[J-74A-H-2017][M.O. - Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

THOMAS D. WALTERS AND CLARA M. WALTERS, HIS WIFE	:	No. 15 WAP 2017
	:	Appeal from the Order of the Superior Court entered on 7/21/16 at No. 309 WDA 2015 affirming in part and reversing in part the order of the Court of Common Pleas of Allegheny County entered 2/6/15 at No. GD-12-018339 and remanding
v.	:	
UPMC PRESBYTERIAN SHADYSIDE; MAXIM HEALTHCARE SERVICES, INC., AND MEDICAL SOLUTIONS L.L.C. D/B/A MEDICAL SOLUTIONS	:	
APPEAL OF: MAXIM HEALTHCARE SERVICES, INC.	:	ARGUED: October 18, 2017
LINDA FICKEN AND WILLIAM FICKEN, HER HUSBAND	:	No. 16 WAP 2017
	:	Appeal from the Order of the Superior Court entered on 7/21/16 at No. 310 WDA 2015 affirming in part and reversing in part the order of the Court of Common Pleas of Allegheny County entered 2/6/15 at No. GD-12-016165 and remanding
v.	:	
UPMC PRESBYTERIAN SHADYSIDE; MAXIM HEALTHCARE SERVICES, INC., AND MEDICAL SOLUTIONS L.L.C. D/B/A MEDICAL SOLUTIONS	:	
APPEAL OF: MAXIM HEALTHCARE SERVICES, INC.	:	ARGUED: October 18, 2017
WANDA J. BRAUN AND EDWIN J. BRAUN, HER HUSBAND	:	No. 17 WAP 2017
	:	Appeal from the Order of the Superior Court entered on 7/21/16 at No. 311 WDA 2015 affirming in part and reversing in part the order of the Court of Common Pleas of Allegheny County entered 2/6/15 at No. GD-12-024324 and remanding
v.	:	
UPMC PRESBYTERIAN SHADYSIDE; MAXIM HEALTHCARE SERVICES, INC., AND MEDICAL SOLUTIONS L.L.C. D/B/A	:	

MEDICAL SOLUTIONS	:	
	:	
APPEAL OF: MAXIM HEALTHCARE SERVICES, INC.	:	ARGUED: October 18, 2017
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RONNIE D. MURPHY AND CONNIE E. MCNEAL, AS CO-EXECUTORS OF THE ESTATE OF ELEANOR Y. MURPHY, AND IN THEIR OWN RIGHT	:	No. 18 WAP 2017
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	:	Appeal from the Order of the Superior Court entered on 7/21/16 at No. 312 WDA 2015 affirming in part and reversing in part the order of the Court of Common Pleas of Allegheny County entered 2/6/15 at No. GD-14-000899 and remanding
v.	:	
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UPMC PRESBYTERIAN SHADYSIDE; MAXIM HEALTHCARE SERVICES, INC., AND MEDICAL SOLUTIONS L.L.C. D/B/A MEDICAL SOLUTIONS	:	
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	:	ARGUED: October 18, 2017
APPEAL OF: MAXIM HEALTHCARE SERVICES, INC.	:	
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THOMAS D. WALTERS AND CLARA M. WALTERS, HIS WIFE	:	No. 19 WAP 2017
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	:	Appeal from the Order of the Superior Court entered on 7/21/16 at No. 309 WDA 2015 affirming in part and reversing in part the order of the Court of Common Pleas of Allegheny County entered 2/6/15 at No. GD-12-018339 and remanding
v.	:	
	:	
UPMC PRESBYTERIAN SHADYSIDE; MAXIM HEALTHCARE SERVICES, INC., AND MEDICAL SOLUTIONS L.L.C. D/B/A MEDICAL SOLUTIONS	:	
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APPEAL OF: UPMC PRESBYTERIAN SHADYSIDE	:	ARGUED: October 18, 2017
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LINDA FICKEN AND WILLIAM FICKEN, HER HUSBAND	:	No. 20 WAP 2017
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	:	Appeal from the Order of the Superior Court entered on 7/21/16 at No. 310 WDA 2015 affirming in part and
v.	:	

