[J-59-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CHARLES DELLENBAUGH, ADMINISTRATOR OF THE ESTATE OF DORA M. DELLENBAUGH	:	No. 31 M.D. Appeal Docket 1999
v.	:	Appeal from the Order of Commonwealth Court dated February 19, 1999, denying the post-trial motion of the Commonwealth of Pennsylvania Medical Professional Liability Catastrophe Loss Fund and affirming the order dated January 7, 1999 at No. 655 M.D. 1997
COMMONWEALTH OF PENNSYLVANIA MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND AND PENNSYLVANIA MEDICAL SOCIETY LIABILITY INSURANCE COMPANY	:	
APPEAL OF: MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND	:	SUBMITTED: April 12, 2000

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: August 22, 2000**

I would affirm the Commonwealth Court, as I believe that the plain language of the Malpractice Act requires the CAT Fund to provide statutory excess coverage in the underlying malpractice action against Dr. Azurin, regardless of the CAT Fund's regulation to the contrary. Accordingly, I respectfully dissent.

As noted by the majority, 40 P.S. § 1301.102 sets forth the dual purposes of the Malpractice Act. First, Section 1301.102 makes clear that the Malpractice Act is intended to make professional liability insurance available at a reasonable cost. In addition, but no less importantly, Section 1301.102 indicates that the Malpractice Act is intended to establish and maintain a system whereby persons injured by the torts and/or breaches of

contract of their health care providers can obtain a prompt adjudication of their claims and a determination of fair and reasonable compensation. In order to achieve its dual purposes, Section 1301.701(d) of the Malpractice Act provides for the creation of:

> a contingency fund for the purpose of paying all awards, judgments and settlements for loss or damages against a health care provider **entitled to participate in the fund** as a consequence of any claim for professional liability . . . to the extent such health care provider's share exceeds its basic insurance coverage.

40 P.S. § 1301.701(d) (emphasis added).[1] Thus, the legislature determined that the dual purposes underlying the Malpractice Act would be best served by the creation of a contingency fund providing statutory excess coverage to any and all health care providers who, according to the terms of the Malpractice Act, are "entitled to participate in the fund." In my view, the relevant question therefore becomes whether or not, pursuant to the terms of the Malpractice Act, Dr. Azurin's entitlement to participate in the fund as of the date that he operated on Dora M. Dellenbaugh was conditioned upon his payment of the CAT Fund's annual surcharge for that year.

As the following discussion indicates, based on the plain language of several of the provisions contained in the Malpractice Act, it is clear that health care providers' entitlement to participate in the fund is not conditioned on their payment of the annual surcharge. Therefore, I believe that the CAT Fund's regulation relied upon by the majority in reversing the Commonwealth Court, 31 Pa. Code § 242.17(b), which indicates that statutory excess

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[1] It bears noting that some three years after Dr. Azurin operated on Dora M. Dellenbaugh in 1993, the legislature amended 40 P.S. § 1301.701. Act of Nov. 26, 1996, P.L. 776, No. 135, § 3, imd. effective. However, none of the language contained in Section 1301.701 that is cited in this dissenting opinion was affected in any way by the 1996 amendment. Accordingly, I believe that the disposition of the instant appeal would remain the same under both the present version of Section 1301.701 and the previous version of the section that was in effect as of the date of Dora M. Dellenbaugh's surgery.

coverage is conditioned on payment of the annual surcharge, is not in accord with the plain language of the Malpractice Act, and should not be deferred to.

Citing Section 1301.701(e)(1) of the Malpractice Act, the majority asserts that all health care providers are required to pay the CAT Fund's annual surcharge, and from that point, educes that "the clear and logical implication is that if a provider fails to pay his share, he may not participate in the coverage offered by the fund." My analysis leads to the conclusion that the majority is incorrect.

First, the majority incorrectly asserts that all health care providers are required to pay the annual surcharge. Section 1301.701(e)(1) of the Malpractice Act provides that "the fund shall be funded by the levying of an annual surcharge on or after January 1 of every year on all health care providers **entitled to participate in the fund**." 40 P.S. § 1301.701(e)(1) (emphasis added). Thus, the annual surcharge is only levied against those health care providers who are "entitled to participate in the fund." In addition, the plain language of the Malpractice Act indicates that health care providers' entitlement to statutory excess coverage from the CAT Fund is not conditioned on payment of the annual surcharge. Pursuant to 40 P.S. § 1301.701(a)(1)(i), health care providers who conduct 50% or more of their health care business or practice within the Commonwealth of Pennsylvania and who annually insure or self-insure their professional liability at least in the amounts specified therein "shall be entitled to participate in the fund." As noted above, Section 1301.701(d) provides, in no uncertain terms, that the CAT Fund was created for the express purpose of "paying all awards, judgments and settlements for loss or damages against a health care provider **entitled to participate in the fund** . . . to the extent such health care provider's share exceeds its basic coverage insurance." 40 P.S. § 1301.701(d) (emphasis added). Therefore, construing Section 1301.701(a)(1)(i) and Section 1301.701(d) in *pari materia* with one another, as we must pursuant to Section 1932 of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1932, it becomes clear that health care

providers need only conduct at least 50% of their health care business within the Commonwealth and maintain certain statutorily-set amounts of primary professional liability insurance coverage in order to be entitled to statutory excess coverage from the CAT Fund.[2]

