[J-117-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, GREENSPAN, JJ.

RODGER A. FREED,	:	No. 77 MAP 2007
	:	
Appellee	:	Appeal from the order of the Superior Court dated September 29, 2006, at No. 819 MDA 2005 reversing the order of the
v.	:	Court of Common Pleas of Centre County at No. 200-2613
	:	
GEISINGER MEDICAL CENTER, AND HEALTHSOUTH CORPORATION,	:	910 A.2d 68 (Pa. Super. 2006)
FORMERLY KNOWN AS HEALTHSOUTH REHABILITATION CORPORATION, AND HEALTHSOUTH OF NITTANY VALLEY, INC., T/D/B/A/ HEALTHSOUTH NITTANY VALLEY REHABILITATION HOSPITAL,	:	REARGUED: December 2, 2009
	:	
Appellants	:	

OPINION ON REARGUMENT

MADAME JUSTICE TODD **DECIDED: September 29, 2010**

The background of this matter, in which we granted reargument, is set forth in Freed v. Geisinger Medical Center, et al., 601 Pa. 233, 971 A.2d 1202 (2009), wherein this Court affirmed the Superior Court's reversal of the trial court's grant of a compulsory nonsuit in favor of Defendants Geisinger Medical Center and HealthSouth Corporation (collectively, "Geisinger"). Therein, we addressed whether, as a matter law, a nurse may testify in a negligence action that a breach of the nursing standard of care caused a plaintiff's medical condition. Ultimately, we held that an otherwise competent and properly qualified nurse is

not prohibited by the Professional Nursing Law, 63 P.S. §§ 211 et seq., from giving expert testimony at trial regarding medical causation. In so holding, we overruled *sua sponte* our prior decision in Flanagan v. Labe, 547 Pa. 254, 690 A.2d 183 (1997), wherein this Court had held a nurse was precluded from offering opinion testimony regarding the specific identity and cause of a medical condition because such testimony constituted a medical diagnosis, which a nurse is precluded from making under the Professional Nursing Law. In our original opinion, we concluded that Flanagan was inherently flawed because it applied a statute — the Professional Nursing Law — governing the specific practice of nursing to the distinct area of expert testimony in a court of law, which is governed by rules of evidence, rules of civil procedure, and common law rules regarding expert witnesses. We further determined that our decision applied retroactively to the parties in the instant case, and, therefore, that the trial court should, on remand, assess the competency of plaintiff Rodger Freed's witness, a registered nurse, to testify regarding the relevant nursing standard of care and medical causation under the common law standards set forth in Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 664 A.2d 525 (1995), or the Medicare Availability and Reduction of Error Act ("MCARE Act"), if applicable.[1]

Geisinger filed a petition for reargument, asserting that this Court, in *sua sponte* overruling Flanagan and applying our decision retroactively, denied it its due process rights of notice and an opportunity to be heard. Geisinger further argued that, because Freed did not challenge the validity of Flanagan at trial or on appeal, or request that it be overruled, he waived any challenge to the validity of Flanagan. This Court recognized that, prior to overruling decisional law *sua sponte*, the interests of all parties are best served by allowing the participants an opportunity to present argument. Accordingly, we granted reargument

[1] Justice Eakin filed a dissenting opinion, which was joined by Justice Saylor, wherein he opined that the Flanagan decision should not be overruled. Justice McCaffery did not participate in our original opinion.

to allow both parties to address the continued viability of Flanagan, as well as the question of any waiver of this issue. The parties fully briefed these points, and presented oral argument before this Court on December 2, 2009.

In its Supplemental Brief, Geisinger first argues that Freed waived any right to challenge the validity of this Court's decision in Flanagan because he did not raise or preserve his argument (a) before the trial court; (b) in his Statement of Matters Complained of on Appeal filed pursuant to Pa.R.A.P. 1925; (c) in his brief to the Superior Court; or (d) in his brief to this Court. Conversely, Freed argues that it is the trial court's Rule 1925(a) opinion that serves as the basis of appellate review, and because the trial court based its decision on Flanagan, the continuing viability of Flanagan is, at least implicitly, before this Court.

While we granted reargument, *inter alia*, on the issue of waiver, upon reflection, we conclude that consideration of traditional principles of waiver are inapt to the broader issue before us, namely, Geisinger's objection to this Court's *sua sponte* reconsideration and overruling of prior precedent. Thus, we turn to that question.