	:	reversing in part the order of the Court
UPMC PRESBYTERIAN SHADYSIDE;	:	of Common Pleas of Allegheny County
MAXIM HEALTHCARE SERVICES, INC.,	:	entered 2/6/15 at No. GD-12-016165
AND MEDICAL SOLUTIONS L.L.C. D/B/A	:	and remanding
MEDICAL SOLUTIONS	:	
	:	
APPEAL OF: UPMC PRESBYTERIAN	:	
SHADYSIDE	:	ARGUED: October 18, 2017
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WANDA J. BRAUN AND EDWIN J.	:	No. 21 WAP 2017
BRAUN, HER HUSBAND	:	
	:	Appeal from the Order of the Superior
	:	Court entered on 7/21/16 at No. 311
v.	:	WDA 2015 affirming in part and
	:	reversing in part the order of the Court
UPMC PRESBYTERIAN SHADYSIDE;	:	of Common Pleas of Allegheny County
MAXIM HEALTHCARE SERVICES, INC.,	:	entered 2/6/15 at No. GD-12-024324
AND MEDICAL SOLUTIONS L.L.C. D/B/A	:	and remanding
MEDICAL SOLUTIONS	:	
	:	
APPEAL OF: UPMC PRESBYTERIAN	:	
SHADYSIDE	:	ARGUED: October 18, 2017
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RONNIE D. MURPHY AND CONNIE E.	:	No. 22 WAP 2017
MCNEAL, AS CO-EXECUTORS OF THE	:	
ESTATE OF ELEANOR Y. MURPHY,	:	Appeal from the Order of the Superior
AND IN THEIR OWN RGHT	:	Court entered on 7/21/16 at No. 312
	:	WDA 2015 affirming in part and
	:	reversing in part the order of the Court
v.	:	of Common Pleas of Allegheny County
	:	entered 2/6/15 at No. GD-14-000899
UPMC PRESBYTERIAN SHADYSIDE;	:	and remanding
MAXIM HEALTHCARE SERVICES, INC.,	:	
AND MEDICAL SOLUTIONS L.L.C. D/B/A	:	
MEDICAL SOLUTIONS	:	
	:	
APPEAL OF: UPMC PRESBYTERIAN	:	
SHADYSIDE	:	ARGUED: October 18, 2017

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE SAYLOR **DECIDED: JUNE 19, 2018**

I concur in the result relative to Maxim Healthcare Services, Inc., and respectfully dissent as concerns UPMC Presbyterian Shadyside.

Regarding UPMC, the majority relies upon a federally imposed regulatory duty to report the diversion of controlled substances to the federal Drug Enforcement Administration to support a state-level, judicially-created, common-law standard of care running to Appellees. *See* Majority Opinion, *slip op.* at 44-47. Per the majority decision, a breach of this reporting duty may now give rise to civil liability, on UPMC's part, for Appellees' injuries allegedly occasioned by the criminal conduct of a third party to the litigation (namely, David Kwiatkowski). *See id.* In so holding, the majority undertakes a loose-form duty assessment according to the generalized range of policy considerations discussed in *Althaus v. Cohen*, 562 Pa. 547, 756 A.2d 1166 (2000).

In my view, resort to such measures is neither necessary nor appropriate here. While the majority places great emphasis on "the expressions of public policy manifest in the governing federal statutes and regulations," *id.* at 44-45, the federal policy itself has nothing to do with tort liability or even with the protection of any particular class of individuals that would subsume Appellees.

