

## **2018 ESCM PROFESSIONAL LIABILITY UPDATE**

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## **2018 PROFESSIONAL LIABILITY UPDATE**

### **INTRODUCTION**

These materials started as a 20 page outline over 20 years ago and grew to over 200 pages. Countless attorneys have contributed to these materials over the years. I could say there are too many to name and that would probably be true, but the constant has been my friend and law partner Don Brooks. At one time I was his mentor, but now the tables have turned, and I learn more from him than he does from me. Certainly, Joan Plump, who has since left the practice of law (probably because of all this writing) had been a great help. Our current team at Eckert Seamans of Francis J. Greek, Andrew F. Albero, Andrew J. Bond, Kevin W. Fay, Alexandra Rogin, Kevin F. Farrington, and Brooke M. Alston have been solid contributors. I thank them for their effort. Last, but not least, Ms. Lisa Gervasi, my loyal and long suffering assistant, deserves special praise.

Also, I need to comment on my co-course planner on the medical malpractice course and friend Joseph (Pete) Ricchiuti, who has been so helpful to this entire project, as well as the great faculty on the Med-Mal and Civil Litigation Update. And finally, the PBI staff who puts up with my nonsense.

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## **PROFESSIONAL LIABILITY – AN OVERVIEW**

Professional liability cases have developed an aura that they require special knowledge and expertise. By and large these cases are grounded in negligence or breach of contract. Some of them tend to be complex in terms of the underlying facts, or background. Certainly, the case against a surgeon may require the development and understanding of a number of medical principles, and likewise, the case against an attorney or accountant arising in the context of a complicated business transaction, or sale of securities will require an understanding of complex facts. The basic elements in most professional liability cases require that the plaintiff prove the following: (1) duty; (2) breach of the duty; (3) causation; and (4) damages. These concepts are certainly simple enough to recite, and lawyers learn them in their first year of law school. As they relate to professional liability cases, they can become more problematic.

Most of the law that has developed in terms of professional liability has been in the last fifty years. Most of the development has been in the common law, and reflects policy changes over time. Additionally, there have been a number of rule changes, as well as statutory changes which likewise reflect policy changes over time.

## **STANDARD OF CARE AND CAUSATION – MEDICAL MALPRACTICE**

### **Duty**

It is well settled that a claim for medical malpractice is not cognizable unless the health care provider owes a duty to the patient or a third party. Normally, but not always, this requires privity.

### **Existence of a Duty of Care is a Prerequisite to Maintain Medical Malpractice Claim**

As a matter of law, a claim for medical malpractice is not cognizable unless the physician or hospital owes the patient a duty of care. See *Rachlon v. Edmison*, 813 A.2d 862, 868 (Pa. Super. Ct. 2002). Whether such a duty exists is a question of law. See *Emerich v. Phila. Ctr. For Human Dev. Inc.*, 720 A.2d 1032, 1044 (Pa. 1998); *Cooper v. Frankford Hosp.*, 960 A.2d 134 (Pa. Super. Ct. 2008), app. denied, 970 A.2d 431 (Pa. 2009).

The Superior Court reiterated these principles in *Long v. Ostroff*, 854 A.2d 524 (Pa. Super. Ct. 2004), app. denied, 871 A.2d 192 (Pa. 2005), where Plaintiff sued Defendant-doctor for malpractice on the basis that the doctor was negligent in failing to disclose the adulterous relationship he was having with Plaintiff's wife during the course of treatment. Although Plaintiff's psychiatry expert opined that Defendant's actions deviated from the standard of care, upon Defendant's motion, the trial court found that Plaintiff failed to plead a claim entitling him to relief because a general practitioner's duty of care does not prohibit an extramarital affair with a patient's spouse, even if such conduct is unethical. Id. at 526-28.

The issues in *Long* were re-examined in *Thierfelder v. Wolfert*, 978 A.2d 361 (Pa. Super. Ct. 2009), rev'd, 52 A.3d 1251 (Pa. 2012). In *Thierfelder*, Plaintiffs, as husband and wife, filed a medical malpractice suit after the Plaintiff began a sexual relationship with the general practitioner treating her for anxiety, depression, and marital problems. 52 A.3d at 1253-54. The Superior Court reversed the trial court and found that "a patient *does* have a cause of action against a general practitioner rendering psychological care, when during the course of treatment the physician has a sexual relationship with the patient that causes the patient's emotional or psychological symptoms to worsen." 978 A.2d at 364-65 (emphasis added). However, in accordance with *Long*, this type of claim belongs only to the patient, not to the spouse of the patient. Id.

On appeal, the Supreme Court reversed, but noted that: (1) medical specialists may be held to a particularized standard of care for their area of specialty, and (2) mental health professionals do have a duty to avoid sexual contact with their patients. 52 A.3d at 1271. However, the Court declined to expand mental health professionals' specialized duties to general practitioners who provide mental health care based on the consideration of the five *Althaus* factors: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk involved and foreseeability of the harm incurred; (4) the consequences of imposing a duty on the actor; and (5) the overall public interest in the proposed solution. Id. at 1263.

With respect to the first factor, the Court acknowledged that the particularly vulnerable state of mental health patients has caused courts to recognize a specialized duty on the part of mental health professionals; however, the same concerns are not apparent when mental health treatment is incidental and rendered by a general practitioner. Id. at 1277. This factor, therefore—and the remaining factors—weighed against holding general practitioners to the same standard as mental health professionals, as general practitioners increasingly treat patients’ mental health issues because of familiarity, convenience, or insurance requirements, and this incidental treatment has social utility and value. Id. at 1285. The Court also found that to hold general practitioners to the same standards as mental health professionals would discourage relatively routine attention to patients’ mental and emotional health. Id. Accordingly, because the Court declined to impose a duty on general practitioners to avoid sexual contact with their patients, the Court determined that Defendant did not violate any duty of care when he engaged in sexual relations with Plaintiff-wife. Id. at 1279.

In Cooper v. Frankford Health Care Sys., 960 A.2d 134 (Pa. Super. Ct. 2008), app. denied, 970 A.2d 431 (Pa. 2009), Plaintiff brought suit against Frankford Hospital for the suicide death of her husband, a physician who practiced medicine at the hospital. Plaintiff’s husband had been suspected of abusing drugs, and he committed suicide after he was given a drug test at work. Id. at 137. Plaintiff claimed negligence in the way that her husband was confronted about his potential drug abuse, which led to his “foreseeable” suicide. Id. at 137-39. The Superior Court affirmed the trial court’s grant of the hospital’s preliminary objections, finding that Plaintiff failed to properly plead a cause of action due to failure to establish that the hospital owed a duty to protect Plaintiff’s husband from suicide. Id. The Superior Court stated, “generally, suicide has not been recognized as a legitimate basis for recovery in wrongful death cases...because suicide constitutes an independent intervening act so extraordinary as not to have been reasonably foreseeable by the original tortfeasor.” Id. at 147 (quoting McPeake v. William T. Cannon, Esq., P.C., 553 A.2d 439 (Pa. Super. Ct. 1989)).

In K.H. v. Kumar, 122 A.3d 1080 (Pa. Super. Ct. 2015), app. denied, 135 A.3d 586 (Pa. 2016), the Superior Court reversed the trial court’s decision to grant summary judgment in Defendants’ favor after the trial court found that neither the Child Protective Services Law (“CPSL”), 23 Pa.C.S. §§ 6301, *et seq.*, nor Pennsylvania common law created a duty on a physician to discover and report cases of possible child abuse. The minor plaintiff had asserted negligence claims against a number of treating physicians related to the failure to report Plaintiff’s abuse pursuant to the CPSL. Id. at 1085. In reversing, the Superior Court held that a generalized duty arises as soon as a plaintiff establishes a physician-patient relationship. Id. at 1097. However, whether or not Defendants’ failure to identify and report Plaintiff’s child abuse constituted a breach in the standard of care was a question for the jury. Id. at 1100. The Superior Court reasoned that because Plaintiff had presented expert testimony that the standard of care required Defendants to recognize and report Plaintiff’s child abuse, and that Defendants breached the standard of care, causing Plaintiff’s injury, Plaintiff had presented a *prima facie* case of medical negligence for the jury to evaluate. Id. at 1098-1112.

## **Privity**

## Duty of Health Care Providers to Non-Patients and Third Parties

In McCandless v. Edwards, 908 A.2d 900 (Pa. Super. Ct. 2006), app. denied, 923 A.2d 1174 (Pa. 2007), the Superior Court held that a healthcare provider did not owe a duty of care to a decedent who overdosed on methadone he bought that had been stolen from Defendant's facility. Decedent's argument was premised on the theory that Defendant owed a general duty of care to the public at large. Id. at 903. In reiterating that a plaintiff must demonstrate a specific duty owed to him, the Superior Court affirmed the trial court's finding that Defendant did not owe any duty to the decedent based on the following considerations:

(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.

Id. at 903-04, (citing F.D.P. ex. rel. S.M.P. v. Ferrara, 804 A.2d 1221, 1231 (Pa. Super. Ct. 2002)). The court further explained that, "in determining whether to create a duty of care, the most important factor to consider is social policy." Id. at 904 (citing Ferrara, 804 A.2d at 1231).

Applying the Ferrara factors, the Superior Court determined that no relationship existed between Defendant and Decedent, and that Defendant only had a cognizable duty of care to its patients. Id. The court reasoned that creating a duty of care between healthcare providers and the "public at large" might interfere with the treatment of patients, and thus, fail to serve the public interest. Id. Finally, the Superior Court held that the fact that Defendant took steps to regulate the dissemination of methadone in accordance with federal guidelines and "general principles of social responsibility," and that Defendant maintained internal guidelines governing the administration of medication in no way created a *de facto* duty of care to Decedent. Id.