We begin by noting there have been numerous occasions in which this Court has *sua sponte* reconsidered and overruled prior precedent. See, e.g., Commonwealth v. Collins, 585 Pa. 45, 53-61, 888 A.2d 564, 568-73 (2005) (after *sua sponte* directing parties to brief issue of whether to modify approach to PCRA's previous litigation provision, Court revisited precedent and recognized that, in accordance with Supreme Court case law, a Sixth Amendment claim of ineffectiveness raises a distinct legal ground for purposes of review under the PCRA); Cimaszewski v. Bd. of Prob. & Parole, 582 Pa. 27, 45, 868 A.2d 416, 427 (2005) (in light of United States Supreme Court case law, *sua sponte* reconsidering and overruling year-old decision in Finnegan v. Pa. Bd. of Prob. & Parole, 576 Pa. 59, 838 A.2d 684 (2003)); Commonwealth v. Freeman, 573 Pa. 532, 545-63, 827 A.2d 385, 393-403 (2003) (*sua sponte* abrogating capital direct appeal relaxed waiver

doctrine); Commonwealth v. Grant, 572 Pa. 48, 67, 813 A.2d 726, 737-38 (2002) (*sua sponte* directing parties to brief continuing vitality of Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977), and then, in contravention to the parties' wishes, overruling that decision, noting "we have learned that time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness"); Commonwealth v. Albrecht, 554 Pa. 31, 45, 720 A.2d 693, 700 (1998) (*sua sponte* abrogating relaxed waiver doctrine in PCRA appeals, noting that its application "runs afoul of the very terms of the Post-Conviction Relief Act").

The concerns that support *sua sponte* reconsideration and overruling of prior precedent are several. First, parties are unlikely — understandably so — to ask for reconsideration of what appears to be controlling precedent. Indeed, where parties are faced with precedent that appears unfavorable to their position, they are more likely to attempt to distinguish factually their case from the established precedent.

Further, parties before this Court generally are focused on the application of precedent to *their specific case*. In fact, the parties may not be aware of the impact or implication of the same precedent in cases involving different factual or procedural circumstances. Rather, it is this Court's function and responsibility to consider the broader picture, including the impact of precedent beyond the facts of an individual case, and the interplay between established precedent in varying areas of the law. The need for corrective action in cases such as Albrecht, Grant, Freeman, and Collins became apparent precisely because of this Court's problematic experience with settled doctrine.

Finally, there is no absolute jurisprudential bar to this Court's *sua sponte* reconsideration of precedent. As noted above, we have reconsidered prior decisions *sua sponte* on numerous occasions. The United States Supreme Court also has decided cases on grounds not argued in the lower courts or in the petitions for certiorari. See, e.g., Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990) (deciding a question "antecedent . . .

and ultimately dispositive" to the questions raised by the parties); Citizens United v. Federal Election Comm'n, 130 S.Ct. 876 (Jan. 21, 2010) (overruling, *inter alia*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), after having *sua sponte* remanded for supplemental briefing on the matter); Mapp v. Ohio, 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949), without briefing or argument, and despite counsel expressly indicating he was not asking the Court to do so); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (overturning *sua sponte*, and without giving the parties an opportunity to brief or argue the issue, the century-old precedent of Swift v. Tyson, 41 U.S. 1 (1842)).

In the instant case, while neither party argued that Flanagan should be overruled, the vitality of that decision was antecedent to the issue raised by Geisinger, namely, whether the Superior Court properly determined that Flanagan was distinguishable from the instant case because it involved no medical diagnosis. Upon review, we determined that the Superior Court's decision was, indeed, in conflict with Flanagan. However, in reviewing and applying Flanagan to the facts of the instant case, the tension between Flanagan and the rules of evidence, the rules of civil procedure, and the common law pertaining to expert testimony became apparent. Accordingly, it was appropriate for this Court to examine the viability of Flanagan in rendering our decision. Furthermore, we have now provided both parties the full opportunity for briefing and reargument.[2] Of course, as we recognized and addressed in our original opinion, the ultimate determination of whether it is appropriate for this Court to overrule prior precedent depends on a number of factors, all of which are implicated under the doctrine of *stare decisis*. That doctrine, however, does not control the threshold issue of our authority to *sua sponte* address arguments which are clearly implicated in the cases before us.

[2] In light of our conclusion, it is not necessary to address Freed's alternative arguments that any issue of waiver is moot, or should be excused for equitable reasons.

