

[J-178-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

WALTER M. STRINE, WALTER M. STRINE, JR., AND WILLIAM B. STRINE TRADING AS COMMONWEALTH REAL ESTATE INVESTORS D/B/A CHESTER CARE CENTER, : No. 227 MAP 2003
: :
: Appeal from the Order of the
: Commonwealth Court dated August 1,
: 2003, at No. 270 MD 1999

Appellees

v.

COMMONWEALTH OF PENNSYLVANIA MEDICAL CARE AVAILABILITY AND REDUCTION OF ERROR FUND, AND JOHN H. REED, FORMER DIRECTOR OF MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND, :

Appellants

: ARGUED: November 30, 2004

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: March 29, 2006

I am able to join parts I and II of the Majority Opinion. Specifically, I agree with the Majority that in determining whether a service triggers coverage under the Medical Professional Liability Catastrophe Loss Fund (the “Fund”), a court “must focus on whether [the] service involved a medical skill (broadly understood as per [the Healthcare Services Malpractice Act’s defined class of health care providers]) associated with specialized training.” Maj. Op. at 10. With this focus in mind, however, it is my view that the bath given

by Mr. Twyman to Ms. Barnes was not a service that triggered coverage under the Fund. I, therefore, would reverse the Commonwealth Court's order granting summary judgment in favor of Appellees. Accordingly, I respectfully dissent from part III of the Majority Opinion.

While I accept that the Court must determine whether the skill required to bathe Ms. Barnes properly constituted a medical skill associated with specialized training within the context presented in this case, *i.e.*, nursing home care, I nonetheless am unable to conclude that the set of skills necessary to perform this task equated to such a medical skill. Regardless of whether Ms. Barnes' physician prescribed the bath or whether, as a certified nursing assistant, Mr. Twyman received training in bathing persons in Ms. Barnes' condition, Mr. Twyman's deposition testimony clearly demonstrates that the type of skill that was required to bathe Ms. Barnes on a daily basis was not a "medical skill," let alone a medical skill "associated with specialized training."

Mr. Twyman offered the following testimony regarding his duty to bathe Ms. Barnes:

[T]hey needed me to pick her up, put her in the bath, pick her up, take her out of the bath.

Plaintiffs' Reply Brief in Support of Motion for Partial Summary Judgment, Exhibit A. While the successful completion of these tasks certainly required the exercise of judgment as to considerations such as water temperature and water levels, I, unlike the Majority, cannot go as far as to classify the type of judgment necessary to bathe Ms. Barnes properly as "professional judgment." See Maj. Op. at 14. It is beyond dispute that the proper exercise of judgment was important to Ms. Barnes' safety. The importance of the proper exercise of judgment in bathing Ms. Barnes properly does not, however, transform this judgment into "professional judgment," the improper exercise of which would trigger coverage under the Fund.

As the Majority notes, the Legislature created the Fund to serve as "a contingency fund for the purpose of paying all awards, judgments and settlements for loss or damages

against a health care provider ... as a consequence of any claim for *professional liability*...”
40 P.S. §1301.701(d) (emphasis added) (superseded). In my view, finding, as the Majority does, that the negligent giving of a bath, under the circumstances presented in this case, constitutes the improper provision of a medical service giving rise to Fund coverage stretches the scope of “professional liability” claims covered by the limited resources of the Fund beyond that which the Legislature intended.

For these reasons, I would reverse the Commonwealth Court’s order granting summary judgment in favor of Appellees.

Mr. Justice Castille joins in this dissenting opinion.