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## High Court Ruling Offers Hope to Lawyers Challenging Precedents

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*Freed v. Geisinger Medical Center* represents a departure for the Pennsylvania Supreme Court in that the court overruled its own recent precedent in a case involving the admissibility of expert nursing testimony in a medical negligence case. The justices took an opportunity to revisit a problematic precedent and replace it with a commonsense rule that should lead to better use of nursing experts in litigation.

The court's ruling may also signal more than just a change of the law pertaining to nurse experts: It may indicate a change in the court's attitude toward overturning prior case law that is impractical, legally inconsistent and without strong policy underpinnings. However, lawyers who are quick to compliment the court on this decision should pause and recognize that it has limited value given Section 512 of the Medical Care Availability and Reduction of Error Act, 40 P.S. Section 1303.512.

Although the court's ruling will apply in certain medical negligence cases, it has limited effect in professional medical negligence cases as the MCARE Act will continue to limit the use of nursing experts against physician defendants. Despite that limitation, *Freed* should be viewed as an important decision as it signals a willingness by the court to carefully scrutinize its precedents for continued vitality.

### CASE OVERVIEW

Following a 1998 car accident, Roger Freed was hospitalized at Geisinger Medical Center. He was later transferred to Nittany Valley Rehabilitation Hospital for inpatient therapy. While at Nittany Valley, Freed developed bedsores on his buttocks and sacrum, as noted

in the opinion. These wounds became infected and led to a four-month hospitalization for debridement and therapy.

As a result of his injuries, Freed filed a lawsuit against both Geisinger and HealthSouth Corp., alleging that the nursing care at both facilities fell below the standard of care and led to the development of pressure ulcers. At trial, plaintiff's counsel offered the expert testimony of R.N. Linda D. Pershall to testify as to both standard of care and causation.

During direct testimony, Pershall was questioned regarding the cause of Freed's bedsores. Defense counsel objected, and the trial judge sustained the objection, finding that Pershall was not a medical doctor; therefore, she could not opine as to a medical diagnosis (causation). Because this causation opinion was not permitted, defendants successfully moved for compulsory nonsuit. In its opinion, the trial court held that, in light of the Supreme Court's ruling in *Flanagan v. Labe*: "Pershall was not qualified to offer an opinion as to the cause of Freed's pressure wounds because an opinion regarding the specific cause and identity of an individual's medical condition constitutes a medical diagnosis, which a nurse is prohibited from making under the Professional Nursing Law." Sidestepping *Flanagan*, the Superior Court reversed, holding that Pershall was competent to provide expert testimony as to both standard of care and causation. In light of the apparent conflict with *Flanagan*, the Supreme Court granted review.

### SUPREME COURT'S ANALYSIS

Prior to *Freed*, prevailing precedent, namely *Flanagan*, held that in light of the Professional Nursing Law, 63 P.S. Section 211, et seq., nurses were not permitted to make a medical diagnosis, and therefore, could not testify regarding causation. While the Supreme Court decision in *Flanagan*

permitted nurses to offer expert testimony regarding the applicable standard of nursing care and whether nursing procedures were substandard, it held that because the Pennsylvania Professional Nursing Law statutorily precluded nurses from making a diagnosis, nurses could not testify as to causation. In *Freed*, the court rejected this analysis and overturned *Flanagan*.

The Supreme Court's analysis focused on the conflict between the well-established requirements for expert testimony in the commonwealth and the Pennsylvania Professional Nursing Law. Long-standing Pennsylvania case law provides a liberal standard for expert testimony. The inquiry turns on whether the witness "ha[s] any pretension to specialized knowledge on the subject at issue ... it is not necessary that the witness possess all the knowledge in a given field, only that he possess more knowledge than is otherwise within the ordinary range of training, knowledge, intelligence or experience," as noted in *Miller v. Brass Rail Tavern Inc.* The *Flanagan* decision limited the application of this standard to nurses, citing the Professional Nursing Law's express prohibition against nurses from making medical diagnoses.

