



## II. FACTUAL BACKGROUND

This matter arises out of the in-patient psychiatric care of the minor-Plaintiff, Joseph Lathrop (hereinafter Plaintiff), at the defendant hospital, Northwestern Institute of Psychiatry (hereinafter Northwestern), rendered by a psychiatric aide, Jason Ruggiano.

On February 8, 2000, Joseph Lathrop was admitted as an in-patient at Northwestern. His admission to Northwestern came shortly after his parents' separation. Northwestern was an in-patient psychiatric institution that was granted licensure by the Department of Public Welfare and provided psychiatric care in the form of individual, group, and family counseling.<sup>1</sup> (Motion for Summary Judgment, Exhibit A.)

Jason Ruggiano is a psychiatric aide who was employed at Northwestern at the time of the events giving rise to the lawsuit. A psychiatric aide oversees and maintains patients, escorts them to group therapy and takes vital signs. (Motion for Summary Judgment, Exhibit B, pgs. 16-17.)

On February 9, 2000, Joseph Lathrop, then age 8, tied a cord from his bathrobe around his neck and began choking himself, which was diagnosed as a suicidal gesture. (Response to Motion for Summary Judgment, Exhibit C). As a result, he was admitted to Northwestern. (Motion for Summary Judgment, Exhibit C.)

The admitting psychiatric note at Northwestern revealed that the Plaintiff manifested a longstanding, pre-existing psychiatric history, such as fighting with his sisters, increased agitation, problems at school, outburst of anger and defiance, including

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<sup>1</sup> On October 27, 2000, Northwestern filed Chapter 11 in the United States Bankruptcy Court for the Eastern District of Pennsylvania. Northwestern was dissolved and no longer exists. Thus, this case was placed on deferred status on March 12, 2002, and was removed from deferred status on the civil docket on December 18, 2003, pursuant to U.S. Bankruptcy Court for E.D. PA. Dismissal Order dated 1/14/03.

lighting matches, fires, multiple school detentions and cruelty to people and animals.  
(Motion for Summary Judgement, Exhibit C).

Lathrop was admitted to Northwestern Institute of Psychiatry with a diagnosis of depression. On admission, Plaintiff was placed on suicide and assault precautions.  
(Motion for Summary Judgment, Exhibit C).

On the day after admission, February 9, 2000, Joseph Lathrop was noted to be “disruptive to the group and instigated peers attempting to get them in trouble.” He started a scuffle with a roommate and was punched in the eye by a roommate. (Motion for Summary Judgment, Exhibit D). Later that same evening, Plaintiff was in his room at Northwestern playing with his roommates. He and his roommates were directed to go to bed by Ruggiano. (Deposition of Joseph Lathrop dated 12/17/04, pg. 22). Approximately five to ten minutes later, disregarding the instructions given by Ruggiano, Plaintiff admitted that he and his roommates “started goofing off again.” (Deposition of Joseph Lathrop dated 12/17/04, pg. 22). When Ruggiano discovered that Plaintiff and his roommates failed to follow his instructions, Ruggiano instructed Plaintiff to sit in a chair in the hallway in a “time-out.” (Deposition of Joseph Lathrop dated 12/17/04, pg. 23).

Once again, Plaintiff failed to respond to Ruggiano’s redirection. He became loud, boisterous, cursed at staff, and refused redirection. As a result, Ruggiano was forced to physically pick up Plaintiff in an attempt to restrain him in a “therapeutic hold” until he calmed down. The hold is one which is customarily used by psychiatric technician’s in the children’s unit at Northwestern. (Deposition of Lynne Wooden dated 11/12/04 pgs.101-102). According to Ruggiano’s nursing note:

Pt. was given a time-out. Pt. was banging on wall loudly with foot. Pt. refused redirection and cursed staff. Pt.

then kicked over heavy wooden table. Pt. was blanket wrapped. (Motion for Summary Judgment, Exhibit D).

Twenty minutes after the therapeutic hold was administered, the Plaintiff told a psychiatric aide that his left wrist hurt. The wrist was red but not swollen. The Plaintiff further informed the nurse that he had, previous to this incident, broken his left arm.

Following this incident, Plaintiff was taken to Chestnut Hill Hospital. When questioned as to how he hurt his wrist, Plaintiff told the doctors that he had hurt it when he “fell out of bed.” (Motion for Summary Judgment, Exhibit E, pgs.37-38). Plaintiff was diagnosed with a buckle fracture with no dislocation or displacement. Plaintiff’s arm was then placed in a cast without surgery.

