



PENNSYLVANIA ACADEMY OF FAMILY PHYSICIANS

MEDICAL TORT REFORM PROPOSAL BY THE PENNSYLVANIA ACADEMY OF FAMILY PHYSICIANS TO CURB FRIVOLOUS LAWSUITS

**TO: Honorable Members of the Judiciary Committee of the
Pennsylvania House of Representatives**

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The Pennsylvania Academy of Family Physicians supports House Bill 2122 and Senate Bill 790. This testimony is presented to recommend a concept to improve the legislation's efforts to curb frivolous lawsuits against physicians.

The Problem - Frivolous Lawsuits

- PAFP's physician members report numerous instances of frivolous lawsuits.
- Examples include (a) treatment provided within the applicable standard of care and (b) referrals made by family physicians to other providers who may have been negligent, whereby family physician had no involvement in allegedly negligent care.
- The common law is well settled that no cause of action exists for a physician's negligent referral. Hannis v. Ashland State Hospital, 123 Pa. Cmwith. Ct. 390, 554 A.2d 554 (1989) *app. den.* 574 A. 2d 73 (1990). (Failure to refer, of course, could form the basis of a proper cause of action).
- Frivolous lawsuits are typically filed by undiscerning, inexperienced, untalented or unethical counsel, often on the eve of expiration of the statute of limitations, or to seek nuisance value settlement.
- This problem is real. There are bad lawyers just like there are bad doctors.

Present Disincentive

- The Wrongful Use of Civil Proceedings Act ("WUCP"), commonly referred to as the "Dragonetti Act," creates a disincentive for a plaintiff to file a frivolous lawsuit under present law. 42 Pa.C.S. §8351 - §8354.
- WUCP permits any successful defendant to sue for compensatory damages, punitive damages, witness costs and attorney fees following the successful defense of a frivolous lawsuit. 42 Pa.C.S. §8353.
- A frivolous suit is one which "lacks probable cause" or was "brought in a grossly negligent manner." 42 Pa.C.S. §8351(a)(1).

- WUCP applies to medical malpractice cases. Gentzler v. Atlee, 443 Pa.Super.Ct. 128, 660 A.2d 1378 (1995), *app. den.* 670 A.2d 142 (1995). I have relied on WUCP in my practice to seek restitution for physicians subjected to frivolous litigation.
- Unfortunately, a cause of action under WUCP does not accrue until the case is **terminated** in the defendant's favor. 42 Pa.C.S. §8351(a)(2). The PA Supreme Court ruled that "termination" does not occur until all appeals are exhausted. Ludmer v. Nernberg, 520 Pa. 218, 553 A.2d 924 (1989). This could take between 5 and 7 years from the date of filing. The time lag, and joint settlements, eliminate any real incentive for a physician to pursue a WUCP claim.

HB 2122 and Frivolous Lawsuits

- HB 2122 (§302-A) sanctions attorneys who bring frivolous lawsuits.
- Section 302-A is similar to federal court practice under which attorneys can be sanctioned for filing frivolous lawsuits (Federal Rules of Civil Procedure 11).
- PAFP presents for the Committee's consideration an alternative proposal to the sanctions under §302-A of HB 2122.

The PAFP Alternative - Acceleration of a Dragonetti Cause of Action

- Medical malpractice defendants may assert a WUCP cause of action as a counterclaim filed concurrently with new matter. Creates exception to "termination" standard.
- No limitation would be imposed on existing discovery rules. Many local rules of court already require rapid completion of discovery.
- If plaintiff, at conclusion of discovery, withdraws claim with prejudice, physician loses any claim under WUCP.
- If plaintiff does not withdraw frivolous suit at completion of discovery and before defendant physician (WUCP counterclaim plaintiff) files a motion for summary judgment, and physician is successful in having case dismissed on summary judgment (or obtains directed verdict at trial), a legal presumption arises that claim against physician was frivolous. It also applies to case dismissed on demurrer/preliminary objection.
- Damages include existing remedies under WUCP (compensatory and punitive damages, expert witness fees, attorney's fees) plus physician's time expended on case at \$200 per hour.
- Plaintiff may rebut presumption by showing (a) probable cause existed or (b) good faith extension, modification or reversal of existing law was foundation for claim.
- A physician's failure (or decision not) to assert a counterclaim does not preclude a physician from filing a WUCP claim under the Act's existing procedures.
- If the malpractice plaintiff survives the physician's demurrer, motion for summary judgment and motion for directed verdict, the presumption in favor of the physician does not arise; however, the physician's claim is not extinguished and proceeds under the existing burden of proof.