In Matharu v. Muir, 29 A.3d 375 (Pa. Super. 2011), vacated and remanded, 73 A.3d 576 (Pa. 2013), the Superior Court again analyzed the Althaus factors, but held that physicians did owe a duty of care under the circumstances. In Matharu, Plaintiffs sued Defendants for failure to administer RhoGAM, which may prevent harm in future pregnancies, to Plaintiff during her early pregnancies. Id. at 378-80. Plaintiff treated with a new physician for a subsequent pregnancy, which resulted in a C-section and the death of Plaintiff's child. Id. at 380-81.

In determining whether Defendants owed a duty to Plaintiff related to the subsequent pregnancy, the court considered the Althaus factors and DiMarco v. Lynch Homes-Chester Cnty., Inc., 583 A.2d 422 (Pa. 1990), overruled in part by Seebold v. Prison Health Servs., 57 A.3d 1232 (Pa. 2012), in which the Pennsylvania Supreme Court concluded that a physician's duty encompassed third parties whose health could be threatened by contact with a diseased patient, thereby extending the physician's duty to those within the foreseeable orbit of the risk of harm. Id. at 386. The Matharu court concluded that the deceased child was in the class of persons whose health and life was likely to be threatened by Defendants' failure to administer RhoGAM, and it was reasonably foreseeable that the failure to administer RhoGAM could cause injury to future unborn children. Id. at 387. Thereafter, the Pennsylvania Supreme Court vacated and remanded the Superior Court's holding for reconsideration in light of the decision in Seebold v.

Prison Health Servs., 57 A.3d 1232 (Pa. 2012), *infra*, but the Superior Court affirmed its prior ruling as distinguishable from Seebold.

In Seebold, the Supreme Court held that healthcare providers did not breach any duty owed to Plaintiff correctional officer, who contracted MRSA after the providers learned that inmates at a prison were infected with the bacterial infection. The Court distinguished DiMarco, *supra*, Troxel v. A.I. duPont Inst., 675 A.2d 314 (Pa. Super. Ct. 1996), and Emerich v. Philadelphia Ctr. For Human. Dev., Inc., 720 A.2d 1032 (Pa. 1998), *infra*, noting that: (1) those cases delineated a duty to advise a patient, not identify, seek out, and provide information to third-party non-patients; (2) there is a difference between advising a patient and disclosing protected medical information to a third party; and (3) unlike Emerich, there was no threat of imminent violence at issue in the present action. Id. at 1243-44.

The Court determined that limiting the existence of a duty to actions within the context of the physician-patient relationship is consistent with Section 324A of the Second Restatement, upon which DiMarco is based, and which provides that one who renders services for the protection of others is subject to liability for harm “resulting from his failure to exercise reasonable care to protect his undertaking.” Id. at 1244-45. For a physician, the original undertaking is the entry into the physician-patient relationship for treatment purposes. Id.

The Court also explained that multiple considerations in the prison context may impede a physician’s ability to provide third-party warnings, such as physician-patient confidentiality, the burden of identifying individuals at risk for transmission, and maintenance of prison order and security. Id. at 1247. The Court concluded Plaintiff’s request for the imposition of a new, affirmative common law duty on the part of a physician to undertake third-party interventions required a broader policy assessment, and the trial court did not err in applying the default approach of declining to impose a new affirmative duty under the circumstances. Id. at 1250.

In Emerich, *supra*, a case of first impression, the Pennsylvania Supreme Court held that under certain limited circumstances, mental health professionals have a duty to warn third parties of serious bodily threats made by their patients. In Emerich, a third-party was shot by a psychiatrist’s patient after the patient made a threat against the third-party, and the psychiatrist warned the third-party to stay away from the patient’s apartment. Id. at 1035. The court carefully reviewed the parameters of the Mental Health Procedures Act, Pa. Cons. Stat. § 7101 *et seq.*, and policy issues related to mental health care. Id. at 1037-43. The Court set forth the limitations relevant to the duty to warn:

In summary, we find that in Pennsylvania, based upon the special relationship between a mental health professional and his patient, when the patient has communicated to the professional a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party, and when the professional determines, or should determine under the standards of the mental health profession, that his patient presents a serious danger of violence to the third party, then the professional bears a duty to exercise reasonable care to protect by warning the third party against such danger.

Id. at 1043. The Court concluded that the requisite psychiatrist-patient relationship existed and that the psychiatrist knew or should have known that the patient was a serious threat to the third-party because of a specific threat to kill, thereby creating a duty to warn the non-patient. Id. at 1044-45. The court concluded that the psychiatrist discharged his duty by warning the non-patient third-party to stay away from an apartment after the patient told the psychiatrist of a specific intent to kill the third party when she returned to the apartment to pick up her clothes. Id.

In Ferrara, supra, the Superior Court affirmed the trial court's order granting Defendant's preliminary objections for failure to state a cause of action. This matter involved a resident of a group home with a long standing history of sexually deviant behavior who molested a young girl while visiting his family. Id. at 1223-25. The girl's family sued the home, alleging that it breached a duty owed to the girl pursuant to the standards established under the Mental Health and Mental Retardation Act of 1966 ("MHMR Act"). Id. The court held that Defendant owed a duty to the resident, but that mental health professionals do not owe a duty to protect third parties except when there are specific threats directed at an actual person. Id. at 1229. Accordingly, the appellate court affirmed the trial court's order granting Defendant's preliminary objections. Id. at 1234.

The issue of privity has presented itself to the Federal Courts as well.

**In Allen v. Ellis, 2017 U.S. Dist. LEXIS 120202 (E.D. Pa. July 31, 2017), the court denied a defendant's motion to dismiss claims related to a former inmate's allegations that a corrections officer was negligent in failing to protect him from a violent attack by another inmate. The defendant officer relied on Emerich, supra, to argue that he had no duty to protect Plaintiff. The court stated that Emerich placed a duty on a mental health professional to warn a third party where he knows that his patient poses a serious danger of violence to that third party, but the court differentiated this case, and stated that Plaintiff was not a "third party" to the defendant, and was instead directly under defendant's care. Id. at \*6-7.**

In Collins v. Christie, No. 06-4702, 2007 U.S. Dist. LEXIS 61579 (E.D. Pa. Aug. 22, 2007), Plaintiff, a nursing assistant, was arrested after an elderly patient falsely accused him of abuse. After the accusation was made, a doctor misread the patient's x-rays as showing newly fractured ribs, when in fact, the films revealed old, healed fractures. Id. at \*4. As hospital protocol required, the doctor reported his findings to the police who arrested Plaintiff. Id. Plaintiff sued the hospital and the doctor for breach of a "[d]uty of due care to provide true and accurate information and diagnosis to the police." Id. at \*18. The court held that the social utility in physicians reporting elder abuse outweighs the foreseeable harm of an erroneous report, and therefore, the hospital and doctor did not owe a duty of care to Plaintiff with respect to reporting the abuse to the police. Id. at \*26.

In Ward v. Most Health Servs., Inc., No. 06-4646, 2008 U.S. Dist. LEXIS 61573 (E.D. Pa. Aug. 8, 2008), Plaintiff's husband was employed by a company that provided its employees with free physicals due to the possibility of occupational exposure to hazardous materials. Plaintiff's husband received a physical and a chest x-ray, which Defendant physician interpreted as normal. Id. at \*4. A year later, Plaintiff's husband died from lung cancer, and Plaintiff brought

suit. Id. at \*5. In response to Defendants' summary judgment motion, the court determined that a physician-patient relationship existed such that the interpreting physician owed a duty to Plaintiff's husband based on the five Althaus factors, *supra*, and the reasoning set forth in Doyle v. South Pittsburgh Water Co., 199 A.2d 875, 878 (Pa. 1964):

[w]hen a physician treats a patient who has been exposed to or who has contracted a communicable and/or contagious disease, it is imperative that the physician give his or her patient the proper advice about preventing the spread of the disease; that the duty of a physician in such circumstances extends to those 'within the foreseeable orbit of risk of harm; and that [i]f a third person is in that class of persons whose health is likely to be threatened by the patient, and if erroneous advice is given to that patient to the ultimate detriment of the third person, the third person has a cause of action against the physician.

Id. at \*31-32 (internal quotations omitted).

In Walters v. UPMC Presbyterian Shadyside, 144 A.3d 104 (Pa. Super. Ct. 2016), the Superior Court held that Plaintiffs made a *prima facie* showing of a duty on the part of defendant hospital and medical staffing agency to report an employee technologist's criminal behavior to law enforcement. The technologist was fired for diverting controlled substances, substituting water in patients' syringes, and for testing positive for opiates, but the hospital did not report the technologist to the DEA as required by federal law. Id. at 108-09. After the incident, the technologist obtained a license and employment in another state, where he continued to engage in the same pattern or behavior, and a patient at the second hospital became infected with, and died from, the technologist's strain of Hepatitis C. Id. at 109.

Defendants, relying in part on Seebold, argued that there was no special relationship that created a duty of care between them and a patient who had not been treated at their facility, and that this type of duty could subject hospitals to limitless liability. Id. at 115-116. The Superior Court disagreed, applying the Althaus factors to determine that Plaintiffs pled sufficient facts to support an imposition of a duty upon Defendants. Id. at 119. It was highly foreseeable that, if left unchecked, the technologist would seek new employment with access to drugs to continue his practice of substitution. Id. at 114. Also, the court found that Defendants had a special relationship with the technologist that created a duty to report his behavior to the DEA or other enforcement agencies. Id. at 119.