The Plaintiff’s mother contacted the police. Thereafter, a criminal case was instituted against Jason Ruggiano for simple assault, reckless endangering another person, and neglect of a care-dependent person. (Response to Motion for Summary Judgment, Exhibit D). The Commonwealth specifically noted that the statements obtained during the investigation were “inconsistent with regard to what actually happened” and that “the significant problems that the victim was being treated for, which prompted his admission to Northwestern Institute, gave rise to significant issues with his credibility.” (Motion for Summary Judgment, Exhibit G).

Given the credibility issues of the Plaintiff, together with minor-child’s long-standing and current psychiatric problems, the Commonwealth chose not to prosecute concluding:

Given the specific circumstances surrounding this incident and the setting in which it took place, it cannot be stated that the Defendant grossly deviated from a reasonable standard of care. (Motion for Summary

Judgment, Exhibit G).

On January 16, 2005, Plaintiffs instituted this civil action by filing their complaint alleging counts of Assault by Jason Ruggiano and Negligence against Northwestern for negligent supervision. Plaintiffs seek compensatory and punitive damages from Northwestern and Jason Ruggiano as a result of psychiatric care and treatment rendered to Joseph Lathrop by a psychiatric aide while an in-patient at the psychiatric hospital. On March 2, 2005, this Court granted Defendants' Motion for Summary Judgment dismissing Plaintiffs' case. Plaintiffs' appealed from this order on April 8, 2005 and filed their Statement of Matters pursuant to Pa.R.A.P. 1925(b) accordingly.

The issue on appeal is whether the lower Court committed an error of law or abused its discretion in granting Defendants' Motion for Summary Judgment and dismissing Plaintiffs' claims with prejudice.

### **III. LEGAL ANALYSIS**

Under Pennsylvania law, Summary Judgment is appropriately granted "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report."

*Pa. R.C.P. 1035.2.*

### **MENTAL HEALTH PROCEDURES ACT**

The Pennsylvania Mental Health Procedures Act (hereinafter MHPA) provides:

In absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be

otherwise reduced. . . shall not be civilly or criminally liable for such decision or its consequences. 50 P.S. §7114.

Our Supreme Court has determined that the protection provided by the MHPA extends to institutions, as well as natural persons, that provide care to mentally ill patients. ***Farago v. Sacred Heart General Hospital***, 522 Pa. 410, 562 A.2d 300, 303 (Pa. 1989). Additionally, our Supreme Court has interpreted § 7114(a) to include not only treatment decisions, but also, “care and other services that supplement treatment in order to promote the recovery of the patient from mental illness.” ***Allen***, 696 A.2d at 1179. Ruggiano was employed at Northwestern which is an in-patient psychiatric institution that was granted licensure by the Department of Public Welfare and was providing treatment to Joseph Lathrop at the time of the incident. The facility is also protected under the MHPA. Our Supreme Court has determined that the immunity provided by the MHPA extends to institutions, as well as natural persons, that provide care to mentally ill patients. ***Farago v. Sacred Heart General Hospital***, 522 Pa. 410, 562 A.2d 300, 303 (1989).

In Plaintiffs’ Concise Statement of Matters Complained of on Appeal they state in paragraph 2a(1) that, “Immunity under the Act was not raised by Defendants in their pleadings as an affirmative defense as required by Pa.R.C.Pro. 1030 and said defense was waived . . .” (Plaintiff’s Concise Statement of Matters dated 4/19/05 pg.1). Although Plaintiff does not go on to suggest which part of Rule 1030 applies to the instant matter, but, for purposes of this discussion, the court will assume that Plaintiff is referring to the language in Rule 1030(a) which requires that “all affirmative defenses including, but not limited to the defenses of . . . immunity from suit . . . shall be pleaded in a responsive pleading under the heading ‘New Matter.’”

Procedurally, Plaintiffs' citation of Rule 1030(a) is inapplicable to the issue of waiver of a defense, since Rule 1030(a) pertains to what constitutes an affirmative defense. Rule 1030(a) is silent on the issue of waiver of defenses, which instead is appropriately addressed under Pa.R.C.P. 1032.