The Supreme Court resolved this apparent conflict, holding that the Professional Nursing Law only applies "in the context of the practice of nursing" and not during expert testimony. As the court noted, had the drafters of the Professional Nursing Law intended otherwise they could have expressly stated this intention. Therefore, the court held the *Flanagan* decision conflicts with the well-established principles for the admission of expert testimony and is overturned. If qualified, a nurse expert is permitted to testify not only as to nursing standard of care, but to causation. *Freed* also gave the Supreme Court's imprimatur to permitting non-physician experts besides nurses to testify

as to causation, at least in those cases not covered by Section 512 of the MCARE Act.

## MCARE ACT LIMITS DECISION

Although the plaintiff's bar is likely to welcome this decision as departure from existing precedent, the court itself acknowledged its limited effect in professional medical negligence actions in light of the MCARE Act, which establishes specific guidelines for the admissibility of expert testimony in medical negligence actions against physicians.

First and foremost, experts are required to have an unrestricted physician's license to practice medicine in any state or the District of Columbia and should have had active clinical practice of medicine within the last five years. Given these requirements, a nurse could not express opinions as to standard of care and causation as to a physician in a negligence case. However, the court in footnote 8 recognized that its expansion of the use of nurse experts may well apply to certain medical negligence actions and other non-negligence cases: "However, there are certainly situations in which it is questionable whether the MCARE Act will apply and thus we conclude our decision today retains its vitality. For example, the MCARE Act, by its terms, appears to apply only to medical professional liability actions against physicians, and not to other professional liability actions, or to actions against non-physician health care providers. In addition, it is not at all clear that the MCARE Act would apply in criminal cases."

So where does this leave those lawyers practicing in medical negligence cases?

As Justice Debra Todd indicated, there are those cases that involve direct negligence on the part of nurses. For example, a nurse gives the wrong medication when the correct one was ordered by the physician; a nurse fails to properly secure a patient and he falls out of bed; or, like in *Freed*, nurses fail to properly monitor and turn a bed-bound patient resulting in bedsores. In cases like these, malpractice attorneys on both sides of the aisle will be free to retain and offer only nursing experts to express opinions as to negligence and causation. However, those

cases where the liability is so clearly directed only at the nursing staff are dramatically outnumbered by cases where a number of health care providers, including physicians, contributed to the plaintiff's alleged harm and, as a result, the burden on the plaintiff will be the same — physician experts opining as to a physician's standard of care and causation. Thus, it must be recognized that the *Freed* ruling, allowing nurses to opine as to causation, will not suddenly allow nurses to come to court and testify as to the causative elements of a physician's negligence in a case that involves negligent conduct on the part of both physicians and nurses. The MCARE Act precludes such testimony.

## FREED'S DEPARTURE FROM PRECEDENT SIGNALS HOPE

The more important aspect of the Supreme Court's decision in this case comes not from the outcome, which may only change a little for most medical negligence cases, but from the analysis that the court engaged in reaching its decision. This decision represents an apparent willingness by the court to depart from precedent and put some law school notions of jurisprudence into practice. Phrases like *stare decisis* and prospective and retrospective analysis rarely, if ever, come into play in the daily life of most attorneys. This decision, however, may represent a willingness by the Supreme Court to closely examine precedent and abandon a decision that is in conflict with fundamental notions of justice and good public policy. Perhaps, the most promising words of the opinion are the following by Todd:

"Despite our conclusion that *Flanagan* is inherently flawed, we are loathe to reverse our own prior decisions, as such action necessarily implicates the great principle of *stare decisis* ... However, as Chief Justice [Ronald] Castille explained in his opinion in support of affirmance in *Comm. v. Persichini* 'the doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly process of the law to flourish.'"

*Freed* signals hope for those attorneys who have been struggling with out of

date precedents. Lawyers who previously questioned the wisdom of challenging an established precedent in a petition for review might now rethink their hesitation in light of this ruling and the guidance it offers for when the court may reverse itself. If *Freed* accomplishes nothing else for the bar, it, at the very least, encourages the next litigant to challenge an unfavorable precedent in the hope of finding a similarly sympathetic court.

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