[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

OPINION OF THE COURT

MR. CHIEF JUSTICE FLAHERTY **DECIDED: August 22, 2000**

This is an appeal from a memorandum decision of Commonwealth Court[1] which held that the appellant, Medical Professional Liability Catastrophe Loss Fund (CAT Fund), an agency of the Commonwealth, is responsible for providing statutory excess liability coverage in a medical malpractice action against a surgeon, Arturo Azurin, M.D. The background of the case is as follows.

[1] This case was addressed to Commonwealth Court's original jurisdiction; hence, appellate jurisdiction is governed by 42 Pa.C.S. § 723(a).

On January 13, 1993, Dr. Azurin performed abdominal surgery on Dora M. Dellenbaugh. Following the surgery, serious complications developed. These included an uncontrollable infection, respiratory distress syndrome, and arterial thrombosis that necessitated an above-the-knee amputation. As a result, Dellenbaugh was forced to remain in in-patient care and her death ensued in August of the same year.

Appellee, Charles Dellenbaugh, as administrator of his wife's estate, filed this malpractice action against Dr. Azurin. It is uncontested that damages could exceed the $200,000 of basic coverage that Dr. Azurin maintains through his primary insurance carrier, Pennsylvania Medical Society Liability Insurance Company (PMSLIC). The CAT Fund, in accordance with its statutory function, normally provides excess coverage for such claims. See Health Care Services Malpractice Act (Malpractice Act), 40 P.S. §§ 1301.701-1301.706. The fund notified appellee, however, that it would not provide coverage in this case. The basis for the CAT Fund's action was that, beginning in January of 1992, Dr. Azurin failed to pay his required annual surcharges to the fund. Pursuant to the Malpractice Act, such surcharges are assessed against health care providers in the Commonwealth to provide funding for the CAT Fund. See 40 P.S. § 1301.701(e) (assessment of annual surcharge). The surcharges are normally collected by one's primary insurance carrier, which, in turn, remits them to the fund.

The CAT Fund was notified by PMSLIC, via letter dated June 2, 1992, that Dr. Azurin had not paid his annual surcharge. The penalty for failure to pay an annual surcharge to the fund is suspension or revocation of the delinquent health care provider's license by the state licensure board. 40 P.S. § 1301.701(f). It is the responsibility of the fund's director to notify the applicable licensure board when a health care provider fails to

comply with the surcharge requirement. 31 Pa.Code § 242.17(a) ("The failure of the health care provider to comply . . . will result in notification by the Director to the applicable Licensure Board."). With regard to Dr. Azurin's failure to pay the surcharge, however, the director failed to provide notification to the Board of Professional and Occupational Affairs, State Board of Medicine (licensure board). Hence, proceedings to suspend or revoke Dr. Azurin's license to practice medicine did not promptly commence.[2] In January of 1993, therefore, when Dr. Azurin performed surgery on Dellenbaugh, his failure to pay CAT Fund surcharges had not been brought to the attention of the licensure board.

With regard to the CAT Fund's liability for payment of damage awards in cases where health care providers fail to comply with surcharge requirements, it is specified in 31 Pa.Code § 242.17(b) that:

> A health care provider failing to pay the surcharge or emergency surcharge within the time limits prescribed will not be covered by the Fund in the event of loss.

Based on this, the CAT Fund denied liability for any damage award arising from Dr. Azurin's alleged malpractice.

On July 7, 1997, appellee filed a petition for review in Commonwealth Court seeking a declaratory judgment that the CAT Fund was estopped from denying statutory excess coverage by virtue of its failure to have promptly reported Dr. Azurin to the licensure board for failing to pay his annual surcharge. Commonwealth Court held that the fund cannot

[2] Proceedings were not commenced by the licensure board until July 6, 1995, and, ten months later, on May 6, 1996, Dr. Azurin's license to practice medicine was revoked.

deny coverage. It reasoned that one of the central purposes of the Malpractice Act is to provide fair and reasonable compensation for persons injured by medical malpractice.

Commonwealth Court concluded that the Malpractice Act was intended to assure compensation for tort victims regardless of whether surcharges have been paid by the health care provider. It reasoned that although 31 Pa.Code § 242.17(b), supra, provides that a doctor who fails to pay a surcharge is not covered by the fund in the event of loss, the fact that the doctor is not covered does not mean that the fund is not responsible for payment of damages to a victim of malpractice. The court viewed 31 Pa.Code § 242.17(a), supra, as creating a duty for the fund to protect potential victims of malpractice by providing expeditious notice to licensure boards when health care providers fail to pay their annual surcharges. It held, therefore, that appellee could maintain a claim against the fund and that the fund was estopped from denying coverage. We disagree and accordingly reverse.

The purpose of the Malpractice Act was set forth in 40 P.S. § 1301.102, which provides:

> It is the purpose of this act to make available professional liability insurance at a reasonable cost, and to establish a system through which a person who has sustained injury or death as a result of tort or breach of contract by a health care provider can obtain a prompt determination and adjudication of his claim and the determination of fair and reasonable compensation.

