



Phelps v. Physicians Insurance Company of Wisconsin, 768, N.W.2d 615 (Wis. 2009)

744 N.W.2d 880 (Wis. App. 2007), 698 N.W.2d 643 (Wis. S.Ct. 2005)

Topics Covered: Professional Liability, Tort Reform

Outcome: Very Favorable

Issue

The issues in this case are: (1) whether a first year unlicensed medical resident was a "borrowed employee" of a teaching hospital where he cared for patients; and (2) whether "bystander" damages are available in medical malpractice cases to a father who witnessed his child's death during the birthing process.

AMA Interest

The AMA supports caps on non-economic damages in medical malpractice cases. Also, the AMA opposes any dilution of the patient-physician relationship.

Case Summary

Marlene and Gregory Phelps and their two surviving children sued Mathew Lindemann, M.D., an unlicensed first-year resident, and his insurer, Physicians Insurance Company of Wisconsin, for damages claimed as a result of the death of a newborn during childbirth. The Phelps attributed the death to Dr. Lindemann's negligence.

Mrs. Phelps had been hospitalized at St. Joseph's Hospital as a high risk obstetrical patient, and Dr. Lindemann was a first year resident at the hospital. After a trial, the court found Dr. Lindemann to have been negligent.

On an earlier appeal, the Wisconsin Supreme Court had remanded the case for a lower court determination of whether Dr. Lindemann was an employee or even a "borrowed employee" of St. Joseph's Hospital. If so, he would be protected by a cap on non-economic damages. On remand, the trial court found that Dr. Lindemann should have been deemed a borrowed employee protected by the damages cap. It also awarded Mr. Phelps damages for the emotional distress he had suffered as a result of his child's death, even though he had not himself been under Dr. Lindemann's care. Both of these findings by the trial court were appealed to the Wisconsin Court of Appeals, which found that Dr. Lindemann should not have been deemed a borrowed employee and thus was not covered by the statutory cap on non-

economic damages. The Court of Appeals did not analyze the propriety of the bystander damages that had been awarded to Mr. Phelps.

Dr. Lindemann's insurer appealed to the Wisconsin Supreme Court, seeking a determination of whether: (1) first year unlicensed residents are borrowed employees of the teaching hospitals where they care for patients; and (2) bystander damages are available in medical malpractice cases to a father who witnessed his child's death during delivery, when medical negligence causing the death had occurred several hours before the death.

On the final appeal, the Wisconsin Supreme Court ruled in favor of the resident physician and the insurance company on both issues. Thus, it held that the physician was a borrowed employee for purposes of the damages cap, and the Wisconsin medical liability statute did not allow bystander damages to the father. Two of the justices dissented.

Litigation Center Involvement

The Litigation Center joined with the Wisconsin Medical Society to file an *amicus curiae* brief supporting the applicability of the damages cap and opposing the applicability of bystander damages liability.

Wisconsin Supreme Court brief