No. 30115 -- Gorman Dale Osborne, et al. v. The United States of America, et al.

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Maynard, Justice, dissenting:

It is not easy for me to dissent to the majority opinion. My sympathy for the plaintiffs in light of their terrible suffering naturally causes me to want to see them compensated for their injuries. The law, however, simply does not provide for recovery in every instance of tragedy. Regardless of how badly I want the plaintiffs to recover, and I do, I cannot concur with the majority's holding and remain intellectually honest in determining the scope of the Medical Professional Liability Act ("MPLA").

I disagree with the majority opinion for several reasons. First, I do not agree that the language of the MPLA supports the conclusion reached by the majority. The statute in question defines "medical professional liability" as "any liability for damages resulting from the death or injury of a *person* for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a *patient.*" W.Va. Code § 55-7B-2(d) (emphasis added). The majority contends that the Legislature's use of the word "person" is a deliberate decision to "allow individuals generally to recover damages for injuries attributable to medical professional liability regardless of whether they are actually 'patients.'"

Under the common law of this State, a physician-patient relationship was required to maintain a medical malpractice action. *See,* e.g., Weaver *v. Union Carbide Corp.*, 180 W.Va. 556, 378 S.E.2d 105 (1989); *Sisson v. Seneca Mental Health Council*, 185 W.Va. 33, 404 S.E.2d 425 (1991); *Gooch v. West Virginia Dept. of Public Safety*, 195 W.Va. 357, 465 S.E.2d 628 (1995); *Rand v. Miller*, 185 W.Va. 705, 408 S.E.2d 655 (1991). This Court has previously said, "In determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the Legislature did not intend to innovate upon, unsettle, disregard, alter or violate . . . the common law[.]" Syllabus Point 27, *Coal & Coke Ry. Co. v. Conley*, 67 W.Va. 129, 67 S.E. 613 (1910). Further, "[o]ne of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law." Syllabus Point 2, *Smith v. West Virginia State Board of Education*, 170 W.Va. 593, 295 S.E.2d 680 (1982). Despite the majority's claim to the contrary, it certainly is not clear from the text of the MPLA that the Legislature intended to change the common law insofar as it required a doctor-patient relationship. Had the Legislature truly intended to provide for third-party suits against health care providers under the MPLA, I am confident it would have set forth its intent in express and explicit language instead of leaving it to this Court to guess at its intent from clues buried in its use of the terms "person" and "patient."

This is especially so when one considers that the majority's interpretation is so

contrary to the purposes of the MPLA. According to W.Va. Code § 55-7B-1, the Legislature intended to control the costs of medical malpractice insurance while maintaining adequate compensation for persons injured as the result of medical negligence. It is downright absurd to believe that the Legislature sought to achieve this purpose by increasing exponentially the potential liability of health care providers. *See* Syllabus Point 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938) ("Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made."). In short, the majority opinion disregards the applicable rules of statutory construction to arrive at an interpretation of the MPLA that is clearly inimical to its purposes.

Second, I believe the majority opinion ignores longstanding principles of tort law. In that infamous old first year law school case of *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), Justice Cardozo explained that negligence is a matter of a relation between the parties and must be founded upon the foreseeability of harm to the person in fact injured. Dr. Srichai had absolutely no relation to the third-party plaintiffs who were injured and thus no legal obligation to them. Nevertheless, the majority finds that it was foreseeable that Dr. Srichai's negligent treatment of his patient could injure these third- party plaintiffs who were completely unidentified at the time Dr. Srichai treated his patient.

Third, I am deeply concerned about the impact of the majority opinion. It is plain

to me that our State is suffering a medical malpractice insurance crisis. For reasons that are vehemently disputed, doctors are unable to find affordable malpractice insurance. As a result, a significant number of doctors have retired or shut down their practices and moved to other states. Newspapers and broadcast media are full of stories about rural communities without adequate medical care due to the insurance crisis. Even larger cities like Charleston and Huntington may experience a lack of doctors who practice certain medical specialties. The Legislature has responded by taking some steps to ensure that West Virginians have access to adequate affordable health care. In contrast, this Court responds by dramatically and significantly *expanding* the liability of health care providers. Regardless of the cause or causes of the present crisis, it cannot be denied that the majority opinion likely will result in more medical malpractice suits. This in turn, will cause further increases in medical malpractice premiums. Obviously, this can only aggravate the current crisis.

I will say that the majority opinion is very carefully and tightly written. The majority no doubt genuinely believes this rule will have no broad application but will apply only to the facts of this case and a scarce few similar cases. I simply do not agree. Rather, I am convinced that the scope and consequences of the majority opinion cannot be exaggerated. Every doctor in West Virginia who prescribes any type of medication to a patient is now potentially liable to countless unknown third parties because of that prescription.

Moreover, every car accident case in which the driver at fault is currently under

the care of a doctor or who is being treated with a prescription medication could now result in a medical malpractice action. This means that in every single auto accident case, the plaintiff's attorney has a duty to investigate to ascertain if the defendant driver was taking any prescription medications or was under any type of medical care. If so, the plaintiff's attorney then must ascertain whether the defendant driver's physician properly warned him or her about all the direct and side effects of each and every medicine prescribed. And with what result?

Let us say that the defendant is taking a beta blocker for high blood pressure or a prescription antihistamine for a cold or allergy, both of which are common drugs daily taken by millions of Americans. Either one of these medications can slow reaction time or cause drowsiness which, incidentally, is a side effect of thousands of prescription drugs. If the physician who prescribes the medication fails to tell the patient of these side effects and the patient subsequently causes an auto accident, would the physician likely be sued? Clearly, I believe that he or she would.

In the world of real litigation, there exists the all-too-common practice of a few lawyers suing every possible defendant, some on remote theories of negligence, simply to add these defendants to the pool of payers. This, in turn, enables these lawyers to coerce these defendants into contributing to the overall settlement. Proponents of the majority opinion may argue that this will not happen as a result of this case. Sadly, I think it will. I further believe

that it will dramatically increase the cost of litigating medical malpractice cases. The risk of such litigation is simply an unreasonable burden to place on the backs of physicians, insurers, and, of course, patients. It is, after all, patients, not doctors or insurance companies, who ultimately pay the bills!

In conclusion, the majority disregards the applicable rules of statutory construction, the common law, and historical principles of tort law and expands health care provider liability at a time when health care providers, for whatever reasons, cannot find affordable medical malpractice insurance. The tired, worn out cliche and oft-cited legal maxim, "hard cases make bad law" is certainly true of the majority opinion in this case. The majority has used the very sad and tragic facts of this case to make law that is bad for every West Virginian who needs or who may need affordable health care in the future. Accordingly, I reluctantly and respectfully dissent.