Geisinger next argues that, if we are inclined to reassess the vitality of Flanagan, we should uphold it as valid precedent. Specifically, Geisinger argues that this Court erred in concluding in our original opinion that Flanagan had applied the Professional Nursing Law as a rule of evidence, instead of recognizing that Flanagan simply "held that the Professional Nursing Law defines the scope of competency of nurses in practice and, therefore, defines the scope of the competency of nurses to provide expert testimony." Appellants' Supplemental Brief on Reargument at 8. Geisinger further argues that Flanagan does not conflict with the normal liberal standard for competency, as we concluded in our original opinion, because Flanagan merely recognizes that, because a nurse is prohibited from making a medical diagnosis in practice, he or she would be unable to obtain the specialized knowledge necessary to allow her to testify in a court of law.

As we explained in our original opinion, however,

> in the context of legal proceedings, if a witness has any reasonable pretension to specialized knowledge on the relevant subject, he may be offered as an expert witness, and the weight to be given his testimony is for the trier of fact to determine. Rule 702 of the Pennsylvania Rules of Evidence also provides that "a witness qualified as an expert by knowledge, skill, experience, training or education may testify." Pa.R.E. 702. Under Flanagan, however, a nurse duly qualified under Rule 702, but licensed under 63 P.S. § 216, is precluded from offering expert testimony on medical causation, while presumably a non-licensed nurse, *or any other individual*, with the same knowledge or experience would be permitted, under the broad common law standard for expert testimony, to offer such testimony.

601 Pa. at 248, 971 A.2d at 1210 (emphasis original). Thus, Flanagan clearly operates as a rule of evidence in that it precludes an otherwise qualified nurse from offering expert testimony. In this regard, Flanagan arguably runs afoul of Rule 702. See Albrecht, 554 Pa. at 45, 720 A.2d at 700. Moreover, to the extent Geisinger suggests that a nurse would be unable to obtain legally the specialized knowledge or expertise necessary to qualify as an expert witness, we note that the Professional Nursing Law does not prohibit a nurse from

attending medical school, reading medical textbooks, or working along side a physician. Thus, there are any number of ways a nurse might obtain expertise that is beyond the ordinary range of training, knowledge, intelligence, or expertise, and it remains the duty of the party proffering the expert witness to establish that the witness meets these requirements.

Geisinger also maintains that Flanagan has not produced inconsistent case law, and that overruling Flanagan would "unduly liberalize" the admission of expert testimony. Appellants' Joint Supplemental Brief on Reargument at 11. As we explained in Miller, however, "the standard for qualification of an expert witness *is a liberal one*." 541 Pa. at 480, 664 A.2d at 528 (emphasis added). Geisinger further suggests that the holding in our original opinion is "particularly inappropriate in light of the restrictions imposed on the qualifications of medical experts by the Legislature in MCARE." Appellants' Supplemental Brief on Reargument at 11. However, we specifically recognized in our opinion the limited impact of our decision in light of the more stringent requirements for expert testimony established by the MCARE Act, which became effective on May 19, 2002, and resulted in substantial changes in the requirements for qualifying an expert witness in medical professional liability actions. We also noted that there are situations in which the MCARE Act arguably might not apply.

Finally, Geisinger contends that Flanagan "does not involve a purely procedural rule," and, therefore, that if we reaffirm our prior decision overruling Flanagan, we should not apply our decision retroactively, because it would negatively affect its substantive rights, namely, the judgment entered in its favor. Appellants' Joint Supplemental Brief at 10, 12. In our original opinion, we explained that, in determining whether to apply a new rule of law retroactively, there are two primary considerations: (1) whether the holding involves an interpretation of a statute or some other source of law; and (2) whether the issue is substantive or procedural. Freed, 601 Pa. at 253, 971 A.2d at 1213. Based on

these considerations, we concluded that the rule established in Flanagan was "*akin* to a procedural ruling," id. at 253, 971 A.2d at 1214 (emphasis added), and thus our holding properly was applied retroactively. Geisinger offers no argument or case law to suggest this determination was in error.

Thus, upon review, we find that Geisinger has offered no argument in its Supplemental Brief that this Court did not already consider in reaching the decision set forth in our original opinion. Accordingly, we reaffirm our prior decision.

The proceedings on reargument are concluded and the matter is remanded per our original opinion. Jurisdiction is relinquished.

Mr. Justice McCaffery did not participate in the consideration or decision of this case.

Former Justice Greenspan did not participate in the decision of this case.

Mr. Justice Baer joins the opinion on reargument.

Mr. Chief Justice Castille joins the opinion on reargument and files a concurring opinion.

Mr. Justice Saylor files a dissenting opinion.

Mr. Justice Eakin files a dissenting opinion.