ADVANTAGES TO PAFP FRIVOLOUS LAWSUIT AMENDMENT

- **Patient's right to recover damages for bona fide medical negligence remains fully intact and unimpeded.**
- **Permits physicians to accelerate existing remedy under the Judicial Code. Presently, as a result of the interpretation of the term "terminated" in 42 Pa.C.S. §8351(a)(2) by the Supreme Court in Ludmer v. Nernberg, 520 Pa. 218, 553 A.2d 924 (1989), a physician's cause of action typically does not accrue for between 5 and 7 years after a frivolous suit was filed. Here, a counterclaim for WUCP could be asserted with Answer and New Matter, 20 days after complaint served.**
- **Plaintiff gets more than adequate opportunity to discover whether physician had any role in alleged negligence or acted outside the standard of care.**
- **If the plaintiff withdraws the case after conducting full discovery, but before the physician files a motion for summary judgment, the plaintiff walks away clean. Even though the physician has endured unnecessary hassle, the period of hassle has been shortened dramatically. This balances the plaintiff's interest in conducting adequate discovery to determine the liability of a physician on one hand, and the physician's interest in being dropped promptly upon the discovery of either no involvement in the alleged negligence or that his treatment comported with the standard of care.**
- **Permits plaintiff's counsel to fully explore discovery and does not place counsel in jeopardy for professional negligence.**
- **The nature of professional liability cases is such that very few are dismissed on demurrer, summary judgment or directed verdict. If any dispute of material fact exists, the case goes to the jury. Only truly frivolous claims are dismissed on demurrer, summary judgment or directed verdict.**
- **The concept does not violate any constitutional principle, including separation of powers, right to trial by jury, access to courts, etc. It does not encroach upon sacrosanct Supreme Court jurisdiction over the practice of law by altering rules for attorney conduct, delay damages, discovery timeframes, or expert witness certification.**
- **The concept establishes a strong and necessary disincentive against unscrupulous plaintiffs or attorneys to push frivolous claims hoping for nuisance value settlement. Because of the multiple year time lag before a physician can bring a WUCP claim under present law, and because physicians without fault in a case who are dragged through suits with multiple defendants are covered in joint tortfeasor settlements, no real disincentive to frivolous suits presently exists. Execution of a settlement agreement extinguishes a cause of action under the WUCP. Rosenfield v. Pa. Automobile Insurance Plan, 431 Pa. Superior Ct. 383, 636 A.2d 1138 (1994).**

Pennsylvania Academy of Family Physicians
Amendments to Wrongful Use of Civil Proceedings Act
[Proposed Amendatory Language Appears in Bold and Underlined Print]

Section 8351. Wrongful use of civil proceedings.

(a)

(2) The proceedings have terminated in favor of the person against whom they are brought; **provided, however, that a licensed health care provider named as a defendant in a medical professional liability action may assert a counterclaim under this subchapter if the defendant reasonably believes the action was brought in a grossly negligent manner or without probable cause. Failure of a defendant in a medical professional liability action to file a counterclaim as authorized under this subsection shall not prejudice his right to file an action under this subchapter following termination of the underlying medical professional liability claim.**

Section 8353. Damages.

.....

(4) Any specific pecuniary loss that has resulted from the proceedings. **In a medical professional liability action, a defendant's specific pecuniary loss shall include the number of hours devoted to preparation of the defense of the action times two hundred dollars.**

Section 8354. Burden of Proof.

