty. See, e.g., Joyce v. Boulevard Physical Therapy & Rehabilitation Center, P.C., 694 A.2d 648, 654 (Pa. Super. 1997).

Notably absent from the timeline, however, is the date of the passage of the MCARE Act, nine months before the common pleas court's ruling excluding Dr. Lazar's testimony. Moreover, the assertion of unfairness depends critically on the propriety of the trial court's decision to deny a continuance to permit Appellant to secure an expert witness qualifying under Section 512. See id. at 10-11. However, because Appellant did not challenge the denial of her request for a continuance in her statement of matters complained of on appeal, there is nothing in the record to reflect the trial court's reasons supporting its decision in this regard. Accordingly, as we have previously explained, a direct challenge to that decision is presently unavailable. See supra note 2. We also decline to do indirectly that which cannot be done directly by recasting such challenge into the essential lynchpin of an argument that Section 512 is unlawful as applied to the circumstances of this case.[11]

We hold, therefore, that Section 512 applies at trials of medical malpractice actions occurring after its effective date, again, assuming the affordance of adequate time for preparation and adjustment. Accord Betha, 871 A.2d at 226.

II. Application of the MCARE Act's Competency Standard

Our review of the specific requirements of Section 512 focuses on the directive of subsection (b)(1) that an expert witness testifying about the applicable standard of care

[11] In this regard, certainly the Legislature, in enacting the MCARE Act, was entitled to take into account that ordinary court procedures, such as the availability of a continuance in appropriate circumstances, would ensure the fair and just administration of trials conducted under its terms. As such, the timeline commentary is better suited to a review of the trial court's decision to deny a continuance (were it available) than it is to a broader scale determination that Section 512 of the MCARE Act is "unlawfully retroactive."

must possess an unrestricted physician's license to practice medicine, see 40 P.S. §1303.512(b)(1), as we find this provision dispositive.

Appellant contends that Dr. Lazar meets the requirement of Section 512(b)(1) by virtue of his license to practice podiatric medicine. She points to the definition of "physician" in Section 1991 of the Statutory Construction Act as "an individual licensed under the laws of this Commonwealth to engage in the practice of medicine and surgery in all its branches . . .," 1 Pa.C.S. §1991, characterizing podiatry as simply one branch of medicine. Appellant also references a definition from a medical dictionary suggesting that a physician is one graduated from a college of medicine or osteopathy and licensed by the appropriate board.

Dr. Hecht's argument follows the line of reasoning advanced by the common pleas court, noting in particular that the MCARE Act and many other statutes expressly distinguish between physicians and podiatrists. See supra note 4 and accompanying text. Dr. Hecht and his amici observe that Appellant's recitation of the definition of "physician" as specified in the Statutory Construction Act omits significant detail, in that licensure is required "within the scope of the act of July 20, 1974, known as the Medical Practice Act of 1974, and its amendments, or in the practice of osteopathic medicine and surgery within the scope of the act of October 5, 1978, known as the Osteopathic Medical Practice Act, and its amendments." 1 Pa.C.S. §1991 (citations omitted).

We agree with Dr. Hecht, his amici, the common pleas court, and the Superior Court on this point as well. Although clearly there is some overlap in practical application, it is evident from the panoply of referenced legislation that the Legislature is well aware of the clear and formal line of demarcation between regulation of the practice of medicine generally and regulation of the practice of podiatric medicine. Thus, we find that the General Assembly's reference in Section 512(b)(1) to an expert "possessing an

unrestricted physician's license to practice medicine" unambiguously denotes a medical doctor or osteopath licensed by a state board appropriate to such practices.[12] Further, since there is no provision for waiver of this requirement relative to expert testimony concerning the applicable standard of care, see supra note 3, the common pleas court appropriately concluded that Dr. Lazar was unqualified, under the MCARE Act, to provide evidence essential to the support of Appellant's action.

III. The Refusal to Conduct a Hearing

Appellant also maintains her contention that the trial court erred by failing to permit Dr. Lazar to testify regarding his qualifications at the hearing on Dr. Hecht's motion in limine, despite Appellant's urging. Since, however, it is undisputed that Dr. Lazar is not licensed as a physician to practice medicine by the State Board of Medicine or any analogue, the common pleas court did not err in excluding his opinion testimony concerning the applicable standard of care on the existing record.[13]

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[12] Parenthetically, the legislative history of the MCARE Act suggests that the General Assembly employed the expert competency standard proposed by the Pennsylvania Medical Society in Section 512. See House Legislative Journal, February 13, 2002, at 301.

[13] The dissent also perceives unfairness arising from the trial court's decision to broaden the basis for its decision to grant summary judgment in its opinion under Appellate Rule 1925(a), which purportedly "deprived the parties of any opportunity to develop a record responsive to [the MCARE Act's] provisions." See Dissenting Opinion, slip op. at 11 (Castille, J.) (quoting Wexler, 847 A.2d at 109 (Johnson, J., dissenting)). In the first instance, however, Appellant was certainly aware of the potential relevance of the MCARE Act to the summary judgment decision which she challenged on appeal, because she specifically raised Dr. Lazar asserted qualification under the MCARE Act in her statement of matters complained of on appeal under Appellate Rule 1925(b). Particularly as Appellant raised the issue, there is nothing untoward in the trial court's approach of resolving her argument in its opinion in response.

(continued. . .)

The order of the Superior Court is affirmed.

Mr. Chief Justice Cappy and Messrs. Justice Eakin and Fitzgerald join the opinion.

Mr. Justice Castille files a dissenting opinion in which Mr. Justice Baer and Madame Justice Baldwin join.

(. . . continued)
Moreover, there has never been a proffer of evidence in this case that Dr. Lazar, who, again, does not possess an unrestricted physician's license, could possibly meet such requirement of the MCARE Act to testify regarding the medical standard of care applicable to an orthopedic surgeon. Therefore, there is no injustice resulting from the absence of an opportunity to develop a record relevant to the MCARE Act's provisions.