By not citing to the proper rule for to support their position, Plaintiffs have failed to properly preserve their issue for appellate review. *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1999) (holding that issue must be raised in court-ordered Pa.R.A.P. 1925(b) statement to be preserved); *Kanter v. Epstein*, 866 A.2d 394 (Pa.Super. 2004) (indicating *Lord* and its progeny applies to civil cases). In *Kanter*, our Superior Court held that, “[a]ny issue not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived.” *Kanter v. Epstein*, 866 A.2d 394, 400 (Pa.Super. 2004). “[A] Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent to no Concise Statement at all. Even if the trial court correctly guesses the issues [an] [a]ppellant raises on appeal and writes an opinion pursuant to that supposition, the issue is still waived.” *Commonwealth v. Heggins*, 809 A.2d 908, 911 (Pa.Super. 2002), See *Kanter*, *supra*.

Under the caselaw, Plaintiffs are required to assert their 1925(b) issues with specificity. As such, use of Rule 1030(a) in their 1925(b) statement is not one that addresses waiver of defenses; rather it defines what constitutes an affirmative defense. According to *Heggins* and *Kanter*, it is not sufficient that this Court may have correctly interpreted the Plaintiffs' intention to preserve his claim as an issue of waiver of defenses under Pa.R.C.P. 1032(a). Therefore, Plaintiffs' failure to raise the Rule 1032(a) waiver issue in their 1925(b) statement, according to the caselaw, waives Plaintiffs' right to

address this issue on appeal. Despite the court's position that the Plaintiffs' failed to preserve their 1032(a) issue for appeal, this court also believes that Rule 1032(a) does not preclude the protection of *50 P.S. §7114* of the MHPA.

This appears to be a case of first impression in Pennsylvania. This court found no reported cases directly addressing or interpreting the issue of whether the heightened standard of care of gross negligence or willful misconduct, required for liability to attach to an action involving a mental health institution, under *50 P.S. §7114*, is an "immunity" which is waived if not asserted by defendant in their affirmative defense.

Despite this contention, Plaintiffs' position is still fatally flawed because the MHPA does not create a defense, which can be waived if not pled in defendant's New Matter. What the MHPA does create is a standard of care which must be satisfied in cases where a mental health facility or an employee acting within the scope of his or her employment provided treatment to a person in the facility. While there is no case which specifically addresses this issue, our appellate courts have provided sufficient guidance and authority for this Court's conclusion.

Plaintiffs stated that Ruggiano assaulted Plaintiff and were negligent in their supervision of him, while Plaintiff was treated at Northwestern's mental health facility. Defendants did not raise applicability of the MHPA in their Answer or New Matter. However, the defendants' failure to raise the applicability of the MHPA in their Answer or New Matter does not prevent them from asserting its protections in their Motion for Summary Judgment, because the protections of §7114 of MHPA are not immunities which can be waived if not timely pleaded. Rather the §7114 creates a statutorily created standard of care, unlike that of the ordinary negligence standard created under common

law. This heightened standard of proving gross negligence or willful misconduct in cases where the MHPA is applicable cannot be waived like the defenses and immunities of Pa.R.C.P. 1032 and therefore properly be raised at anytime.

In *Farago*, Plaintiff was admitted to the psychiatric unit of Sacred Heart Hospital by her husband. *Id.* 562 A.2d at 301. Plaintiff filed suit against the hospital alleging that she was raped by a male patient while admitted to the hospital and that the hospital was negligent for failing to supervise and protect the Plaintiff while admitted there. *Id.* at 301-302. The case proceeded to trial. At the conclusion of evidence, the trial court raised for the first time, *sua sponte*, the issue of the appropriate standard of care that was owed to the Plaintiff under the MHPA. The trial court instructed the jury to apply a willful misconduct or gross negligence standard consistent with the MHPA. *Id.* at 302, 303. The jury returned a verdict for the Defendant Sacred Heart. Plaintiff appealed alleging *inter alia* that the court should have instructed the jury that the correct standard of care was ordinary negligence. *Id.* The Superior Court and the Supreme Court both affirmed the trial court. Although Plaintiffs' primary issue in *Fargo* was whether Sacred Heart could be considered a "person" for purposes of the MHPA, the Supreme Court also acknowledged that it was the "clear intent of the General Assembly in enacting Section [7]114 of the MHPA was to provide limited civil and criminal immunity to those individuals and institutions charged with providing treatment to the mentally ill." *Id.* at 303. The legislature chose to make this defense available to all those covered by the MHPA "in absence of willful misconduct or gross negligence." *Id.* The legislature made the application of the gross negligence or willful misconduct standard mandatory when it

said that persons or institutions covered by the MHPA “*shall not be civilly or criminally liable.*” 50 P.S. §7114 (emphasis added).