However, as noted by the majority, the CAT Fund has promulgated a regulation interpreting the terms of the Malpractice Act at 31 Pa. Code § 242.17(b), which provides that a health care provider's failure to pay the annual surcharge will result in the loss of statutory excess coverage. In addition, the majority correctly asserts that administrative agencies such as the CAT Fund are entitled to deference when they interpret the statutes that they enforce. See generally Tool Sales & Serv. Co., Inc. v. Commonwealth of Pennsylvania, Bd. of Fin. and Revenue, 536 Pa. 10, 22, 637 A.2d 607, 613 (1993). Nevertheless, the validity of an administrative agency's interpretive regulation depends "upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute that it interprets." Pennsylvania Human Relations Comm'n v. Uniontown Area Sch. Dist., 455 Pa. 52, 77, 313 A.2d 156, 169 (1973). Given the plain language of the Malpractice Act indicating that entitlement to CAT Fund statutory excess coverage is not conditioned on payment of the annual surcharge, I would find that the CAT Fund's regulation to the contrary, 31 Pa. Code § 242.17(b), does not track the meaning of the Malpractice Act and thus, should not be deferred to.

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[2] 40 P.S. § 1301.701(e), when considered in *pari materia* with Section 1301.701(a)(1)(i), provides further support for the conclusion that the Malpractice Act does not condition statutory excess coverage on payment of the annual surcharge. If the legislature intended to condition statutory excess coverage on payment of the annual surcharge, then it could have easily added payment of the surcharge to the dual requirements for entitlement to participate in the fund set forth in Section 1301.701(a)(1)(i). It did not, and instead saw fit to levy the annual surcharge against health care providers who were already entitled to statutory excess coverage (i.e., "entitled to participate in the fund"). 40 P.S. § 1301.701(e).

By way of reiteration, I believe that the plain language of the Malpractice Act dictates that a health care provider's entitlement to statutory excess coverage from the CAT Fund is conditioned only on meeting the in-state practice and primary insurance requirements set forth in 40 P.S. § 1301.701(a)(1)(i). In its brief to this Court, the CAT Fund does not argue, much less point to any evidence of record indicating that Dr. Azurin conducted less than 50% of his health care practice in the Commonwealth of Pennsylvania or that he failed to maintain the minimum amounts of primary professional liability insurance coverage required by the Malpractice Act at any time relevant to the underlying malpractice action against him. Therefore, all indications are that Dr. Azurin was "entitled to participate in the fund" pursuant to 40 P.S. § 1301.701(a)(1)(i) at all times relevant to the underlying malpractice action. Accordingly, I believe that the CAT Fund should be required to provide statutory excess coverage in the underlying malpractice action against Dr. Azurin despite the fact that he failed to pay his annual surcharge.[3] [4]

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[3] The majority finds such a result inconceivable, most likely out of a legitimate concern for the continuing financial viability of the CAT Fund if health care providers are not required to pay their annual surcharges in order to enjoy statutory excess coverage. However, the majority fails to recognize that there is already a strong safeguard built into the Malpractice Act to protect against abuse by health care providers seeking to obtain statutory excess coverage without paying their annual surcharges. Section 1301.701(f) of the Malpractice Act provides that:

> [t]he failure of any health care provider to comply with any of the provisions of this section or any of the rules and regulations issued by the director shall result in the suspension or revocation of the health care provider's license by the licensure board.

40 P.S. § 1301.701(f). Thus, while health care providers such as Dr. Azurin who fail to pay their annual surcharges will not lose their statutory excess coverage immediately, they will have their professional licenses revoked by the appropriate licensure board, at which point they will inevitably lose their status as health care providers under the Malpractice Act. In fact, that is exactly what happened to Dr. Azurin, whose license to practice medicine was (continued…)

Mr. Justice Saylor joins in the dissenting opinion.

(…continued)
revoked after the State Board of Medicine was notified by the CAT Fund of his failure to pay his annual surcharges commencing in January of 1992. In addition, such a result is fully consistent with the dual purposes of the Malpractice Act, since it helps to ensure the availability of fair and just compensation for persons injured by the torts and/or breaches of contract of their health care providers while protecting the continued financial viability of the fund, which helps to make professional liability insurance available to health care providers at a reasonable cost.

[4] As a final aside, it bears noting that although Dr. Azurin's primary professional liability insurance carrier, PMSLIC, informed the CAT Fund by letter dated June 2, 1992 of Dr. Azurin's failure to pay his annual CAT Fund surcharge for 1992, the CAT Fund made no effort to notify the State Board of Medicine of Dr. Azurin's delinquency until January of 1993. Thus, for reasons still unclear from the record, the CAT Fund failed to act for some six months before complying with the dictates of its own regulation at 31 Pa. Code § 242.17(a), which provides that "[t]he failure of a health care provider to comply with section 701 of the act (40 P.S. § 1301.701) . . . will result in notification by the Director to the applicable Licensure Board." In my view, the simple fact that the CAT Fund knew of Dr. Azurin's failure to comply with the surcharge provisions of the Malpractice Act for some six months before reporting it to the State Board of Medicine is inexcusable, regardless of whether or not a prompt notification would have resulted in the revocation of Dr. Azurin's license to practice medicine before he operated on Dora M. Dellenbaugh.