Except as provided for in section 8355 (relating to rebuttable presumption),
in an action brought pursuant to this subchapter the plaintiff has the burden of
proving.....

Section 8355. Rebuttable Presumption.

(a) Liability of a Plaintiff in Medical Professional Liability Action. - It shall be presumed as a rebuttable presumption of law that a medical professional liability action dismissed by a court of competent jurisdiction on demurrer, summary judgment, or directed verdict was brought in a grossly negligent manner or without probable cause.

(b) Defenses. - In order to rebut the presumption of liability, the plaintiff in a medical professional liability action whose claim is dismissed as provided in subsection (a) must affirmatively prove by clear and convincing evidence one of the following defenses:

(1) The action was not brought in a grossly negligent manner or without probable cause.

(2) The action was brought on the basis of a good faith argument for an extension, modification or reversal of existing law.

(c) Elimination of Presumption. - Any plaintiff who withdraws with prejudice a medical professional liability action during discovery or following the close of discovery but prior to the defendant's filing of a motion for summary judgment shall not be subject to either:

(1) the presumption established in subsection (a); or

(2) any recovery by the defendant under this subchapter.

(d) Effect of Denial of Motions. - If a court of competent jurisdiction denies a demurrer, motion for summary judgment or motion for directed verdict filed by a defendant in a medical professional liability action, the defendant's counterclaim under this subchapter shall not be extinguished and shall proceed pursuant to the burden of proof under section 8354.

Section 8356. Definitions.

The terms used in this Subchapter shall have the following meanings:

"Medical Professional Liability Action" means any action filed in a court of competent jurisdiction sounding in professional negligence, breach of contract, informed consent, strict liability, or any other claim or cause of action arising from alleged injury caused by any act, treatment or omission by a licensed health care provider.

§ 8351 CIVIL ACTIONS & PROCEEDINGS 42 Pa.C.S.A.

SUBCHAPTER E

WRONGFUL USE OF CIVIL PROCEEDINGS

- Sec.
8351. Wrongful use of civil proceedings.
8352. Existence of probable cause.
8353. Damages.
8354. Burden of proof.

§ 8351. Wrongful use of civil proceedings

(a) Elements of action.—A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:

(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) The proceedings have terminated in favor of the person against whom they are brought.

(b) Arrest or seizure of person or property not required.—The arrest or seizure of the person or property of the plaintiff shall not be a necessary element for an action brought pursuant to this subchapter.

1980, Dec. 19, P.L. 1296, No. 232, § 1, effective in 60 days.

Historical Note

Section 2 of Act 1980, Dec. 19, P.L. 1296, No. 232, provides that said act "shall take effect in 60 days and shall be applicable to causes of action accruing thereafter".

Notes of Decisions

Construction and application 1
Pleadings 2

Sacks v. Philadelphia Health Management Corp., 519 F.Supp. 818, D.C.1981.

1. Construction and application
Under Pennsylvania law, favorable termination of underlying action is required before claim for malicious prosecution can be brought. U. S. ex rel.

In an action for malicious prosecution and abuse of process, it was permissible for plaintiff to take the deposition of a magistrate who presided over hearings involving private criminal complaints which formed the basis for said action; there was no Pennsylvania or local law which would render a magistrate an in-

42 Pa.C.S.A.

competent witness. Harris 19 D. & C.3d 283.

2. Pleadings

In absence of information brought by owner against member in favor of counterclaim on wrongful use of dismissed without Sheridan v. Fox, 1982.

Complaint charged filed lawsuit, unless solely for its dismissal existing lawsuit action for tort of of mental distress

§ 8352.

A person who brings an action for civil liability shall not be liable for doing so if he or she can show that which the claim

(1) Reasonable

(2) Belief in the merits of the claim, and all relevant facts and circumstances

(3) Belief that the procurement was intended to benefit the party.

1980, Dec. 19, P.