Significantly, as the common law has developed, courts have imposed greater structure relative to particular forms of asserted duties than is manifested in *Althaus*. *See, e.g.*, *Seebold v. Prison Health Servs., Inc.*, 618 Pa. 632, 654, 57 A.3d 1232, 1246 (2012) (explaining that "the courts' reluctance to impose new affirmative duties reflects that the wider field of common-law duties is governed appropriately by existing broad

precepts which have been well traveled").[1] As is especially relevant here, this Court has adopted Section 286 of the RESTATEMENT (SECOND) OF TORTS, which provides a template for determining when a standard of conduct defined by legislation or a regulation will be adopted. *See, e.g.*, *C.C.H. v. Phila. Phillies, Inc.*, 596 Pa. 23, 41 n.16, 940 A.2d 336, 347 n.16 (2008).

One of the mandatory requirements of Section 286 is that the statute or regulation relied upon to establish a standard of care must be designed "to protect *a class of persons* which includes the one whose interest is invaded." RESTATEMENT (SECOND) OF TORTS §286(a) (1965) (emphasis added). A comment in a corollary section explains:

> Many legislative enactments and regulations are intended only for the protection of the interests of the community as such, or of the public at large, rather than for the protection of any individual or class of persons. Such provisions create an obligation only to the state, or to some subdivision of the state, such as a municipal corporation. *The standard of conduct required by such legislation or regulation will therefore not be adopted by the court as the standard of a reasonable man in a negligence action brought by the individual.*

Id. §288, cmt. b. on clause (a) (emphasis added); *cf. id.* §874A (recognizing the authority of common law courts to provide for tort liability "[*w*]*hen a legislative provision*

[1] By referencing *Seebold* as an example of a case discussing structural restraints relative to *particular permutations* of duty, I have no intention of suggesting that *Seebold* "displace[d]," "abrogate[d]," or "flattened" the purport of the *Althaus* decision. Majority Opinion, *slip op.* at 19 n.15, 23 n.17. In this regard, I note that *Althaus* did not concern the discernment of a standard of care in the particular-permutation scenario presented here, *i.e.*, derivation of a duty from a statute or regulatory provision.

protects a class of persons but does not provide a civil remedy for the violation" (emphasis added)).[2]

The Controlled Substances Act was enacted for the benefit of the general public. *See, e.g.*, *Safe Sts. Alliance v. Hickenlooper*, 859 F.3d 865, 898 (10th Cir. 2017); *cf. State v. Garza–Villarreal*, 864 P.2d 1378, 1380-81 (Wash. 1993) (noting that the public at large is the victim of criminal possession of controlled substances).[3] Its provisions are "enforceable only by the Attorney General and, by delegation, the Department of Justice." *Schneller v. Crozer Chester Med. Ctr.*, 387 Fed. Appx. 289, 293 (3d Cir. 2010) (*per curiam*). Discretion is thus vested in the executive branch to determine the circumstances under which the statutes will be enforced. *See Jones v. Hobbs*, 745 F. Supp. 2d 886, 893 (E.D. Ark. 2010), *aff'd sub nom. Williams v. Hobbs*, 658 F.3d 842 (8th Cir. 2011). Given that the statute and concomitant regulations are not designed to protect any particular class of persons, governing Pennsylvania law incorporating the above Restatement provisions does not support the creation of a common law standard of care premised upon them.[4]

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[2] Although UPMC does not specifically cite these Restatement provisions, a running thread throughout its arguments is its contention that a regulatory reporting duty should not be converted into a common law duty where the governing regulation does not operate for the benefit of a particular class of individuals but, rather, serves the public at large. *See, e.g.*, Brief for Appellant at 16.

[3] The majority correctly recites the relevant goals of investigating and prosecuting those involved in the diversion of controlled substances and enabling the DEA to monitor patterns of diversion that might signal a systematic effort to traffic controlled substances. *See* Majority Opinion, *slip op.* at 27 n.20 (referencing *Reports by Registrants of Theft or Significant Loss of Controlled Substances*, 70 F.R. 47094-01, Final Rule (Aug. 12, 2015)).

