

## HEALTH CARE PRACTICE GROUP

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### PENNSYLVANIA SUPREME COURT CONSIDERS PHYSICIAN-PATIENT SEXUAL RELATIONSHIPS

On Sept. 28, the Pennsylvania Supreme Court rendered an opinion in **Thierfelder v. Wolfert** which reached several holdings of significance to medical malpractice law in the Commonwealth. The case arose from treatment rendered to Mr. and Mrs. Thierfelder by Dr. Wolfert, a general practitioner acting as their primary care physician. Treatment of the wife included both physical ailments and complaints of anxiety, depression, stress, and emotional problems, for which he both prescribed anti-depressants and referred her to outside mental health counseling. In 2002, Dr. Wolfert and the wife began a year-long sexual relationship. The wife broke off the relationship and asserted she suffered anxiety and depression as a result. The patients both sued Dr. Wolfert for medical malpractice and other torts.

The trial court dismissed the case, holding that while a general practitioner engaging in a sexual relationship with a patient may violate medical ethics, it did not constitute medical malpractice. On review, the Superior Court, hearing the case *en banc*, reversed, in a 6-3 decision which found that a general practitioner who provides mental health care to a patient could be held liable for malpractice if they engaged in a sexual relationship with the patient, concluding that a psychiatrist or psychologist could already be held so liable and that a general medical practitioner providing mental health treatment would also face such "specialist" liability.

In a lengthy, 5-1 decision, the Supreme Court reached several noteworthy holdings. First, the Court disagreed with the trial court that there was already a special duty owed psychiatrists which forbade sexual relations with their patients. The Supreme Court noted that there was no such case law, statute, or other source for any such rule of law. Having said that, the Supreme Court then endorsed the idea that such a special duty does exist, because of the particular vulnerability such patients may have to psychiatrists or counselors.

The Court next held that a general practitioner can **not** be sued for medical malpractice for engaging in a sexual relationship with a patient from which the patient allegedly suffered mental or

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### NEW JERSEY APPELLATE COURT APPLIES DISCOVERY RULE TO TOLL STATUTE OF LIMITATIONS

Gloriana Urban was visiting an Atlantic City Casino on Dec. 10, 2007 when she fell and broke her right ankle. That same day, Dr. Lawrence Naame performed an open reduction/internal fixation with plate and screws. He told her the operation went "perfect," and she would be able to walk without crutches after four to six weeks. Six weeks came and went, and she continued to experience increasing pain, though Dr. Urban reassured her that healing would take time. She continued treating with him for about three months in total, and her last visit with him was March 26, 2008. She then sought second and third opinions which both said she needed additional surgery, which she had performed by another doctor.

The statute of limitations for medical malpractice in New Jersey is two years. Ms. Urban filed suit against Dr. Naame on March 24, 2010, which was two days shy of two years from her last date of treatment with Dr. Naame, but more than two years and three months after the first surgery. Defendant moved to dismiss her case asserting that the statute of limitations began to run on the date of the surgery, and had thus expired by the time she filed suit. Ms. Urban responded that under the discovery rule, the statute of limitations did not begin to run until she consulted with a second doctor, and that her suit was therefore timely.

Under New Jersey law, the discovery rule will "toll" or delay the running of the statute of limitations. The two year period only begins to run "if the facts presented would alert a reasonable person exercising ordinary diligence that he or she was injured due to the fault of another." The trial court held that Plaintiff's claim was stale because she testified that as of February, 2008, she believed that there was something "wrong" with her ankle and thought that perhaps Dr. Naame had done something wrong. She also testified that she was not sure, that he reassured her it was just a matter of time, and that this is why she ultimately went to a second and third doctor for their opinions. The trial court determined that she knew or should have known of the potential malpractice as of Feb., 2008, and dismissed her claim as barred by the statute of limitations.

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emotional harm. The Court refused to apply the standard of care which would apply to a psychiatrist to a primary care physician. The majority, led by Justice Castille, wrote:

“Application of our holding is straightforward. The facts as alleged by [patients] . . . do not establish that [Dr. Wolfert] violated his duty of care to [the patients], which was that of a general practitioner and not that of a mental health specialist precluded from engaging in sexual relations with a patient.”

This did not mean the patients could not sue the doctor for other claims – intentional infliction of emotional distress, perhaps – but only that such behavior did not support a claim for medical malpractice.

The other significant holding in this case relates to the “specialist’s” duty of care. For years, lawyers have battled over whether it was appropriate to instruct a jury that a specialist physician, as opposed to a general practitioner, was held to a “higher,” specialist standard of care, and vice-versa – that the jury cannot hold a general practitioner to a specialist’s standard of care. The Supreme Court noted that it had never previously issue such a rule of law, (the lower courts have) but endorsed the concept without expressly adopting it. The Court went so far as to note its reluctance to “blur the still-meaningful distinction between the standards and duties of care borne by specialists and general practitioners.” This will be helpful to the use of these jury instructions in the future.

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On appeal the trial court decision was reversed. The Appellate Division held that Plaintiff’s mere suspicions that something “might not be right” with the way her ankle was healing were not enough to trigger the start of the running of the statute of limitations, writing:

“[P]laintiff’s dissatisfaction with her ankle’s failure to heal, despite Dr. Naame’s reassurances, led her to seek a second opinion. However, her vague suspicions did not amount to objective evidence that would have caused a reasonable person to suspect malpractice.”

The Appellate Division took issue with the trial court for misapplying the rule: it is required to consider an objective standard – when would a reasonably diligent person suspect they were injured due to another’s negligence – and instead the trial judge applied a subjective standard, considering when Ms. Urban, in particular, was sufficiently suspicious that **she** should have concluded Dr. Naame might have been negligent.

The Court further noted that the application of the discovery rule is an equitable doctrine and that the trial court is required to take other factors into consideration, all of which favored the Plaintiff in this case. She acted reasonably promptly, filing suit within two years of her last treatment with the Defendant. The Court felt that Dr. Naame was not unfairly prejudiced by the passage of a few months past the two year anniversary. Furthermore, Dr. Naame had continued treating her and told her that she would eventually recover. The Court agreed with the Plaintiff that the statute of limitations should be deemed to run from the last day she treated with Dr. Naame, which made her claim timely by two days. This final holding is curious. Based on the rules applied by the Court, the last date she saw Dr. Naame does not seem to be an appropriate date for the statute of limitations to begin running – there was nothing peculiar about her last treatment with Dr. Naame which would have made a reasonable person suspect he had been negligent. The more appropriate finding may be that it was the date upon which she got a second opinion that her ankle had not healed properly and required surgery. Given that the use of either date would make the case timely, the Court may merely have found further exposition of the appropriate date to be unnecessary.