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PENNSYLVANIA SUPREME COURT RESCINDS REMITTITUR RULE

With no fanfare, on Wednesday, October 17, the Pennsylvania Supreme Court rescinded Rule 1042.72 of the Pennsylvania Rules of Civil Procedure, which provided the trial courts with the power to reduce “excessive” pain and suffering awards in medical malpractice cases. In a short, one page Order, the Court wrote that the Rule is “rescinded,” upon the recommendation of its own Civil Procedure Rules committee, which submitted its recommendation without publication.¹

Rule 1042.72 became effective on Dec. 1, 2004, and was part of a series of reforms adopted by the Supreme Court after the passage of the MCARE Act in 2002. These reforms included the Certificate of Merit Rules adopted in 2003, and new rules on which counties could be the appropriate forum for malpractice actions which might cross county borders.

Under Rule 1042.72, any Defendant in a medical malpractice action against whom non-economic damages were awarded (i.e., pain and suffering), could file a motion asking the Court to deem the award excessive and for the judge to lower the amount awarded. An excessive award was defined as one which “deviates substantially from what could be reasonable compensation.”

Interestingly, the Rule also contained a built-in “sunset” provision, indicating that it would automatically be deemed to have expired after five years, which passed on Dec. 1, 2009. Accordingly, anyone who would have attempted to invoke this Rule from 2010 to present would have had a difficult time persuading anybody that the Rule was still valid.

Rule 1042.72 has always been somewhat redundant. The power of a Court to lower a jury’s verdict where the amount is disproportionate to the injury has been around for generations at common law in the form of “remittitur.” Under Pennsylvania common law, where a judge concludes that a verdict “plainly is excessive, exorbitant, and beyond what the evidence warrants, or where the verdict resulted from partiality, prejudice, mistake, or corruption,” the court has the inherent power to lower the award, or to order a new trial on damages. Remittitur has always been a seldom-used tool reserved for awards that are so large they might “shock the conscience.” Nothing in the rescinding of Rule 1042.72 deprives a trial court of its ability to exercise its power of remittitur.

In addition, this action does not affect a provision of the MCARE Act, 40 P.S. § 1303.515, which provides specifically for remittitur in medical malpractice actions, and requires a trial court to consider evidence of the impact a large verdict would have on access to health care in the community when it rules.

Remittitur is an uncommon enough issue facing courts that the revocation of Rule 1042.72 will not affect many cases, but when an excessive verdict is returned by a jury, the availability of remittitur as a remedy is critically important. The Court’s action is puzzling, given that Rule 1042.72 hasn’t been effective for nearly two years according to its own terms. Because Rule 1042.72 is essentially redundant to the common law remittitur rules, it had been widely viewed that the Court enacted the Rule to encourage trial courts to use their remittitur powers in malpractice cases. Was the Rule rescinded for housekeeping reasons – to remove a stale rule from the books? Or was the Rule rescinded to remove this perception that the Court was encouraging judges to use remittitur? Regardless of which is true, rest assured that the next time a medical defendant is required to file a motion for remittitur the plaintiffs will point out that the Supreme Court took this step of *revoking* a Rule of Procedure which was perceived to encourage remittitur consideration.

¹ You can find the Order itself at this link:

<http://www.pacourts.us/OpPosting/Supreme/out/567civ.pdf>

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