

SUPREME COURT UPHOLDS APPLICATION OF STRICT ACT 13 EXPERT REQUIREMENTS TO ALL CASES PENDING AT ITS ENACTMENT



In June 5, 2007, the Supreme Court of Pennsylvania issued a landmark, but narrow, 4-3 decision applying §512 of the MCARE Act, which sets requirements for expert witnesses in malpractice cases. Wexler v. Hecht, 2007 WL 1610160 (Jun. 5, 2007). The Court forbade a podiatrist from testifying as an expert against an orthopedic surgeon.

Plaintiff in the case was a patient of a board-certified orthopedic surgeon who underwent a bunionectomy. She claimed the doctor performed the surgery negligently and that she was unable to walk without crutches afterward. Plaintiff's standard of care expert was a podiatrist. Just before trial, the defense moved to prohibit the expert from testifying based upon §512 of the MCARE Act. §512 imposes several conditions on an expert who testifies on the standard of care, including the requirement that he or she:

(b)(1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.

The defense contended that the plaintiff's expert held only a podiatric license, which was not an "unrestricted physician's" license." The trial court agreed and precluded plaintiff's standard of care expert. A motion for continuance to permit plaintiff time to locate an orthopedic surgery expert was denied and the case was dismissed.

The Superior Court affirmed, in a 2-1 opinion, agreeing with the trial court that a "podiatrist," is not a "physician." It noted also that the MCARE Act separately deals with "physicians" and "podiatrists." A major issue argued at the Superior Court had to do with the effective date of §512. Act 13, a.k.a. "the MCARE Act" took effect 60 days after its signing, on May 20, 2002. The trial of the case at issue took place 7 months later. Plaintiff contended it should not apply because her complaint was filed before the statute took effect and it could not be applied "retroactively."

The Supreme Court first examined the question of whether it was permissible to apply §512 "retroactively." It concluded that §512 applied to all cases then pending when Act 13 took effect on May 20, 2002. The Court agreed with the dissenting justices in *principle* - statutes are not to be construed so as to retroactively change substantive rights which had already "accrued." But the Court held that §512 only changed procedures - the manner of proof required in a malpractice suit, and that this was not a substantive change in the law.

The Court then considered whether the plaintiff's podiatrist expert was competent to testify under §512(b)(1), which requires a licensed "physician." It agreed with the lower courts that a podiatrist is not qualified. The expert must be a medical doctor or osteopath and the requirement cannot be waived.

The three-justice dissent, authored by Justice Castille, includes some strong statements. In one, he writes

that "[w]ith respect to expert testimony, the MCARE act works a very deliberate revolution, in favor of medical malpractice defendants, adopting a heightened standard of admissibility for expert testimony." Citing the venerable Judge Justin M. Johnson, who was the dissenter from the Superior Court's opinion, Justice Castille quoted that §512 represented a "seismic shift in the evidentiary landscape of medical malpractice cases."

The Wexler case settles the question of whether §512 applies to cases which the alleged negligence took place prior to the effective date of the act. Most cases now pending arose after May 20, 2002, and there is little doubt that all of Act 13 now applies to most cases. The more important ramification of this case is the Supreme Court's commitment to applying Act 13's strict reform provisions. Note, however, that if only one vote was switched, the Act would have suffered a damaging defeat. Thus, the future of Act 13 remains clouded.

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