In *Goryeb v. Commonwealth, Department of Public Welfare*, 525 Pa. 70, 74-75; 575 A.2d 545, 547 (1990), a psychiatric patient was released by a state mental institution even though he should have remained hospitalized under the MHPA. *Id.* The patient then killed his former girlfriend and committed suicide. An action was brought on behalf of the victims against the Commonwealth Department of Public Welfare and a hospital physician. *Id.* Plaintiffs alleged, in relevant part, that the Defendants had been grossly negligent in releasing the patient when they knew that he was a danger to himself and others. *Id.* The Supreme Court in *Goryeb* considered the application of the MHPA when raised by the Defendant in a Summary Judgment Motion submitted at the conclusion of extensive discovery. *Id.* at 547. In determining the protection of the Act at that stage of the proceedings, the Court implicitly recognized the legislative enactment of the gross negligence or willful misconduct standard of care to persons or institutions covered by the MHPA in arriving at its conclusions.

Further, in *Emerich v. Philadelphia Center For Human Development, Inc.*, 554 Pa. 209; 720 A.2d 1032, (1998), our Supreme Court was asked to decide whether there was a duty to warn a third party of a threat to harm made by a mental health patient against that third party. *Id.* 554 Pa. at 216. The issue was raised in defendant’s Motion for Judgment on The Pleadings. *Id.* 554 Pa. at 216. In deciding that such a duty existed, albeit with some parameters, the *Emrich* Court confirmed that the duty was subject to the legislatively mandated standard of care established by the MHPA. Justice Zappala, in his concurring opinion, captured the true nature of the MHPA in a footnote, which read:

*I would also note that both the duty and the willful misconduct or gross negligence standard involved in **Goryeb**, represented a legislative judgment made law as part of the Mental Health Procedures Act, 50 P.S. §7101 et seq. rather than an extension of the common law of negligence. **Id.** at 237. (Zappala, J. concurring) (emphasis added).*

In considering whether the standard of care created by the legislative enactment embodied by the MHPA, the Court in **Goryeb** acknowledged the non-waivability of the application of the standard to cases involving the Sovereign Immunity Act. Specifically, the Supreme stated that §4117 of the Mental Health Procedures Act should be read *in para materia* with the medical exception to the Sovereign Immunity Act, 42 P.S. §8522(b)(2). **Id.** at 548.

The Supreme Court stated that its conclusion in **Goryeb** was

reinforced by the provisions of Section 4(a) of Act 1978, Sept. 28, P.L. 788, No. 152, which was adopted in conjunction with 1 Pa.C.S. § 2310 and the former 42 Pa.C.S. § 5110, the predecessor of the current Sovereign Immunity Act. Section 4(a) lists certain statutes, including, inter alia, the Mental Health Procedures Act, which either affect or are affected by the Sovereign Immunity Act. The affected statutes ‘are repealed insofar as they waive or purport to waive sovereign immunity inconsistent with this act, but are saved from repeal insofar as they provide defenses or immunities from suit.’ Since the Sovereign Immunity Act contains a medical-professional liability exception, it is not inconsistent with the immunity section of the Mental Health Procedures Act, i.e. 50 P.S. § 7114; therefore, the latter statute has not been repealed. Indeed, by applying the second portion of the above-quoted language, it is clear that the legislative intent is to provide the Commonwealth with the additional protections of 50 P.S. § 7114, i.e. no civil or criminal liability *except* in a case of willful misconduct or gross negligence. **Id.** (emphasis in original).

The Supreme Court further stated that

by construing the two statutes *in pari materia*, as we are constrained to do, the following rule emerges. When a Commonwealth party participates in a decision that a person be examined, treated or discharged pursuant to the Mental Health Procedures Act, such a party shall not be civilly or criminally liable for such decision or for any of its consequences except in the case of willful misconduct or gross negligence. Conversely, . . . a Commonwealth party participating in a decision to examine, treat or discharge a mentally ill patient within the purview of the Mental Health Procedures Act who commits willful misconduct or gross negligence can be liable for such decision. *Id.* at 548-549.