### **Contractual Liability of a Doctor to the Patient**

In Toney v. Chester Cnty. Hosp., 36 A.3d 83 (Pa. 2011), the Pennsylvania Supreme Court held that a doctor-patient relationship may involve an implied duty to care for the plaintiff's emotional well-being. In Toney, Plaintiff brought a negligent infliction of emotional distress claim after Defendants mistakenly interpreted a prenatal ultrasound as normal. Id. at 101. The Court examined the issue of whether an NIED claim could be sustained based on a pre-existing doctor-patient relationship, and found that the Defendants did have an implied duty to care for Plaintiff's emotional well-being. Id. at 108-10. While trial courts must consider whether an implied duty applies on a case-by-case basis, the Court did explain that if this implied duty

were breached, there is the potential for emotional distress resulting in physical harm. *Id.* at 124-25.

In *Freedman v. Fisher*, 2014 U.S. Dist. LEXIS 139226 (E.D. Pa. Oct. 1, 2014), the United States District Court for the Eastern District of Pennsylvania distinguished the plaintiff's claim for NIED from that of the plaintiff's in *Toney*. Plaintiff alleged that doctors failed to properly diagnose and treat her husband for a dissecting aorta, and that she witnessed her husband's pain and suffering immediately preceding his death. *Id.* at \*2-4. The court granted the defendant's motion for summary judgment, reasoning that the *Toney* only applied to a subset of cases involving preexisting physician-patient relationships. *Id.* at \*9. Since Plaintiff made no showing that she had any pre-existing relationship with Defendants, or that any relationship developed during the 11 hours before her husband died, Plaintiff failed to establish that her husband's physicians owed her an implied duty of care. *Id.* at \*10.

### **Standard of Care – Medical Malpractice**

#### **The Plaintiff Must Prove that the Defendant Breached the Standard of Care. In Most Cases, This Requires Expert Testimony.**

#### **Expert Witness Requirement**

It is well settled law in Pennsylvania that in order to establish a *prima facie* case of negligence, a plaintiff must also prove that the injuries were proximately caused by negligent conduct of the alleged tortfeasor. See *Flickinger v. Ritsky*, 305 A.2d 40 (Pa. 1973). Thus, liability may not be imposed merely upon proof of negligent conduct by the tortfeasor, but, rather, hinges upon a plaintiff's proof of a causal nexus between the negligent conduct and the plaintiff's asserted injury. See *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978); see also *Maurer v. Trs. of the Univ. of Pa.*, 614 A.2d 754 (Pa. Super. Ct. 1992), *app. granted*, 626 A.2d 1158 (Pa. 1993). In most medical malpractice cases, expert testimony is required to establish both negligence and causation. In certain circumstances, however, the doctrine of *res ipsa loquitur* applies and no expert testimony is needed. Recent cases demonstrating both the general rule and the exception are summarized below.

#### **General Rule – Expert Testimony Required**

In *Rose v. Annabi*, 934 A.2d 743 (Pa. Super. Ct. 2007) , the Superior Court arrived at two holdings: (1) for a settled co-defendant to be included on a verdict sheet, there must be a qualified expert witness to testify as to the alleged breach of the standard of care of the settled co-defendant; and (2) for a co-defendant to be entitled to a comparative negligence jury charge, and have the plaintiff's decedent's name included on the verdict sheet for an apportionment of liability, there must be expert testimony indicating that some act of plaintiff's decedent substantially caused his death.

In *Rose*, Plaintiff filed a professional negligence action against multiple defendants stemming from the alleged delayed diagnosis of cancer. *Id.* at 745. All the defendants settled, with the exception of one physician, who insisted that the settling defendants' names appear on the verdict slip, and that a comparative negligence jury charge should be given for the jury to

consider apportionment between the parties. *Id.* The Superior Court affirmed the trial court’s decision to deny the physician’s requests, reasoning that “in the absence of any qualified witness to testify to the standard of care of [co-defendants], there was insufficient evidence to include [co-defendants] on the verdict sheet.” *Id.* at 746. The court further reasoned that excluding Plaintiff’s decedent from the verdict sheet for an apportionment of liability was proper because the physician failed to present expert testimony to causally relate Plaintiff’s conduct to the delay in colon cancer diagnosis. *Id.*

### **What is Enough Proof?**

In *Faherty v. Gracias*, 874 A.2d 1239 (Pa. Super. Ct. 2005), a defense verdict was reached in a case where the patient died after a sponge left in his body became infected. On appeal, the Superior Court affirmed the trial court’s decision to deny Plaintiff’s motion for a directed verdict, finding that there was evidence that it was not imperative to check under the damaged liver or remove the sponges, given the goal of that particular surgical procedure (which did not involve definitive abdomen closure). *Id.* at 1247. Consequently, the jury could rightfully conclude that Defendants were not negligent. *Id.* at 1247-1248. The court further held that Plaintiff’s argument with respect to her requested *res ipsa loquitur* charge had been waived for failure to object to the jury charge. *Id.* at 1248. *But see Fessenden v. Robert Packer Hosp.*, 97 A.3d 1225 (Pa. Super. 2014); *app. denied*, 113 A.3d 280 (Pa. 2015), *infra*.

In *Carroll v. Avallone*, 939 A.2d 872 (Pa. 2007), Plaintiff brought suit against his wife’s physician, and a jury returned a verdict against the doctor. At trial, Plaintiff presented expert testimony on economic losses in an amount up to \$1,500,000, but on cross-examination, Plaintiff’s expert admitted that his estimate would be reduced to zero if the decedent remained unemployed. *Id.* at 874. Defendants did not present expert testimony to refute Plaintiff’s expert testimony on economic loss, and the jury awarded Plaintiff \$29,207, which was reduced based upon decedent’s contributory negligence. *Id.* at 873.

On appeal, the Superior Court held that the jury’s award of damages did not bear a reasonable relationship to the evidence because Plaintiff’s economic expert’s testimony was uncontroverted. *Id.* at 874. However, the Pennsylvania Supreme Court reversed, holding that the issue of the amount of economic loss was for the jury to decide. *Id.* at 875. The Court reasoned that “[t]he evidence here was not uncontroverted, and the expert’s opinion did not amount to ‘proven damages.’ [Counsel for defendant] challenged the underlying facts supporting the opinion of loss posed by [plaintiff’s] expert; it was admitted by the expert that if decedent never returned to the workforce, her net economic loss would be zero.” *Id.* at 875. The Court noted that each scenario presented by Plaintiff’s expert was based upon pure speculation. *Id.* Accordingly, the jury was open to consider Plaintiff’s expert’s direct testimony and any admissions on cross-examination in its assessment of damages. *Id.*

In *Catlin v. Hamburg*, 56 A.3d 914 (Pa. Super. Ct. 2012), *app. denied*, 74 A.3d 124 (Pa. 2013), the Superior Court reversed the trial court’s decision to award summary judgment to defendants after Plaintiff’s expert—who cited no supporting literature—was precluded from testifying as to standard of care and causation. Although the trial court found the opinion entirely speculative, the Superior Court held that an expert’s failure to cite to any literature or treatise does not render his opinion inadmissible, as expert testimony is admissible when, taken in its

entirety, it expresses a reasonable certainty that the incident was a substantial factor in bringing about the injury. Id. at 921 (citing Hreha v. Benscoter, 554 A.2d 525, 527 (Pa. Super. 1989)). The court stated that “experience in a medical field is sufficient to support an articulation of the relevant standard of care, which is first and foremost, what is reasonable under the circumstances.” Id. (citing Collins v. Hand, 431 Pa. 378 (Pa. 1968)). Any qualification goes to the weight of an expert’s opinion, not admissibility. Id.

### **Board Certification and Standard of Care for Provider**

Pennsylvania courts have addressed the issue of board certification and competency to conform to the applicable standard of care and have held that simply because a physician lacks board certification does not mean that said physician lacks ordinary competence to discharge his duties.

In Hawkey v. Peirsel, 869 A.2d 983 (Pa. Super. Ct. 2005), the Superior Court affirmed the trial court’s decision to preclude Plaintiff from introducing evidence regarding Defendant’s board certification status. The court explained that the pertinent issues in the case related to the applicable standard of care, not Defendant’s qualifications, as “board certification is not a legal requirement to practice medicine or be licensed in Pennsylvania.” Id. at 989; see also Batman v. Sedlovsky, 59 Pa. D & C. 4<sup>th</sup> 449, 459 (Pa. C.P. 2002) (while physicians who attain board certification might be more skilled and/or knowledgeable, “the level of care provided to a patient may be equally and competently performed by a non-board certified physician”). The court ultimately concluded that Plaintiff failed to provide precedent to support that board certification is probative of a physician’s compliance with the standard of care. Hawkey, 869 at 989.

The Philadelphia Court of Common Pleas provided a similar analysis in Becker v. Penrod, 15 Phila. 347 (Pa. C.P. 1987), aff’d, 536 A.2d 819 (Pa. Super. Ct. 1987). In Becker, Plaintiff sought to admit Defendant’s unsuccessful attempts at becoming board certified as evidence that the physician failed to conform to the requisite standard of care in treating the patient. Id. at 353. The trial court held that lack of board certification did not make the fact at issue (whether Defendant had taken the requisite steps to keep informed of medicine updates) more or less probable. Id. at 353-354. The court reasoned that “the absence of certification by a professional association does not render a physician legally unqualified to practice a specialty.” Id. at 350. The Court stated:

A danger would arise if we were to hold that the inability to achieve board certification was admissible as substantive evidence on the issue of whether a physician is negligent in a particular case. Such a ruling would create a chilling effect by discouraging physicians from seeking the benefits derived from certification, for fear that failed attempts may be used against them as evidence of malpractice.

Id. at 353

### **Doctrine of Res Ipsa Loquitur**

In Quinby v. Plumbsteadville Family Practice, Inc., 907 A.2d 1061 (Pa. 2006), the Pennsylvania Supreme Court upheld the Superior Court’s finding that Plaintiff was entitled to

JNOV based on its finding that a charge of *res ipsa loquitur* was proper where a quadriplegic died after falling from an operating table. The Court cited the Restatement (Second) of Torts § 328D(1) as the proper standard for determining whether *res ipsa* is applicable to the facts of a particular case, which provides in pertinent part:

- (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
  - (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
  - (b) other reasonable causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
  - (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff . . .

Id. at 1068.

The Court held that all three elements were established because a quadriplegic could not fall off an examination table in the absence of negligence; there was no explanation for Decedent's fall beyond defendants' negligence and; the indicated negligence was within the scope of Defendants' duty to the decedent. Id. at 1073. Applying *res ipsa loquitur*, the Court determined that JNOV should have been granted in Plaintiff's favor because "no two reasonable minds could disagree" that Decedent could have fallen from the operating table in the absence of Defendants' negligence. Id. at 1073-1074. However, a fact question remained as to whether the fall had caused Decedent's death, so the Court remanded the case for a new trial on the wrongful death claim and on the issues of damages in the survival action. Id.

In MacNutt v. Temple Univ. Hosp., 932 A.2d 980 (Pa. Super. Ct. 2007), app. denied, 940 A.2d 365 (Pa. 2007), in a case involving a surgical chemical burn, the Superior Court upheld the trial court's decision to preclude Plaintiff from presenting his case based on a *res ipsa* theory in light of its finding that Plaintiff produced adequate evidence to support a cause of action based on a standard theory of negligence. On appeal to the Superior Court, Plaintiff argued, *inter alia*, that the trial court erred by precluding his *res ipsa* theory given that his expert opined as to how the burn "could" have occurred, but did not offer sufficient testimony to constitute direct evidence of Defendants' negligence. Id. at 986. The Superior Court affirmed the trial court's decision to preclude Plaintiff from proceeding on a *res ipsa* theory because the nature of Plaintiff's injury was itself in dispute (and could have occurred without negligence), and Plaintiff's counsel elicited sufficient testimony from his expert witness (i.e. that Plaintiff's injury was caused by the pooling of betadine solution during surgery) to constitute an adequate cause of action for malpractice based upon a standard theory of negligence. Id. at 984. Therefore, the case was not, in reality, a *res ipsa* case, and the trial court properly limited Plaintiff to proceeding on a conventional negligence theory. Id.

In Asbury v. Mercy Fitzgerald Hosp., 13 Pa. D. & C.5th 225 (Pa. C.P. 2010), aff'd, 23 A.3d 1078 (Pa. Super. Ct. 2011), the court held that plaintiff was permitted to proceed under a *res ipsa* theory. Defendants argued that a *res ipsa* instruction was inappropriate because Plaintiff was required, pursuant to Section 328D(1)(b), to show that other causes of Plaintiff's injury were impossible. Id. at 230. The court disagreed, holding that any purported failure by Plaintiff to show that other causes of injury were impossible did not prevent Plaintiff from carrying her burden to eliminate, as required by Section 328D(1)(b), other possible causes of her injury. Id. at 256. More specifically, to warrant a *res ipsa* instruction, it was sufficient for Plaintiff to show that Defendants' alleged negligence was more likely than not the probable explanation for her injury. Id. at 246-247. The doctrine of *res ipsa*, the court reasoned, would then allow for the jury to resolve how and by whom Plaintiff's alleged nerve injury had been sustained. Id. at 254.

In Vazquez v. CHS Professional Practice, P.C., 39 A.3d 395 (Pa. Super. Ct. 2012), the patient appealed the trial court's decision to enter summary judgment in the defendant's favor due to failure to offer expert medical testimony. The patient sought to rely on *res ipsa*, arguing that expert testimony was not required to establish negligent removal of a pain pump catheter, resulting in a catheter fragment remaining in the patient's shoulder. Id. at 396. The court held that (a) the circumstances of the patient's injury "were beyond the comprehension of the average layperson, (b) the injury could occur in the absence of negligence," and (c) the patient "had not eliminated other possible causes of her injury." Id. Thus, because Plaintiff could not rely on the doctrine of *res ipsa loquitur*, the Superior Court affirmed the decision to grant the defendant summary judgment. Id. at 401.

In Fessenden v. Robert Packer Hosp., 97 A.3d 1225 (Pa. Super. Ct. 2014), app. denied, 113 A.3d 280 (Pa. 2015), Plaintiff discovered that a sponge had been left inside his abdomen after a surgery. Plaintiffs averred that expert testimony was unnecessary pursuant to the doctrine of *res ipsa loquitur*. Id. at 1228. The trial court granted defendants' motion for summary judgment and Plaintiff appealed. Id. at 1228-1229.

The Superior Court held that the trial court erred in entering summary judgment because Plaintiffs sufficiently demonstrated the applicability of *res ipsa* because Plaintiffs had sufficiently demonstrated that surgical sponges were not left in a patient's abdomen absent negligence, and there was no explanation for the retained sponge other than negligence. Id. at 1232. On the latter issue, the court explained that "section 328D does not require that a plaintiff present direct evidence that the defendant's conduct was the proximate cause of the plaintiff's injury." Id. at 1232. Instead, the plaintiff is required to make the negligence "point" to the defendant, establishing by a preponderance of the evidence that it was the defendant, and not a third party, who injured the plaintiff. Id. In cases where it is equally as probable that a third party injured the plaintiff, then the second element of the *res ipsa loquitur* doctrine has not been satisfied. Id. But, in instances where a plaintiff has demonstrated that the injury was caused by the negligence of the defendant, a "plaintiff is not required to exclude all other possible conclusions beyond a reasonable doubt, and it is enough that he makes out a case from which the jury may reasonably conclude that the negligence was, more probably than not, that of the defendant." Id. (citing Restatement (Second) of Torts § 328D, cmt. F (1965)).

In Vitez v. Marmaxx Operating Corp., 2016 Pa. Super. Unpub. LEXIS 1229 (Pa. Super. Ct. 2016), Plaintiff alleged that automatic doors at the entrance to a store closed prematurely, injuring his right hand and affecting his ability to earn a living as a violinist. Because Plaintiff alleged that he was told by the manager that the store was having problems with the door, Plaintiff requested a *res ipsa loquitur* jury instruction, given that he believed that his injury was caused by “a casualty of sort that normally would not have occurred in the absence of the defendant’s negligence.” Id. at \*18-19 (citing William L. Prosser, Law of Torts §§ 39, 40 (4th ed. 1971)). However, during his deposition, the store manager stated that the doors were working properly before and after the incident, and whether the door injured Plaintiff was contested throughout the trial. Id. at \*20. Given that there were no eye witnesses, and that the manager testified that the doors were working properly, the court reiterated the purpose of the *res ipsa loquitur* charge, and held that such an instruction would be improper. Id. at \*19-20.

### **Scientific Evidence – The Frye and Daubert Standards**

Testimony by experts is governed by Rule 702 of the Pennsylvania Rules of Evidence. PA. R. EVID. 702. Rule 702 follows the standard announced in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), which requires scientific evidence to have “general acceptance” in the relevant scientific community. Frye, rather than Daubert, is now the test applied in Pennsylvania state court cases. Conversely, Federal Rule of Evidence 702 follows the modified Daubert standard. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

In Ellison v. United States, 753 F. Supp. 2d 468 (E.D. Pa. 2010), the federal court followed Daubert, and found the testimony of two expert witnesses reliable in a suit where a patient suffered a stroke after experiencing hypotension during an oral surgery. Although the standard of care expert did not know whether other surgeons would disagree with the standard he proposed, he stated: “I *think* it’s the correct way and that’s *my* opinion,” and he did not rely on medical literature, the court found that the expert had a reliable basis for setting forth the procedure as the general standard of care. Id. at 480-83. The court also found the testimony reliable despite a contradicting text, as the expert offered a reasonable explanation for his testimony’s divergence, and indirect references corroborated his testimony. Id. at 483-484.

The court also found the causation expert reliable, noting that the fact that there is no test to definitively determine the cause of a stroke did not make the expert’s testimony unreliable. Id. at 487-488. To determine the cause of the stroke, the expert performed a differential diagnosis, which the Third Circuit had previously held as generally reliable. Id. at 488. The court agreed with the expert that it is not practical to perform every available test on a patient and that, once a doctor determines a cause of a stroke, the testimony about the cause is not unreliable simply because the doctor did not perform more tests in search of another cause. Id. at 488-489. Additionally, the expert did not have to determine which episode of hypotension caused the clot that caused the stroke, because a *prima facie* case of causation only requires a showing that a doctor’s negligence increased the risk of harm and the patient actually suffered harm. Id. at 490-491. Finally, the court admitted the expert’s testimony because the expert stated that, even if the stroke had a vascular, instead of a cardioembolic, cause, his opinions on causation would not have changed. Id. at 490.

Other Daubert cases in the federal courts within the Third Circuit include Sampathachar v. Fed. Kemper Life Ins. Co., 186 Fed. App'x 227 (3d Cir. 2006), and Montgomery v. Mitsubishi Motors Corp., No. 04-3234, 2006 U.S. Dist. LEXIS 24433 (E.D. Pa. Apr. 27, 2006).

In Sampathachar, Plaintiff brought claims against his wife's life insurance carrier for the insurer's refusal to pay on a policy following the Plaintiff's wife's death. At issue was whether the insured had actually died. 186 Fed. App'x at 229. The court denied Defendant's motion to preclude Plaintiff's forensic expert under F.R.E. 702, and the Third Circuit affirmed because the court had conducted a proper Daubert analysis and determined that "the reasoning...underlying the testimony [was] scientifically valid and [could] properly be applied to the facts at issue." Id.

In Montgomery, Plaintiffs brought a products liability suit after their son was killed in an auto accident. 2006 U.S. Dist. LEXIS 24433, at \*3. Plaintiff's prepared a report regarding Plaintiff's wage claim. Id. at \*4-5. In response, Defendant objected on various grounds, including that the expert's opinions regarding the level of education, employment, and family choices Decedent would have obtained were unreliable, speculative, and unsupported by the record, especially because the expert had not consulted with any members of Decedent's family prior to preparing his reports. Id. at \*12-13. The court conducted a Daubert analysis, and held that three separate factors must be considered in determining whether proffered testimony can properly be admitted: qualifications; reliability; and fit. Id. at \*8.

