

REGIONAL NEWS

Court Debates Impact of Late Discovery Reply in Med Mal Case

BY AMARIS ELLIOTT-ENGEL

Of the Legal Staff

In a medical malpractice case revolving around an administrative rule technicality, the state Supreme Court justices spent close to an hour during oral arguments in Philadelphia Monday peppering appellate counsel with questions.

At the heart of *Stimmler v. Chestnut Hill Hospital* is whether or not a trial judge can throw out a plaintiff's case because the plaintiff's tardiness in responding to a defense request during discovery resulted in the defendant's view of the facts being admitted into the case.

Supreme Court Justice Debra Todd said while she found some of the plaintiff's argument compelling, the Supreme Court must provide guidance to the bench and bar on this question. And the justice wanted to know under what circumstances it's an abuse of discretion for a trial judge to deem that a medical malpractice plaintiff's late, unverified reply to a defense request for admissions results in the admissions being regarded as true.

Appellant counsel Joseph L. Messa Jr., of Messa & Associates, told the justices that the request for admissions shouldn't be deemed true by the trial judge if the admissions

involve an issue of causation and affect a plaintiff's ability to prove her case.

Messa admitted that his response to a defendant's request for admissions was two weeks late and was unverified. But he said Philadelphia Common Pleas Judge Allan L. Tereshko committed an abuse of discretion when he entered summary judgment July 12, 2004, on behalf of defendants Chestnut Hill Hospital, Dr. Richard T. Padula, Dr. Walter Matteucci and Dr. Samuel Watterson partly on the basis of plaintiff's late reply.

Tereshko partly granted summary judgment in favor of the defendants because he deemed that a key piece of information in plaintiff Ann Stimmler's medical malpractice case was admitted because of the plaintiff's untimely response, according to court papers.

Messa argued that Tereshko inappropriately raised the issue sua sponte about the plaintiff's belated response to the defense's request for admissions when granting summary judgment, according to court papers. Defendants argued that Tereshko undertook his reasoning in response to a defense motion for summary judgment, according to court papers.

Padula's counsel Sheila A. Haren, of Post & Schell, and Chestnut Hill Hospital's and

Response continues on 9

NEWS IN BRIEF

FUMO'S ESTRANGED SON-IN-LAW BRIEFLY TAKES STAND

The most explosive moments in the corruption trial of state Sen. Vincent J. Fumo may be coming Monday when Fumo's estranged son-in-law, a key prosecution witness, resumes his testimony and goes under cross-examination by defense lawyers.

Christian Marrone, 33, testified only briefly today, but nonetheless gave a solid glimpse of the role he will play in the government's case. However, the jurors have not yet heard that Marrone is married to Fumo's daughter, Nicole, nor that the couple is estranged from Fumo, who has never met their two children.

As a member of Fumo's staff, Marrone testified that he was a Senate employee, but that one of his first assignments was to oversee the renovation of Fumo's 10,000-square-foot mansion — a task that lasted more than 18 months and often consumed most of his workday.

In the indictment, prosecutors allege that Fumo's use of Marrone and other members of his Senate staff to assist in the senator's personal affairs amounted to a fraud on the Senate.

Marrone, under questioning by Assistant U.S. Attorney John Pease, told the jury that the project was an "enormous amount of work," and that he developed a daily schedule of checking in on a passel of contractors each morning and afternoon.

Managing the project, he said, entailed drafting daily "punch lists" of tasks and communicating directly with Fumo about details of the work being done by carpenters, electricians, plumbers, painters, cabinet makers and a slew of other workers.

From 1997 to 2002, Marrone worked as an aide in Fumo's South Philadelphia headquarters. But since 2003, just before their marriage, Christian and Nicole Marrone have reportedly been estranged from Fumo.

Marrone, a 2002 graduate of Temple University's Beasley School of Law, now lives in Virginia and works for the Department of Defense.

—Shannon P. Duffy

SPECTER, CASEY TO HOLD HEARING ON COURT FORECLOSURE PROGRAM

U.S. Sen. Arlen Specter has asked all 60 of Pennsylvania's Common Pleas president judges to consider starting a mortgage foreclosure diversion program if they already haven't started one.