While the second of the stated purposes is indeed to promote the "determination of fair and reasonable compensation" for tort victims, 40 P.S. § 1301.102, supra, the other purpose, to wit, the one deemphasized by the decision below even though it was the one

set forth first in the statutory description of purposes, is to "make available professional liability insurance at a reasonable cost," id. It is inherently contrary to the latter purpose to require the fund to cover claims made against those who have not paid their surcharges to the fund, for, by doing so, the fund would be required to increase surcharges assessed against compliant health care providers. It would also undermine the financial integrity of the fund to pay claims for those who have ignored their responsibility to pay into the fund. We do not believe that the legislature intended such a result.

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). Inasmuch as all providers are required to pay the surcharges, 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. Accordingly, the CAT Fund promulgated the regulation at 31 Pa.Code § 242.17(b), supra, which states that a health care provider who fails to pay CAT Fund surcharges "will not be covered by the Fund in the event of loss." See generally Tool Sales & Service Co. v. Commonwealth, 536 Pa. 10, 22, 637 A.2d 607, 613 (1993) (agencies are accorded deference in interpreting the statutes they enforce).

To conclude that a provider can ignore the requirements of the Malpractice Act, yet reap the benefits thereof, is untenable. Further, when an insured is not covered for a loss, it is inconceivable that the claimant is nevertheless entitled to be paid by the carrier for that loss. The court below, by holding the CAT Fund liable for such a loss, plainly erred.

We are not persuaded by Commonwealth Court's suggestion that the CAT Fund could pay the loss and then pursue Dr. Azurin to recoup any damages that the fund pays

to appellee. This would further drain assets of the fund where the likelihood of recovering such funds is low, and resources of the fund would have to be used to cover the costs of collection. We note, too, that recourse against Dr. Azurin personally is just as available to appellee as it is to the CAT Fund.

Nor do we agree with Commonwealth Court's determination that the CAT Fund is estopped from asserting its non-liability by reason of its failure to have promptly notified the licensure board regarding Dr. Azurin's failure to pay surcharges to the fund. Commonwealth Court relied on its own decision in Central Dauphin School District v. Commonwealth, 437 A.2d 527, 530 (Pa.Cmwlth. 1981) for the proposition that equitable estoppel can apply to a Commonwealth agency when the agency intentionally or negligently misrepresents some material fact, with knowledge or having reason to know that another would justifiably rely on that misrepresentation, and where the other is induced to act to his detriment because of the justifiable reliance. The court's opinion offers virtually no explanation, however, of how the principles of estoppel apply to the facts of this case. The court may have reasoned that failure to have notified the licensure board amounted to a misrepresentation, and that this resulted in Dellenbaugh being subjected to surgery by Dr. Azurin, to wit, surgery that would not have been performed if the fund had complied with its notification requirements. This rationale is not clearly set forth, but it is by implication the basis for the application of estoppel.

Without regard to whether anything that could be deemed a misrepresentation occurred,[3] however, estoppel was not appropriately invoked. There is nothing in the record

[3] It is not alleged that there were ever any communications between the CAT Fund and Dellenbaugh. The fund argues, therefore, that no misrepresentation could have occurred, and that Dellenbaugh placed no reliance on the fund.

to suggest that, if the fund had promptly notified the licensure board regarding Dr. Azurin's failure to pay surcharges, the surgery on Dellenbaugh would not have been performed. If the fund had notified the board in June of 1992 when it first became aware of Dr. Azurin's failure to pay, Dr. Azurin's license would not likely have been suspended or revoked before surgery was performed on Dellenbaugh in January of 1993. Thus, Dellenbaugh was not harmed by the fund's lack of prompt notification to the licensure board.

The fund itself has no power to suspend or revoke a license; rather, such sanctions can be applied only "by the licensure board." 40 P.S. § 1301.701(f). The sanctions are not invoked immediately upon the board's receipt of notice from the fund. Rather, notification to the board merely sets in motion a process by which the license can be suspended or revoked. The process affords full procedural due process safeguards. These include notice, hearings, a decision by a hearing examiner, and review by the licensure board. See 40 P.S. § 1301.901- 1301.905.

As the CAT Fund alleged in its "Answer and New Matter" filed in response to appellee's petition for review in Commonwealth Court, "even if the CAT Fund had reported Dr. Azurin to the licensure board upon learning that he had not paid his 1992 surcharge, Dr. Azurin's license would not have been suspended or revoked by January of 1993." Appellee offered no response to this pleading. On appeal, appellee's brief concedes that "it is impossible to know with certainty what would have occurred," but asserts that "[I]t is certainly possible that some suspension could have occurred before the surgery in question." (Emphasis added). Appellee cites nothing in the record to support this assertion. Indeed, the only indication in the record as to the speed with which the licensure board acts is contrary to appellee's position. After proceedings were initiated against Dr. Azurin on July 6, 1995, his license was not revoked until May 6, 1996. Hence, the process

took ten months. Such extended proceedings, had they been commenced in June of 1992, would have been of no benefit to Dellenbaugh in January of 1993 since Dr. Azurin's license would not yet have been revoked.

We conclude, therefore, that it was error for the court below to hold that the CAT Fund is liable for excess liability coverage where the doctor has not paid the required surcharges, and that it was error to hold that the fund is estopped from denying coverage.

Order reversed.

Mr. Justice Nigro files a dissenting opinion in which Mr. Justice Saylor joins.