The first aspect of a Daubert analysis, whether the witness is qualified as an expert, requires a witness to have "specialized" knowledge about the area of the proposed testimony. Id. at \*9 (quoting Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000)). Given the expert's professional background and qualifications, the court found that the expert was qualified to testify as an expert. Id. With respect to reliability, the court explained that "the expert's opinions 'must be based on 'methods and procedures of science,' rather than on 'subjective belief or unsupported speculation.'" Id. at \*10. (quoting In re Paoli R.R. Yard Litig., 35 F.3d 717, 743 (3d Cir. 1994)). The court further explained that, in determining whether the expert's opinions meet the reliability requirement, courts are advised to look at a series of factors, including:

"(1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put."

Id. at \*10-11 (quoting Paoli, 35 F.3d at 742). Considering these factors, the court concluded that because the evidence upon which the expert's testimony was based would not be fully presented until trial, it would be premature to exclude his testimony on the grounds that it was unreliable. Id. at \*20-21; see also Keller v. Feasterville Family Health Care Ctr., 557 F. Supp. 2d 671, 678 (E.D. Pa. 2008) (expert's opinion on when decedent diagnosed with Alzheimer's would have stopped working, and other issues related to his mental and physical decline, was admissible because the process used in formulating and applying his opinion was reliable and was stated to a

reasonable degree of medical certainty); Meadows v. Anchor Longwall & Rebuild, Inc., No. 02-2062, 2007 U.S. Dist. Lexis 32764 (W.D. Pa. May 3, 2007), aff'd, 306 Fed. Appx. 781 (3d Cir. 2009) (granting Daubert motion because challenged expert's hypothesis was not supported by his own testing and was based on assumptions unfounded in the record facts); Gannon v. United States, 571 F. Supp. 2d 615 (E.D. Pa. 2007), aff'd, 292 Fed. Appx. 170 (3d Cir. 2008) (denying Daubert motion but finding Plaintiff failed to prove causation); Shannon v. Hobart, No. 09-5220, 2011 U.S. Dist. LEXIS 12312 (E.D. Pa. Feb. 8, 2011) (expert's conclusions that are not based on reliable methodology are inadmissible.)

In Amadio v. Glenn, 2011 U.S. Dist. LEXIS 9549, \*1-2 (E.D. Pa. Feb. 1, 2011), a case involving an automobile accident, Defendants sought to preclude Plaintiff's expert because the expert: (1) did not possess the requisite requirements to qualify as an expert with respect to determining whether plaintiff suffered a traumatic brain injury; and (2) relied on unsound methodology, resulting in an unreliable opinion. The court held that the expert was qualified to offer an expert opinion regarding a traumatic brain injury based upon a review of his curriculum vitae, which demonstrated his sufficient formal qualifications as well as his specific expertise in neurology and brain injury. Id. at \*2-23. Further, the expert's methodology, which involved review of other physicians' examinations of Plaintiff, his own examination, and a review of Plaintiff's medical records, was a reliable means of forming an expert opinion. Id. at \*21. The court cited Qeisi v. Patel, 2007 U.S. Dist. LEXIS 9895 at \*13 (E.D. Pa. Feb. 9, 2007), for the proposition that an expert may arrive at an opinion by noting the symptoms a patient exhibits, and making an evaluation based upon those symptoms. Id. at \*20-21.

Conversely, in Maldonado v. Walmart Store #2141, No. 08-3458, 2011 WL 1790840 (E.D. Pa. May 10, 2011), in a products liability case involving a decedent who fell into a pool purchased at Defendant's store, the court excluded the testimony of two witnesses under Daubert because of their insufficient methodology and "fit." The court precluded the testimony of an aquatics expert regarding how the decedent may have entered the pool and sustained his injuries because the opinions were arrived at using insufficient methodology. Id. at \*10-11. The court determined that this expert's opinions could not withstand Daubert scrutiny because they consisted of unsupported speculation and conjecture that was not derived from any testable hypotheses. Id. at \*11. The second expert witness, a purported "drowning prevention issues" specialist, was qualified based upon her experience, but the court nonetheless barred her testimony because of her failure to review any evidence in the case when forming her opinions. Id. at \*12-13. For evidence to be relevant under Rule 702, it must help the trier of fact to understand the evidence; however, because the second expert failed to review any facts or data in the case before forming her opinions, the court found that her testimony failed to meet this requirement. Id. at \*13.

Similarly, the court excluded expert testimony in Sterling v. Redevelopment Authority of the City of Philadelphia, 836 F. Supp.2d 251 (E.D. Pa. 2011), because of its improper basis. Plaintiff sought to introduce expert testimony regarding economic loss stemming from a breach of contract, but the court excluded this testimony because the expert's calculations were based upon several assumptions and projected revenue estimates provided by Plaintiff. Id. at 272. Because Plaintiff failed to adduce any evidence to support his estimates or the assumptions upon which the estimates were based, and the expert did not independently investigate the

reasonableness of these figures, the court concluded that the figures were based upon nothing more than speculation. Id. Consequently, plaintiff's expert was precluded from testifying pursuant to Rule 702. Id.

Pennsylvania state court cases applying Pennsylvania Rule of Evidence 702 and the Frye test are discussed below.

In Grady v. Frito Lay, 789 A.2d 735 (Pa. Super. Ct. 2001), rev'd, 576 Pa. 546 (Pa. 2003), Plaintiffs sued a food manufacturer, claiming that the husband-Plaintiff had been injured when he ate the company's corn chips. After the manufacturer moved to Plaintiffs' experts' testimony based on Frye, the trial court held that the experts were not qualified to render causation opinions, and the expert's methodology constitute "junk science." Id. at 553. The Superior Court reversed, and the case was appealed to the Supreme Court to evaluate the admissibility of the testimony of Plaintiffs' chemical engineering expert. Id. at 554-555.

The Supreme Court stated that PA. R. EVID. 702, which incorporates the Frye test, is the applicable rule controlling admissibility of expert testimony. Id. at 555. The Court also explicitly held Frye, as opposed to Daubert, applies in Pennsylvania. Id. at 557. The Court noted that proper application of Frye is important and spelled out the following elements of proper application: (1) the proponent of expert evidence bears the burden of establishing all of the elements for its admission under PA. R. EVID. 702, including satisfaction of the Frye rule; (2) Frye "applies to an expert's methods, not his conclusions," and the proponent of the evidence must prove that the methodology is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to; (3) the Frye test is only one of several criteria under Rule 702. Id. at 558.

The trial court must separately consider and decide whether the offered expert is qualified to render the offered testimony, and the standard of review applicable on appeal to a trial court's determination made under Frye is abuse of discretion; the appellate court is not to consider all the evidence and reach its own conclusion. Id. at 559. Applying these principles, the Supreme Court concluded that the Superior Court improperly substituted its own judgment. Id. The Supreme Court applied the proper standard of review itself, and in so doing, held that the expert's methodology "misses the mark," because, while the testing methods used were generally accepted for certain purposes, they were "not also necessarily a generally accepted method that scientists in the relevant field (or fields) use for reaching a conclusion as to whether Doritos remain too hard and too sharp as they are chewed and swallowed to be eaten safely." Id. at 560-561. The Court found that Plaintiffs failed to prove that the expert's methodology was generally accepted "as a means for arriving at such a conclusion." Id. at 561. Based on this finding, the Court concluded that the trial court did not abuse its discretion in precluding the expert's testimony, and reversed the Superior Court's decision. Id.

In Trach v. Fellin, 817 A.2d 1102 (Pa. Super. Ct. 2003), app. denied, 847 A.2d 1288 (Pa. 2004), the Superior Court revisited the issue of when the admissibility of evidence is subject to a Frye analysis. The court discussed and criticized recent panel decisions of the court and disagreed with past statements to the effect that Frye applies "every time science enters the courtroom." Id. at 1109. The court stated emphatically, to the contrary, that "Frye only applies

when a party seeks to introduce novel scientific evidence.” Id. Moreover, Frye applies only to determine if the relevant scientific community has generally accepted the principles and methodology an expert employs, not the conclusions an expert reaches. Id. at 1112. Under that analysis, only “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” Id. at 1118. In reaching its decision, the court relied, in part, on the dissenting opinion in Blum, 764 A.2d 1 (Pa. 2000), in which Justice Cappy criticized McKenzie v. Westinghouse, 674 A.2d 1167 (Pa. Commw. Ct. 1996), which held that the expert’s conclusion, as well as the methodology, must be generally accepted. Id. at 1112. The court further noted that the use of extrapolation is appropriate where it would be unethical to perform the sorts of clinical trials that would yield definitive results, but it was for the jury to decide, having been made aware of the fallibility of extrapolation through cross-examination of the expert, whether the expert’s testimony was credible. Id. at 1118-1119.

In, In re Denture Adhesive Cream Litig., 2015 Pa. Super. Unpub. LEXIS 4126 (Pa. Super. Ct. Nov. 12, 2015), the Superior Court affirmed trial court’s exclusion of Plaintiffs’ causation experts under Frye and resulting grant of summary judgment in Defendants’ favor. Plaintiffs had alleged that denture adhesive creams manufactured by P&G caused them to develop an irreversible neurologic condition. Id. at \*1. The court found that, under Frye, the evidence proffered by Plaintiffs did not apply accepted scientific methodology in a conventional fashion. Id. at \*24. In rendering its decision, the court made clear that a motion to exclude expert testimony as inadmissible under PA. R. EVID. 702 or 703, requires under PA. R.C.P. 207.1:

- (i) the name and credentials of the expert witness whose testimony is sought to be excluded,
- (ii) a summary of the expected testimony of the expert witness, specifying with particularity that portion of the testimony of the witness which the moving party seeks to exclude,
- (iii) the basis, set forth with specificity, for excluding the evidence,
- (iv) the evidence upon which the moving party relies, and
- (v) copies of all relevant curriculum vitae and expert reports.