In addition, our Superior Court more recently interpreted our Supreme Court's ruling in *Goryeb* in *F.D.P. Ex Rel S.M.P. v. Ferrara*, 2002 PA Super 223, 804 A.2d 1221, 1232-1233 (2002). The *F.D.P.* Court stated *Goryeb* found that §7114 of the MHPA "must be construed as creating liability to people harmed when a party commits gross negligence or willful misconduct in treatment, discharge, or examination of a mentally ill patient within the purview of the MHPA." *Id.* The Court in *F.D.P.* found that the holding in *Emerich v. Philadelphia Center for Human Development*, 554 Pa. 209, 720 A.2d 1032 (1998), "cemented" the holding of the Supreme Court which "*clearly recogniz[es] the cause of action created in Goryeb as a separate and distinct cause of action against mental health providers operating pursuant to the provisions of the MHPA.*" *Id.* (emphasis added). In its holding the *Emerich* court confirmed that an action under the MHPA is one different than the ordinary negligent action under common law, in that the statutory action under the MHPA requires the heightened standard of care of gross negligence or willful misconduct in order to prove liability.

Although the above-mentioned cases involve the issue of sovereign immunity, which is not applicable in this case, the *Goryeb* ruling and the cases that follow it discuss

applicability and interpretation of §7114 as it applies to actions governed by the MHPA. The caselaw interprets §7114 to create a universal rule that is applicable to cases involving any defendant where the MHPA is involved. This statutorily created standard of care can be raised at anytime and requires the plaintiff to prove the heightened standard of gross negligence or willful misconduct to prove liability in cases where the MHPA is applicable. As such, the protections of §7114 are applicable to defendants and therefore were properly raised by defendants in their Motion for Summary Judgment.

However, if the gross negligence or willful misconduct standard of the MHPA is found inapplicable, this Court would be required to apply an ordinary negligence standard in this case. Not only would this result in direct conflict according to the aforementioned caselaw, it would also be in direct contravention of the legislative mandate expressed in the MHPA. Despite these circumstances, this Court believes that Plaintiffs did not provide sufficient evidence of ordinary negligence to survive summary judgment, because they failed to submit an expert report which would establish a breach in the standard of care.

Negligence requires a plaintiff to establish a breach in ordinary standard of care, causation and damages. Plaintiffs have failed to provide an expert opinion which would support the proposition that Defendants Ruggiano and Northwestern were either negligent or grossly negligent in their supervision and treatment of Joseph Lathrop. An expert's opinion must be supported by references to facts, testimony or empirical data and must delineate how the opinion, based on the record, gives rise to a genuine issue of material fact. Without such support, there can be no prima facie case of gross negligence sufficient to overcome a summary judgment motion. **Downey v. Crozer-Chester Med.**

Ctr., 817 A.2d 517, 528-529 (2003), (citing Kenner v. Kappa Alpha Psi Fraternity, Inc., 2002 PA Super 197, 808 A.2d 178 (Pa. Super. 2002)). In Downey, the Superior Court found that Dr. Blumberg's expert report was inadequate to establish Defendant's standard of care in supervising Plaintiff, who drowned in a bathtub while unmonitored. Id. at 526. At no point in his report did Dr. Blumberg specify what standard of care, procedures or policies were ignored or violated by the Defendant's staff in their supervision and treatment of Plaintiff. Id. The court found that this testimony was insufficient to establish liability on behalf of defendant as a matter of law. Id.

Similarly, in the present case, the Plaintiffs have failed to provide any expert testimony as to what the standard of care would be for supervising Joseph Lathrop and whether Defendants breached that standard of care. Plaintiffs fail to plead in their complaint that the hold in which Joseph Lathrop was placed breach the standard of care for supervision and treatment of a patient in a mental health facility, despite evidence that this hold was of the type customarily used in the field. Thus, as in Downey, Plaintiffs have also failed to prove a prima facie case of ordinary negligence, regardless of the legislative standard of gross negligence as set forth in the MHPA.

#### **IV. CONCLUSION**

For all the aforementioned reasons the court did not commit an error of law or abuse its discretion in granting Defendants Motion for Summary Judgment. Thus, the Court respectfully requests that the Order March 2, 2005 be affirmed.

**BY THE COURT:**

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Date

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**ALLAN L. TERESHKO, J.**

cc: Kevin Kelly for Appellants  
Denise Houghton for Appellees