Specter and U.S. Sen. Robert P. Casey Jr. are holding a field hearing today in Philadelphia in support of their joint push to encourage other counties to adopt a program similar to the

News in Brief continues on 10

Response

continued from 3

Watterson's counsel Mary E. Dixon, of White and Williams, argued in front of the court Monday.

Stimmler sued the defendants after the discovery in 1999 that a catheter wire is embedded in her heart, according to the appellant's brief. Stimmler argues that the wire was lost in her circulatory system in May 1965 when she was at Chestnut Hill Hospital to give birth to her first child and treated for peripheral circulatory failure following labor, the appellant's brief said.

During discovery, Padula asked that Stimmler admit that she had been hospitalized 16 times since 1965 and that catheters were inserted into her body during each of those hospitalizations, according to Padula's brief. Padula also asked that Stimmler admit that the catheter in her heart could be from one of her other hospital visits.

Padula's request for admissions was served March 24, 2004, but Stimmler didn't reply within 30 days as required under Rule of Civil Procedure 4014, Padula's brief said. Stimmler's unverified reply was received May 11, 2004.

Then Padula filed a motion for summary judgment, arguing that Stimmler's late response "amounted to a binding admission that plaintiff had received IV catheterizations on at least 16 other occasions and that any one of those other occasions could have been

the source of the alleged catheter fragment," Padula's brief said.

Tereshko concluded that Padula's request for admissions should be considered to be true because of Stimmler's late reply, according to court papers.

Justice Seamus P. McCaffery raised the concern that Tereshko's decision meant "a trial by affidavit or trial by deposition" instead of a trial with a jury.

"Are we cutting down on access to justice by granting summary judgment so readily?" McCaffery asked.

Dixon replied that in a case involving defendants and a plaintiff who are elderly that it's important to hold the plaintiff to her burden under the Pennsylvania Rules of Civil Procedure.

Under Rule of Civil Procedure 4014, Messa had one month to respond to Padula's request for admissions, Padula's brief said. The plaintiff's untimely response meant that Stimmler's long history of other catheterizations — which are possible sources of the

catheter in her heart — was accepted into the case and "conclusively established" as facts of the case, the brief said.

Haren said that Messa should have asked to amend or withdraw the untimely admission.

Messa said that he wasn't aware Tereshko regarded the admissions as accepted into the case until Tereshko's Rule 1925 opinion.

Messa argued that under Rule of Civil Procedure 126 he should be allowed to continue the case. Rule 126 allows a court to disregard a procedural error that does not affect the rights of the case's parties.

Dixon, however, argued that such an allowance is only possible if Messa had substantially complied with procedural rules. Dixon said that Messa violated procedural rules in several ways and giving him a break under Rule

126 would prejudice the defendants.

Justice Thomas G. Saylor said the tardiness of Messa's reply isn't the problem. The problem is that his reply was a "nonresponsive

response," he said.

The defendants said Stimmler's late response was too general. Messa said that preliminary objection, not a motion for summary judgment, was the proper way to test the sufficiency of the plaintiff's response, according to court papers.

The state Superior Court panel of former Judges Michael T. Joyce and Justin M. Johnson affirmed the summary judgment in favor of Chestnut Hill Hospital on the corporate negligence claim, but reversed summary judgment in favor of the physicians and in favor of the hospital on a vicarious liability claim Nov. 30, 2006. Judge Maureen Lally-Green dissented.

An en banc Superior Court panel, which included Johnson and Lally-Green but not Joyce, reversed the three-judge panel and affirmed summary judgment for all defendants Oct. 17, 2007.

The court is considering "whether the Superior Court committed an error of law when it affirmed the trial court's grant of summary judgment on the basis that Appellee Dr. Padula's request for admissions were deemed admitted," according to the court's order granting allocatur.

Dixon argued that the court granted allocatur on an issue that Stimmler has already waived by not raising it sooner than her Supreme Court brief.

The defendants also said the plaintiff's expert opinions are inadequate.

Messa's brief said Stimmler has had circulatory and respiratory problems for 40 years, and the problem first started in 1965. •

Judge Allan L. Tereshko partly granted summary judgment in favor of the defendants because he deemed that a key piece of information in plaintiff Ann Stimmler's medical malpractice case was admitted because of the plaintiff's untimely response, according to court papers.