Section 2 of Act 1296, No. 232, provides that said act "shall take effect

§ 8353.

When the claimant brings an action under this subchapter (relating to wrongful use of civil proceedings) to recover

competent witness under such circumstances. *Harris v. Clifford Motors, Inc.*, 19 D. & C.3d 283, 1980.

2. Pleadings

In absence of termination of defamation action brought by apartment building owner against tenant association member in favor of member, member's counterclaim on statutory claim of wrongful use of civil process would be dismissed without prejudice as unripe. *Sheridan v. Fox*, 531 F.Supp. 151, D.C. 1982.

Complaint charging that defendants filed lawsuit, unfounded in fact or law, solely for its disruptive effect on trial of existing lawsuit did not state cause of action for tort of intentional infliction of mental distress, since existence of

valid defenses to suit for malicious use of process or mistake as to propriety of such suit or its availability did not elevate defendant's conduct in instituting that action to extreme and outrageous conduct. *Rose v. Wissinger*, 439 A.2d 1193, 294 Pa.Super. 265, 1982.

Court of common pleas had original jurisdiction over defendant's action for malicious use of process, and therefore, allegations charging plaintiffs with filing lawsuit which was unjustified, without probable cause, and motivated by malice were pertinent and material to relief sought in defendant's action for malicious use of process, and plaintiff's complaint failed to set forth cause of action for defamatory remarks made in court filing, not protected by privilege. *Id.*

§ 8352. Existence of probable cause

A person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either:

- (1) Reasonably believes that under those facts the claim may be valid under the existing or developing law;
- (2) Believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or
- (3) Believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

1980, Dec. 19, P.L. 1296, No. 232, § 1, effective in 60 days.

Historical Note

Section 2 of Act 1980, Dec. 19, P.L. 1296, No. 232, provides that said act "shall take effect in 60 days and shall be applicable to causes of action accruing thereafter".

§ 8353. Damages

When the essential elements of an action brought pursuant to this subchapter have been established as provided in section 8351 (relating to wrongful use of civil proceedings), the plaintiff is entitled to recover for the following:

§ 8353 CIVIL ACTIONS & PROCEEDINGS 42 Pa.C.S.A.

(1) The harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of his land, chattels or other things, suffered by him during the course of the proceedings.

(2) The harm to his reputation by any defamatory matter alleged as the basis of the proceedings.

(3) The expense, including any reasonable attorney fees, that he has reasonably incurred in defending himself against the proceedings.

(4) Any specific pecuniary loss that has resulted from the proceedings.

(5) Any emotional distress that is caused by the proceedings.

(6) Punitive damages according to law in appropriate cases. 1980, Dec. 19, P.L. 1296, No. 232, § 1, effective in 60 days.

Historical Note

Section 2 of Act 1980, Dec. 19, P.L. 1296, No. 232, provides that said act shall take effect in 60 days and shall be applicable to causes of action accruing thereafter".

§ 8354. Burden of proof

In an action brought pursuant to this subchapter the plaintiff has the burden of proving, when the issue is properly raised, that:

(1) The defendant has procured, initiated or continued the civil proceedings against him.

(2) The proceedings were terminated in his favor.

(3) The defendant did not have probable cause for his action.

(4) The primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based.

(5) The plaintiff has suffered damages as set forth in section 8353 (relating to damages).

1980, Dec. 19, P.L. 1296, No. 232, § 1, effective in 60 days.

Historical Note

Section 2 of Act 1980, Dec. 19, P.L. 1296, No. 232, provides that said act shall take effect in 60 days and shall be applicable to causes of action accruing thereafter".

MATTERS

Subchapter

- A. General Provisi
- B. Actlons Against
- C. Actlons Against

Title 42, Jud
sylvania Consoli
9, P.L. 586, No.
of final enactm.
(June 27, 1978)

Chapter 85,
added by Act 19

Former Chapt
consisting of §
693, No. 142, § 2

Disposition as
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