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PA Superior Court gives life to civil case involving physicians who failed to report suspected child abuse

Court rules in abusive head trauma case turns attention to the "standard of care"

September 1st – An August 25th opinion issued by [Pennsylvania's Superior Court](#) further underscores the critical importance of specially trained physicians able to recognize and then be prepared to report suspected child abuse and neglect to the proper authorities for investigation.

A three judge panel within the state Superior Court recognized that Pennsylvania's Child Protective Services Law (CPSL) is silent about whether a civil action can be filed against a physician for failure to report suspected child abuse. The Superior Court's August 25th opinion, however, also clearly recognized that the CPSL does not "expressly preclude civil liability for a failure to report abuse, nor immunize those who fail in their reporting obligations."^[1] Ultimately the state Superior Court rendered a ruling that assures the civil claim filed, in 2009, against a number of physicians can advance (back at the trial court level) so that a jury can examine the standard of care that exists between a physician and a patient, independent any other statute (e.g., the CPSL).

[Judge David Wecht](#) authored the [opinion in *K.H. v. Dr. Shakthi Kumar ET AL*](#) and was joined by [Senior Judge Eugene Strassburger, III](#) and [Judge Jaqueline Shogan](#).

In reaching their decision, the Judges wrote that only a jury could decide key matters, including whether the physicians "serially violated the standard of care in passing K.H. amongst themselves while repeatedly setting aside concerns that he was the victim of abuse" or whether the actions of the physicians "caused the crippling harm that eventually befell K.H. at the hands of his biological father's continuing abuse."

A premature infant encounters many physicians, abuse is suspected but no report is made

In Lancaster County a male infant [K.H.] was born prematurely in June 2002. Upon his release from the Neonatal Intensive Care Unit (NICU) until five months later when he was discovered "unresponsive" in his crib, the infant was examined and treated by multiple physicians – in and outside of the hospital setting.

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^[1] K.H. v. Kumar, M.D., ET AL Superior Court Opinion (J-A08018-15) filed August 25, 2015, page 16. Retrieved at <http://www.pacourts.us/assets/opinions/Superior/out/J-A08018-15o%20-%201023340425279130.pdf?cb=1>

Civil complaint alleges a collective failure “to recognize, treat and report child abuse”

The child’s mother and step-father “filed a Complaint for medical professional liability” in Lancaster County on January 13, 2009. They asserted negligence claims against multiple doctors and LGH “alleging that they collectively failed to recognize, treat and report child abuse.” The doctors and LGH (Appellees) argued that the CPSL does not create a private civil cause of action when its reporting provisions are violated. Appellees also argued that there is “no common [-] law duty for a physician to report a reasonable suspicion of child abuse.” Additionally, even if the court were to recognize the duty to report suspected child abuse, it cannot be established that Appellees’ “conduct was the legal cause of [K.H.’s] injuries.”^[4]

The Lancaster County trial court dismissed all of the claims filed, on behalf of the child, relying, in part, on the fact that the CPSL does not include a specific provision permitting a private civil action

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Expert testimony on the “standard of care,” reporting child abuse and action likely to be taken by the child welfare system

The case relied heavily on expert testimony related to the standard of care and how children and youth service (CYS) agencies respond to reports of suspected child abuse and neglect. Testimony from Pennsylvania pediatricians Dr. David Turkewitz and Dr. Maria McColgan as well as former Westmoreland County Children and Youth Services Director Dr. Larry Breitenstein proved persuasive to the Superior Court.

Breitenstein, cited by the Superior Court as “an expert with extensive credentials in social work,” offered his opinion that “the obvious signs and symptoms of child abuse to [K.H.] that were missed by this child’s physicians....[were] as troublesome as [he has] seen in [his] career.”^[5] Breitenstein offered a “detailed account” of how a children and youth services (CYS) agency would have responded to a report from a physician had a call been made. He discussed how

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Praise for the ruling and an abused child’s day in (civil) court

In concluding the opinion, Judge Wecht looks to the Hippocratic Oath “sworn by aspiring physicians” in the United States in concluding the court’s opinion. He notes the Oath provides that the physician will “prevent disease whenever I can, for prevention is preferable to cure.” The opinion also notes that in its archaic form, the Oath provided that the physician “will keep [the sick] from harm and injustice.”^[16]

Wecht then writes, “These sound sentiments are embodied in the CPSL, it is true, but the potential harm that may befall children when their physicians fail to behave according to professional reporting requirements vastly exceeds the harm inuring to the public. Children like all individuals, find legal protection, and grounds for civil recourse, whenever a physician violates his or her duty of care. The duty of care is determined not by the General Assembly but by the community of physicians. Irrespective of whether the legislature intended to imply a private right of action under

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Timeline of the case (2002-2009)

^[4] K.H. v. Kumar, M.D., ET AL Superior Court Opinion (J-A08018-15) filed August 25, 2015, page 8.

^[5] K.H. v. Kumar, M.D., ET AL Superior Court Opinion (J-A08018-15) filed August 25, 2015, page 41.

^[16] K.H. v. Kumar, M.D., ET AL Superior Court Opinion (J-A08018-15) filed August 25, 2015, page 51.

June 29, 2002: Child born prematurely at thirty-three weeks' gestation "as a result of maternal preeclampsia."^[17]

July 15, 2002: Child released from the Neonatal Intensive Care Unit into the care of the parents. His medical condition was "monitored" by Dr. Shakthi Kumar at Lancaster Pediatric.

July - Aug 2002: Admitted to Lancaster General Hospital (LGH) five times related to "respirator, cardiac and gastrointestinal complications due to his prematurity."

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^[17] K.H. v. Kumar, M.D., ET AL Superior Court Opinion (J-A08018-15) filed August 25, 2015, page 4.