[4] I also note that some other state courts have relied upon federalism concerns in declining to adopt *federal* statutes or regulatory provisions as *state*-law standards of care. *See, e.g.*, *R.B.J. Apartments, Inc. v. Gate City Savs. & Loan Ass'n*, 315 N.W.2d (continued…)

Significantly, this "particular class" requirement has substantial justification, as it serves as a limiting principle to rationally cabin the scope of liability relative to matters that have traditionally been outside the sphere of tort law. Absent such constraints, the range of potential defendants, the concomitant liability exposure, and the administrative burden on the courts are particularly great, given the proliferation of positive law in the form of statutes and regulations.[5] The degree of expansion is particularly acute in cases such as this one -- in which a federal reporting requirement designed for the benefit of the public at large is being relied upon to create civil liability exposure, which plainly would not otherwise exist at common law, in a scenario in which multiple independent actors (Kwiatkowski and the DEA) are interposed between UPMC and Appellees. *Accord Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998) (discussing this

(…continued)
284, 290 (N.D. 1982) ("The separation-of-powers doctrine and principles of federalism militate against the adoption of [a] federal statute as the standard of care in a state negligence action when no private cause of action, either explicit or implicit, exists in the federal statute."); *see also Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 27 (Iowa 2012) (reasoning that treating a federal statute as creating an independent state law duty "would have the practical effect of recognizing an implied private right of action under that statute in all but name" and would "circumvent the widely-accepted understanding that Congress did not intend to create a federal private right of action" under that statute (quoting *Guyton v. FM Lending Servs., Inc.*, 681 S.E.2d 465, 474-75 (N.C. Ct. App. 2009))). Given the absence of a protected class and UPMC's failure to pursue this line of argument, I will not address it further here.

[5] *See, e.g.*, Barry L. Johnson, *Why Negligence Per Se Should Be Abandoned*, 20 N.Y.U.J. LEGIS. & PUB. POL'Y 247, 268 (2017) (reflecting on the "massive increase in statutory law," while explaining that "Congress alone has created twelve times the statutory law during the last fifty years than it did in the previous one hundred and fifty years." (citing Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 780 (2012))); Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 497 (1998) ("We live in the 'Age of Statutes.'" (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982))).

concern in the context of a claim that a failure to report suspected child abuse should result in civil liability, on the part of a non-reporter, running to abused children).[6]

Although the majority depicts "a more pragmatic approach to defining the duty" in this case, Majority Opinion, *slip op.* at 46, I do not believe that it is sound to characterize the majority's treatment as something other than an adoption of a statutory reporting duty as a common law standard of care. *See id.* at 47 ("[T]he principal source of the duty we impose on UPMC is the public policy clearly embodied in federal law."); *cf.* Brief for Appellants at 42 (criticizing the Superior Court's similar approach as "essentially a negligence *per se* analysis by another name).[7] Finally, I agree with UPMC that an analysis of the sort employed by the majority disregards the special relationship factor applicable in rescue/protection scenarios and is in strong tension with the overall thrust

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[6] As the reporter for the RESTATEMENT (FIRST) OF TORTS related:

> There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant[.]

Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 218-20 (1908).

[7] In this respect, I find the distinction drawn by the majority between addressing "whether and when a standard of care may be derived directly from a statute or regulation" and considering "whether and when a statute and the legislative policy judgment it reflects may be considered in determining whether to impose a proposed common-law duty," Majority Opinion, *slip op.* at 45 n.24, to be illusory. *Accord* Restatement (Third) of Torts: Phys. & Emot. Harm §38, cmt. b (2012) (explaining that reliance on federal statutes or regulations to recognize an affirmative duty in tort law is "analogous to a court determining that violation of a federal provision constitutes negligence *per se* in a tort case governed by state law.").

of *Seebold*, 618 Pa. at 632, 57 A.3d at 1232, and *Estate of Witthoeft v. Kiskaddon*, 557 Pa. 340, 733 A.2d 623 (1999).

Since I find that the majority's approach to determining whether a regulatory reporting duty should be adopted as a state common-law standard of care has the effect of displacing a core -- and in my view essential -- limiting principle, I respectfully dissent on this basis.