Id. at \*8-9. The court set forth a two-step inquiry: (1) determine whether the evidence is “novel scientific evidence,” and (2) determine whether the expert’s methodology “has general acceptance in the relevant scientific community.” Id. at \*13. Here, the experts’ studies were not based upon generally accepted methodologies, and they failed to opine as to a causal link between the cream and the neurologic condition. Id. at \*36-37.

In Singleton v. Wyeth, Inc., 2012 Pa. Super. LEXIS 1593 (Pa. Super. Ct. 2012), the Superior Court addressed whether the trial court erred in admitting the testimony of an expert whose methodology was allegedly not accepted in the scientific community. Plaintiff alleged that she suffered breast cancer as a result of Defendant’s failure to appropriately warn of the risk

posed by taking hormone replacement therapy (HRT) medications, and that Defendant failed to conduct appropriate medical studies that would have established the significant risk of breast cancer. *Id.* at \*3. The jury awarded a multi-million dollar verdict. *Id.* at \*1. Defendant Wyeth appealed, arguing that it was error to admit the testimony of Plaintiff's expert given that: (1) Defendant presented evidence from a dozen experts with extensive experience in the relevant scientific field that [Plaintiff's] expert's methodology was unreliable; (2) the prerequisites for general acceptance in the scientific community were not met because Plaintiff's expert conceded that her methodology was untested, unpublished, and not validated; and (3) there was no evidence that even a small minority of physicians use that methodology in clinical practice to arrive at the conclusion that Plaintiff's expert attempted to support at trial. *Id.* at \*3.

The Superior Court disagreed with Defendant's proposition that the trial court erred in admitting Plaintiff's expert's testimony, holding that Plaintiff's experts' methodologies had been widely accepted in Pennsylvania state courts, and furthermore, in Pennsylvania, *Frye* challenges cannot be brought "whenever" science comes into court. *Id.* at \*14. Instead, *Frye* challenges can only be presented when "novel science" is presented. *Id.* Plaintiff's expert's methodologies were not that of "novel science," but were instead supported through her experience treating patients and medical literature. *Id.* at \*15-16. Relying on *Trach*, the court also held that the expert's conclusions, which are developed from the generally accepted methodologies, need not be generally accepted. *Id.* at \*12. Therefore, Plaintiff's expert's constituted proper medical opinion employing proper medical criteria. *Id.* at \*25. Whether the expert's opinion was accepted by the fact finder is a question of weight and not admissibility. *Id.*

**In *Porter v. Smithkline Beecham Corp.*, 2017 Pa. Super. Unpub. LEXIS 1734 (Pa. Super. Ct. May 8, 2017), Plaintiff sought to link her use of Zolofit while pregnant to her child's birth defect. She introduced expert testimony of a physician, whose report the court determined "contained methodological defects" under *Frye*. *Id.* at \*10-12. An appeal to the Superior Court followed. *Id.* at \*2-3. The Superior Court considered the basis of the expert's opinions, which did rely upon peer reviewed articles. *Id.* at \*29-31. The studies, however, were not definitive, and in his deposition, the expert conceded that "he was not aware of any tests that were available to determine whether Zolofit contributed to any birth defects." *Id.* Accordingly, the Superior Court found that Plaintiff failed to prove that the expert's methodology was generally accepted in the relevant scientific community, and the court affirmed the trial court's decision to preclude the testimony.**

### **Reliance on Extrajudicial Sources**

The type of facts or data in which an expert may rely is governed by Rule 703 of the Pennsylvania Rules of Evidence, which differs from the recently amended Rule 703 of the Federal Rules of Evidence. Both the state and federal rule allow an expert to base their opinion upon otherwise inadmissible facts or data which are "of a type reasonably relied upon by experts in the particular field." However, unlike the state rule, Federal Rule 703 prohibits the disclosure of the underlying data relied upon, unless the court determines that its probative value in assisting the jury to evaluate the expert's opinion substantially outweighs any prejudicial effect on the jury.

Pursuant to Pennsylvania Rule 705, an expert may testify in terms of opinion and inference and the “expert must testify as to the facts or data on which the opinion or inference is based.”

Under Pennsylvania law, a purported medical expert is not permitted to simply repeat the diagnosis and opinion of a treating physician. See cmt. to PA. R. EVID. 703. In addition, a testifying expert may not use the report of a non-testifying doctor to bolster the credibility of his own diagnosis. Allen v. Kaplan, 653 A.2d 1249, 1251 (Pa. Super. Ct. 1995); Cooper v. Burns, 545 A.2d 935, 941 (Pa. Super. Ct. 1988), app. denied, 563 A.2d 888 (Pa. 1989). Any expert testimony which incorporates the opinions of other physicians is inadmissible hearsay, unless the physicians making the underlying statements are made available for cross-examination at trial.

Several years ago, in Cacurak v. St. Francis Med.Ctr., 823 A.2d 159 (Pa. Super. Ct. 2003), app. denied, 844 A.2d 5501 (Pa. 2004), Defendants appealed from a Plaintiff’s verdict in a malpractice case based on allegations that Plaintiff developed curvature of the after an inexperienced resident marked the wrong vertebrae before surgery to remove a spinal tumor. On appeal, Defendants argued that the trial court erred in permitting Plaintiff’s expert to testify that another, non-testifying physician had, like Plaintiff’s expert, determined that Plaintiff suffered from thoracic kyphosis. Id. at 171. Defendants noted that Plaintiff’s expert had not relied on the notes of the non-testifying physician in reaching his conclusion, and that the opinion of this non-testifying doctor constituted inadmissible hearsay. Id. The Superior Court agreed, stating that it repeatedly held that an expert witness cannot bolster his own opinion by reading into the record the report of a non-testifying expert who is not available to be cross-examined. Id. at 172. The Superior Court determined that the non-testifying doctor’s opinion had been elicited from Plaintiff’s expert for the sole purpose of bolstering the testifying expert’s credibility, and should have been excluded. Id. at 173. The Superior Court held that a new trial was warranted on the basis of this error. Id.

In Buckman v. Verazin, 54 A.3d 956 (Pa. Super. Ct. 2012), the Superior Court held that surgical records of the defendant-surgeon’s non-party patients cannot be produced even with the patients’ identity redacted. The trial court granted Plaintiff’s motion to compel the defendant-healthcare system to produce all surgical records for two specific types of surgeries performed by Defendant-surgeon in the five years before the procedure at issue, and his surgical records for surgeries performed on the same day as plaintiff’s surgery. Id. at 958. In reversing and remanding back to the trial court, the Superior Court held that the evidentiary interest did not overcome the non-party’s right to privacy. Id. at 964.

**In Peronis v. United States, 2017 U.S. Dist. LEXIS 137382 (W.D. Pa. Aug. 28, 2017) Plaintiff sought to compel Defendants to produce the redacted medical records of a baby treated on the same day as the decedent on the grounds that such records could provide information relevant to the medical staffs’ treatment on the day at issue, *i.e.*, whether the medical staff were distracted by the needs of the other child.” Id. at \*1-2. The Court relied on Buckman in concluding that the records sought by plaintiff were “clearly of a confidential, private nature, implicate physician-patient privilege, and are sought without the consent of the non-party or his or her legal guardians.” Id. at \*7. Because Plaintiffs were “already in possession substantial deposition testimony and all pertinent medical**

records,” the Court stated that the need for the non-party medical records was not “so weighty as to overcome the need for confidentiality.” Id. at \*7-8. Therefore, the court denied Plaintiff’s motion to compel the non-party records. Id. at \*8.

### Learned Treatises

The Supreme Court analyzed the extent to which an expert witness may refer to, or utilize, a learned treatise on direct examination in Aldridge v. Edmunds, 561 Pa. 323 (Pa. 2000), where a defense expert was permitted to support his opinion by referring to excerpts from medical textbooks. The Court held that learned treatises can be utilized on direct examination of an expert witness for the limited purpose of explaining the basis for the expert’s opinion, but that the trial court must exercise careful control over the use of such learned treatises to prevent the texts from becoming the focus of the examination. Id. at 334; see also Hycza v. West Penn Allegheny Health Sys. Inc., 978 A.2d 961 (Pa. Super. Ct. 2009) (learned treatises may be used on direct examination of an expert witness for the limited purpose of explaining basis for opinion as long as appropriate constraints are imposed).

This narrow finding applies even though Pennsylvania does not recognize an affirmative exception to the rule against hearsay for learned treatises. See Wolfinger v. Lincoln Elec. Co., No. 03043, 2012 Phila. Ct. Com. Pl. LEXIS 145 (Pa. C.P. May 7, 2012); PA. R. EVID. 803(18) (“Pennsylvania does not recognize an exception to the hearsay rule for learned treatises.”).

