

***SUPERIOR COURT WEAKENS "SAME SPECIALTY" REQUIREMENT FOR EXPERTS UNDER MCARE ACT – COURT ALSO REFUSES TO REDUCE VERDICT AND TACITLY SANCTIONS LIMITS ON DEFENSE COUNSEL'S ARGUMENTS***



The Superior Court has issued a ruling which may make trial courts wary of enforcing the "same specialty" rule adopted in 2002 as part of the Medical Care Availability and Reduction of Error (MCARE) Act.

The provision in question is codified at 40 P.S. §1303.512. It reads, in part:<sup>1</sup>

§1303.512 Expert qualifications

\* \* \* \*

(c) Standard of care. . . . an expert testifying as to a physician's standard of care also must meet the following qualifications:

(1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.

(2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).

(3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).

<sup>1</sup> Please note that some other important provisions of this section have been eliminated in the interests of space. E-Mail recipients will receive a copy of the full statute text along with this Bulletin.

\* \* \* \*

(e) Otherwise adequate training, experience and knowledge.-A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

The putative purpose of these provisions is to require experts testifying against a board-certified physician to practice in the same specialty and be certified by the same board. Note, however, that subsection (e), above, creates a wide exception, giving trial judges discretion to permit testimony from an expert from an unrelated discipline.

This was a major issue in the case of Gbur v. Golio, which was decided on August 24, 2007.<sup>2</sup> Dr. Anthony Golio is a board-certified urologist practicing in Western Pennsylvania. Patient Joseph Gbur, Jr., was sent to Dr. Golio after a routine prostate screening returned an elevated PSA. An initial biopsy was normal. Six month follow-up returned an even higher PSA, so Dr. Golio did a repeat

<sup>2</sup> 2007 WL 2405229 (Pa.Super.), 2007 PA Super 264.

biopsy, and ordered a pelvic MRI and bone scan. The biopsy demonstrated cancer, with a Gleason Score of "9," indicating an aggressive entity. The bone scan returned what the radiologist described as "abnormal areas of activity in the right mandible . . . consistent with metastasis." The MRI showed no local invasion of the prostate and led Dr. Golio to conclude that the cancer was confined there. He ordered radioactive seed implantation (brachytherapy) and Lupron.

About six months later, after experiencing severe dental pain, and undergoing a number of dental procedures, it was discovered that the source of his jaw pain was a metastasis from his prostate cancer. Mr. Gbur died a few years later from metastatic disease.

Though Dr. Golio is a board-certified urologist, the expert who testified against him at trial was a radiation oncologist.<sup>3</sup> Dr. Golio objected, but the trial court allowed the testimony, ruling that he expert was "otherwise qualified" pursuant to subsection (e), circumventing the "same specialty" requirement. On appeal, the Superior Court upheld this ruling. It wrote that it was an "inescapable conclusion" that plaintiff's expert was qualified to testify.

The Court reviewed the expert's qualifications: He treated lots of

<sup>3</sup> Trial proceeded before Judge Timothy O'Reilly.

patients with urologic cancers, and was trained in performing brachytherapy. He headed a cancer center, and received referrals from urologists. In his practice, he supervised the treatment of 40 to 60 radiation patients every day, 4 to 8 of whom were prostate cancer patients. The Court also noted that the thrust of the expert's testimony did not deal so much with "the substantive field of urology, as such," but related to Dr. Golio's response to the bone scan results.

The Court noted the recent holding of the Supreme Court in Wexler v. Hecht, but only in a footnote, where the panel observed that Wexler did not implicate the same issues. (See *Med Mal Bulletin v. 40, June 8, 2007*) Recall that in that case, the Supreme Court found that a podiatrist could not testify against an orthopedic surgeon based upon §512, but the opinion focused more upon the fact that a podiatrist was not a "physician," as required by §512, rather than the fact that he was outside the orthoped-defendant's specialty.

The Gbur case is discouraging in that it sanctioned a rather broad application of the subsection (e) exception. While the plaintiff's expert had lots of experience treating patients with urologic cancers, one would expect any reasonably qualified radiation oncologist would have been no differently qualified. The same logic might apply to a general surgeon or a hematologist. It might be said that the exception is in danger of swallowing the rule.

The Superior Court reached another holding in Gbur related to other recent reform measures. The verdict against Dr. Golio totaled over \$700,000. Dr. Golio filed a motion for "remittitur," which asks the court to reduce an "excessive" verdict. Defendant's main argument was that Mr. Gbur was 76 years old. The Court found there was no reason to conclude that the verdict "shocked the conscience" such that remittitur would be appropriate.

The most noteworthy aspect of the Superior Court's treatment of this question is that the Court looked to case law for the standards to apply to a remittitur motion, and ignored an important development of recent years on remittitur. After the enactment of MCARE, the Supreme Court undertook its own malpractice reforms. Among these was a new rule which makes significant changes to the handling of remittitur motions. Rule 1042.72 specifically relates to awards of "noneconomic" damages – i.e., the amounts awarded by a jury for "pain and suffering" and the like. Dispensing with the "shock the conscience" standard, the Supreme Court created a rule that a damage award is excessive if "it deviates substantially from what could be reasonable compensation."

The Superior Court entirely failed to mention the new rule, which was made applicable to all cases pending at the time of its enactment, including the Gbur case. Accordingly, the Superior Court's application of the "shock the conscience" standard in this case may be erroneous. In its press release of Sep. 20, 2004, announcing the new rule, the Supreme Court wrote:

The court adopted new Civil Procedural Rule 1042.72 that effectively creates a special category for considering whether medical malpractice awards are excessive. The new standards are distinctly different than existing guidelines for what is known as "remittitur" — or action on the part of a defendant to reduce financial damages awarded by a jury.<sup>4</sup>

This strongly suggests the Court fully intended to create a lower standard for remittitur in malpractice cases.<sup>5</sup>

<sup>4</sup> <http://www.courts.state.pa.us/Index/MedicalMalpractice/prrel04920.pdf>

<sup>5</sup> We note that there is a second reform to remittitur, part of the MCARE Act (§515), which requires any court considering a motion for remittitur to consider the impact the award might have on the provision of healthcare in the community. While this provision probably had little relevance to this matter, it is surprising the Superior Court did not even mention the provision.



A final aspect of the opinion is troublesome to defense lawyers. The Superior Court was critical that defense counsel attempted, in his closing argument, to suggest that other doctors who had treated Mr. Gbur were at fault, and questioned why they had not also been sued. The trial court apparently admonished defense counsel against making such statements, because defendant had never joined those other doctors as defendants. In other words, because Dr. Golio did not sue the other doctors, he could not suggest that they should be held liable along with, or instead of Dr. Golio. This is a worrisome holding from a defense perspective. Because the defendant does not bear the burden of proof, it is generally accepted that a defense attorney may make virtually any argument in the defense of a case without having to offer evidence in its support – merely attacking the credibility of plaintiff's evidence is enough. This is one of few privileges afforded to the defense in a case – it can blame other causes, other people, etc., without having to offer experts or other evidence to prove the point – the jury will decide whether the argument is credible and a defense lawyer makes an incredible argument at his or her peril. The Superior Court found the trial court's behavior in this regard acceptable. While it did not specifically endorse the holding made by the judge, the Court's treatment of the issue may lend tacit approval to this argument.

A petition for appeal to the Supreme Court of Pennsylvania may be filed by Sept. 24, 2007.

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