**The Aldridge decision was again discussed in Crespo v. Hughes, 167 A.3d 168 (Pa. Super. Ct. 2017). There, the Superior Court noted that the trial court “erroneously relied on the federal standard of authentication of learned treatises.” Id. at \*185. The Superior Court stated that Pennsylvania courts must adhere to the common law principles set forth in Aldridge:**

**While other jurisdictions, including the federal courts, have moved away from the common law exclusion in favor of an exception permitting the admission of treatise materials as substantive evidence on a limited basis, *see, e.g.*, F.R.E. 803(18), Pennsylvania has not done so.**

**Id. at \*186 (citing Aldridge, 750 A.2d at 297) (internal citations omitted).**

**Despite this, the Court did not reach the issue of prejudice because the appellants did not preserve the issue for appeal due to their failure to either “make a specific objection specific objection to the impermissible reading of an article” or “to request a specific limiting instruction for the jury.” Id. at \*187 (citing Burton-Lister v. Siegel, Sivitz and Lebed Assocs., 798 A.2d 231 (Pa. Super. 2002)).**

The Superior Court recently remanded a medical malpractice action, based in part, upon the misuse of medical literature at trial. In Klein v. Aronchick, 85 A. 3d 487 (Pa. Super. Ct. 2014), the jury found Defendant-physician negligent; however, it determined that his negligence did not cause Plaintiff’s harm. Id. at 490. One of the issues on appeal was whether the trial court erred in allowing Defendants to introduce the contents of hearsay medical literature as substantive evidence. Id. The court found that the “extensive questioning” of the defense expert

ran afoul of the law concerning learned treatises as outlined in Aldridge, *supra*, because defense counsel had the defense expert discuss at length several journal articles. Id. at 502. The witness did more than cite to the articles as providing a basis for his opinion; rather, the witness first characterized the journal as “probably the world’s most prestigious medical journal” and the “final word on most things” and “proven, good science.” Id. at 504. He then characterized the author as the leader in the field in this area of medicine read directly from the articles. Id. The court concluded that the texts were not used to clarify the basis for the witness’ opinions, but rather as a means by which to convey to the jury the out-of-court, hearsay opinions of the article’s author. Id. at 504.

### **Expert Qualifications – Medical Malpractice**

Section 512 of the MCARE Act sets forth the requisite qualifications for an expert witness testifying in a medical malpractice action against a physician:

**(a) General rule.**--No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.

**(b) Medical testimony.**--An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:

(1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.

(2) Be engaged in or retired within the previous five years from active clinical practice or teaching.

Provided, however, the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.

**(c) Standard of care.**--In addition to the requirements set forth in subsections (a) and (b), an expert testifying as to a physician's standard of care also must meet the following qualifications:

(1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.

(2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care

for the specific care at issue, except as provided in subsection (d) or (e).

(3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).

**(d) Care outside specialty.**--A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that:

(1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and

(2) the defendant physician provided care for that condition and such care was not within the physician's specialty or competence.

**(e) Otherwise adequate training, experience and knowledge.**--A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

40 P.S. § 1303.512.

### **Background**

In Weiner v. Fisher, 871 A.2d 1283 (Pa. Super. Ct. 2005), Plaintiff alleged that the doctor was negligent in failing to diagnose the decedent's malignancy. The trial court ruled that Plaintiff's expert was not qualified to testify under the provisions of the MCARE Act and granted Defendant's motion for a nonsuit. Id. at 1285. On appeal, the Superior Court held that section 512(b)(2) of the MCARE Act's phrase, "within the previous five years," refers to a time period that is measured from the time that the expert testifies. Id. at 1287-88. Because the time period is not measured from the time of the alleged negligence, the trial court erred in finding the expert unqualified on the basis of his teaching activities. Id. Additionally, because the expert must "practice in the same subspecialty as the defendant physician *or* in a subspecialty which has a substantially similar standard of care for the specific care at issue." the court concluded that the MCARE Act does not contemplate disqualifying an expert based upon his failure to teach a specific diagnostic technique. Id. at 1289 (emphasis added). Therefore, the court remanded this matter for reconsideration of the expert's qualifications as a teacher of gastroenterology. Id. at 1290.

It should be noted that the court stated that section 512(b)(2) does not require that the expert's teaching responsibilities be full-time, but that a *de minimis* level of teaching is not sufficient to satisfy the statute. Id. at 1289-90. The level of teaching must be sufficient to

establish the general requirement that the witness possess “sufficient education, training, knowledge and experience to provide credible, competent testimony...” Id. at 1290 (quoting 40 Pa. Cons. Stat. § 1303.512(a)). The Court noted that “there is little guidance in statutory or case law to assist the court in determining what level and involvement in teaching satisfies the statute, but suggested that the trial court inquire into “whether his students are interns, residents, fellows, or others; the subject matter he teaches; the amount of time per week he teaches; the academic level of his students; the settings where he teaches; and the compensation he receives for teaching.” Id. 1290.

Before the federal district court in Madden v. A.I. duPont Hospital, 264 F.R.D. 209 (E.D. Pa. 2010), were medical malpractice cases arising out of open-heart surgeries performed on infants who subsequently died. In support of motions to preclude Plaintiffs’ experts under Daubert, Defendants argued that Plaintiffs’ expert, who was retired and stopped performing surgery two years before the surgeries at issue, was not qualified to testify as an expert due to his lack of familiarity with the surgical procedures used by Defendants, having only performed that surgical procedure a handful of times during his career. Id. at 213. The court began its analysis of Plaintiffs’ expert’s qualifications by noting that a “liberal policy of admissibility” applies. Id. at 215 (citing Pineda v. Ford Motor Co., 520 F.3d 237, 244 (3d Cir. 2008)). The court also noted that Plaintiffs’ expert need not be the “best qualified” expert. Id. (citing Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777, 782 (3d Cir. 1996)). The court then found that Plaintiff’s expert had indeed performed the surgery at issue, and that the opinions of Plaintiffs’ expert are supported by medical literature. Id. Therefore, the court concluded that Plaintiffs’ expert’s opinions were not based solely on subjective belief, and he was qualified to testify as an expert at trial. Id.

Miville v. Abington Mem. Hosp., 377 F. Supp. 2d 488 (E.D. Pa. 2005) involved claims for failure to adequately intubate the patient. Id. at 490. Defendant filed a motion for summary judgment on the basis that Plaintiff could not establish a *prima facie* case of malpractice because she lacked qualified experts under section 512 of MCARE. Id. The court determined that, pursuant to Federal Rule of Evidence 601, section 512 applied in a federal diversity case. Id. at 492. The court then determined that Plaintiff’s experts, an obstetrician and an internist / pulmonary / critical care specialist, did meet the requirements of section 512(c)(2) because the particular care at issue was not unique to anesthesiology, and the experts practiced in subspecialties with similar standards of care. Id. at 493-494. However, that court found that the experts did not meet the requirements of section 512(c)(3) because neither were board-certified in anesthesiology, nor had they been actively involved in or taught full time in the field of anesthesiology within the previous five years. Id. at 494-495. Consequently, Plaintiff’s experts were not competent to testify against the Defendant anesthesiologist. Id. See also Novitski v. Rusak, 941 A.2d 43 (Pa. Super. Ct. 2008)) holding that a vocational rehabilitation expert’s testimony is admissible regarding the medical condition of a plaintiff even with the lack of supporting medical testimony).

In Campbell v. Attanasio, 862 A.2d 1282 (Pa. Super. Ct. 2004), app. denied, 881 A.2d 818 (Pa. 2005), Plaintiff developed acute respiratory distress after Defendant, a third year internal medicine resident, prescribed intravenous Ativan for Plaintiff. Id. 1283-84. Defendant’s motion for summary judgment was granted after the trial court found Plaintiff’s expert psychiatrist was not qualified to testify about the standard of care of the resident under section

512. *Id.* On appeal, the Superior Court reversed, holding that Defendant prescribed Ativan for anxiety, not respiratory problems, and that Plaintiff’s expert was qualified to testify regarding the applicable standard of care because he had both received training in internal medicine and was familiar with the standard of care for the administration of Ativan, which is regularly prescribed by psychiatrists to treat anxiety. *Id.* at 1288-89. The Court further held that as a resident, Defendant could not be deemed a specialist in internal medicine or be held to the standard of care for such a specialist. *Id.* at 1289. Accordingly, the court held that it was irrelevant that Plaintiff’s expert was not board-certified in internal medicine because Defendant was not board-certified in internal medicine at the time he treated Plaintiff. *Id.*

**In Deleon v. Wise, 2017 Pa. Super. Unpub. LEXIS 2649 (Pa. Super. Ct. July 14, 2017), Plaintiff was prescribed Flagyl by her OB/GYN to treat a vaginal infection during her pregnancy, but shortly after taking her first dose she experienced abdominal pain and suffered a miscarriage. She subsequently brought a medical malpractice suit against her OB/GYN, and identified her expert witness as a pharmacist. *Id.* at \*1-2. Defendants filed a motion *in limine* to preclude Plaintiff’s expert from testifying, arguing that, as a pharmacist, he was not qualified to render an opinion on the standard of care of an OB/GYN. *Id.* at \*2-3. On appeal, the Superior Court affirmed the trial court’s decision to preclude the expert, finding that the pharmacist did not possess the requisite qualifications to testify as an expert witness under MCARE. *Id.* at \*4-5. The court stated that “regardless of whether a pharmacological expert is more apt to discuss the risks of a drug to a certain class of patients, MCARE makes clear that such an expert is not qualified to establish the appropriate standard of care for use by an OB/GYN in treating a specific infection. Nor is such an expert qualified to establish a breach of the proper standard of care.” *Id.***

In Anderson v. McAfoos, 57 A.3d 1141 (Pa. 2012), our High Court reviewed whether a surgeon’s objection to a pathologist’s testimony was waived because it was asserted at trial for the first time, rather than via a motion *in limine*. The Superior Court affirmed the trial court’s ruling, finding that the challenge to the pathologist’s testimony was timely raised immediately following *voir dire*, and did not need to be raised by a motion *in limine*. *Id.* at 1148. The Supreme Court framed the issues on appeal as:

- (a) When should the defendant raise an objection to the plaintiff's expert's qualifications under the MCARE Act?
- (b) Whether a board certified pathologist may, under Section 512 of the MCARE Act, testify regarding a general surgeon/treating physician's standard of care in deciding to discharge a patient without reading the patient's blood work results?

*Id.* at 1148. The Supreme Court determined that as to the latter issue, Plaintiffs had not properly preserved the issue for appellate review because they never asserted that the pathologist met the same or similar board certification requirement contained in the MCARE Act. *Id.* at 1152. The Court further held that there is no general legal requirement that an objection to a proposed expert’s qualifications under the MCARE Act be made prior to *voir dire*, nor did they view a case management order merely establishing deadlines for pre-trial motions as establishing such a requirement. *Id.* at 1151.

## Licensure

In Cimino v. Valley Family Medicine, 912 A.2d 851 (Pa. Super. Ct. 2006), app. denied, 921 A.2d 494 (Pa. 2007), Plaintiff's expert was a physician whose medical license was subject to revocation, which had been stayed while he was placed on a five-year probation. He was allowed to practice medicine during this time, but he had to comply with several terms and constraints. Id. at 856. In response to Defendant's challenge to the expert's qualifications, Plaintiff argued that the purpose of section 512(b)(1) was to ensure that any doctor giving expert testimony was a practicing physician who had met the necessary requirements through education and testing to have sufficient knowledge to provide competent testimony, and that this expert's license to practice was not limited. Id. at 853-854. The court, however, found that although MCARE did not provide a definition of "unrestricted," common usage of the meaning of this word denotes no limitations or constraints. Id. at 857. Therefore, the court concluded that the expert's license was not unrestricted, and he was not qualified to testify as an expert. Id. Consequently, the court affirmed the trial court's decision to preclude the expert's testimony to dismiss Plaintiff's case for lack of the required expert testimony. Id. See also George v. Ellis, 911 A.2d 121 (Pa. Super. Ct. 2006) (expert not qualified to testify under the MCARE Act because he possessed a license to practice medicine in Canada, not an unrestricted license to practice in any state or the District of Columbia.).

## Requisite Degree of Medical Certainty

In Stimmler v. Chestnut Hill Hosp., 981 A.2d 145 (Pa. 2009), the Pennsylvania Supreme Court held that Plaintiff's expert reports expressed the requisite degree of specificity and medical certainty for a *prima facie* case of malpractice. The Superior Court upheld the trial court's decision to grant summary judgment, finding that Plaintiff's expert failed to establish causation within a reasonable degree of medical certainty because Plaintiff's experts stated that a procedure had the "highest likelihood" of causing Plaintiff's condition. Id. at 150. On appeal, the Supreme Court reversed, noting that expert witnesses are not required to use "magic words," rather, "the substance of their testimony must be examined to determine whether the expert has met the requisite standard." Id. at 155 (citing Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997)). The Court found that, when read in their entirety, Plaintiff's expert reports and conclusions expressed the requisite degree of specificity, i.e. a high degree of medical certainty, for Plaintiff to show a *prima facie* cause of action. Id. at 157.

**Following Stimmler, in Tillery v. Children's Hosp. of Phila., the court determined that an expert witness in a medical malpractice case is required to testify to a reasonable degree of medical certainty, but that expert witnesses are not required to use "magic words" in expressing their opinions:**

**[I]n establishing a prima facie case, the plaintiff [in a medical malpractice case] need not exclude every possible explanation of the accident; it is enough that reasonable minds are able to conclude that the preponderance of the evidence shows the defendant's conduct to have been a substantial cause of the harm to [the] plaintiff.**

**156 A.3d 1233, 1240 (Pa. Super. Ct. 2017) (citing Stimmler 981 A.2d at 155). In Tillery, the Superior Court affirmed the trial court’s finding that the experts at issue provided testimony, which substantively, amounted to opinion given within a reasonable degree of medical certainty, after finding that the expert’s opinions were supported by the plaintiff’s medical records, peer reviewed journals, book chapters, and their own extensive expertise in the area.” Id. at \*1240-41.**

In Freed v. Geisinger Med. Ctr., 971 A.2d 1202 (2009), aff’d, 5 A.3d 212 (Pa. 2010), the Pennsylvania Supreme Court affirmed the Superior Court’s decision to allow a nurse to provide nursing standard of care and causation testimony, and overruled Flanagan v. Labe, 670 A.2d 183 (Pa. 1997), to the extent that Flanagan “prohibits an otherwise competent and properly qualified nurse from giving expert opinion regarding medical causation.” Id. at 1208. In a footnote, the Court noted that this decision would have limited impact, as the MCARE Act clearly states that for a witness to be qualified as an expert on issues such standard of care, causation, and the nature and extent of injuries in medical professional liability actions, the witness must be a physician licensed to practice medicine and must be engaged in or recently retired from active clinical practice or teaching. Id. at n.8. Therefore, Freed allows for nurses to testify as experts in cases that do not involve medical professional liability actions against physicians, such as those against non-physician health care providers.

**In Drusko v. UPMC Northwest, 2017 Pa. Super. Unpub. LEXIS 799 (Pa. Super. Ct. Mar. 1, 2017), the Superior Court allowed physicians to testify as to the nursing standard of care. Id. at \*21. The issue addressed was whether the nurses’ failure to suspect a cardiac issue and alert a physician was a deviation from the nursing standard of care. Id. at \*21-22.**

**The court stated that although the two physicians did not “expressly” state their testimony in terms of the standard of care, their testimony did serve to “supply the nursing standard of care.” Id. The physicians testified to what nurses “do all the time,” in the face of a patient complaining of chest pain. Id. Their testimony regarding usual procedures or protocols and their testimony that that a delay would increase the risk of harm was deemed sufficient, such that the court found no error in placing the hospital on the verdict slip. Id. at \*22.**

The issue of the required degree of certainty was also presented in Vicari v. Spiegel, 936 A.2d 503 (Pa. Super. Ct. 2007), aff’d, 989 A.2d 1277 (Pa. 2010). Plaintiff filed suit against an otolaryngologist and a radiation oncologist, and the trial court struck the otolaryngologist expert’s testimony on the grounds that he did not render his opinion to the requisite degree of medical certainty. On appeal, the Superior Court held that it must “examine the expert’s testimony in its entirety.” Id. at 510. “That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty.” Id. Nevertheless, this standard of certainty is not met “if he testifies that the alleged cause possibly, or could have led to that result, that it could very properly account for the result, or even that it was very highly probable that it caused the result.” Id. at 510-11 (internal citations omitted). The Court also addressed issues regarding the qualifications of Plaintiff’s experts and remanded the case for a new trial.

The Supreme Court affirmed, holding that the oncologist was qualified to testify as an expert witness against an otolaryngologist and a radiation oncologist. Vicari, 989 A.2d 1277 (Pa. 2010). Additionally, the Court noted that it is important to make competency determinations only after delineation of precisely what is the specific care at issue. Id. at 1283. The sole issue in Vicari with regard to Plaintiff's expert testimony concerned referrals to an oncologist, not breach of standard of care during surgery or the administration of radiation therapy (for which, presumably, Plaintiff's expert would not be qualified to offer opinion). Id. Thus, Plaintiff's expert was permitted to offer his opinions regarding this "related" subspecialty of the defendant physician. Id. at 1284.

### Same Subspecialty

In Smith v. Paoli Mem. Hosp., 885 A.2d 1012 (Pa. Super. Ct. 2005), Plaintiff retained a board-certified general surgeon, an oncologist, and an internist to determine whether Defendants breached the standard of care in failing to order a CT scan to investigate the cause of gastrointestinal bleeding. In response to Defendant's motions *in limine*, Plaintiff asserted that the physicians' subspecialties overlapped with gastroenterology, and they were qualified to opine as to the standard of care applicable when a patient presents to any appropriately trained medical care provider with an obscure GI bleed. Id. at 1019. The Superior Court upheld the trial court's order, finding that the MCARE Act requires only that experts be familiar with the standard of care at issue, and that they practice in at least a similar subspecialty with a substantially similar standard of care for the specific care at issue. Id. at 1022. The court concluded that the experts were all familiar with the standard of care for treatment of gastroenterology-related problems. Id. at 1018-20. Because the standard of care for a surgeon, an oncologist, and internist, when presented with a patient with obscure GI bleeding, clearly overlaps with the expertise of gastroenterologists, the court permitted both experts to testify at the time of trial. Id. at 1019. See also Gartland v. Rosenthal, 850 A.2d 671 (Pa. Super. Ct. 2004), app. denied, 594 Pa. 705 (Pa. 2007) (neurologist was qualified to give an expert opinion about radiologists' standard of care); Herbert v. Parkview Hosp., 854 A.2d 1285 (Pa. Super. Ct. 2004) (while the MCARE Act plainly prefers, and in some cases may require, that expert testimony in medical malpractice cases come from witnesses with expertise in the defendant's subspecialty, the Act does not require that expert testimony in all cases be so restricted); Jacobs v. Chatwani, 922 A.2d 950 (Pa. Super. Ct. 2007), app. denied, 595 Pa. 708 (Pa. 2007) (board-certified urologist, who performs pelvic surgery, was qualified under the MCARE Act to opine on the standard of care related to protection of the ureters during pelvic surgery and diagnostic testing of urological structures following pelvic surgery).

In Gbur v. Golio, 932 A.2d 203 (Pa. Super. Ct. 2007), aff'd, 963 A.2d 443 (Pa. 2009), the Superior Court held that Plaintiff's radiation oncology expert was qualified to opine as to the standard of care applicable to a urologist regarding alleged failure to diagnose Decedent's prostate cancer because although Plaintiff's expert was not a board-certified urologist, he was qualified to testify as an expert given his extensive experience and board certifications in radiation oncology under Section 1303.512(d) (relating to care outside specialty). The court noted that Plaintiff's expert did not testify as to the substantive standard of care applicable to urologists, but rather to the standard of care applicable in diagnosing prostate cancer, an area in which Plaintiff's expert was clearly qualified to testify. Id. at 210.

The Supreme Court affirmed, but noted in dicta that the MCARE “statute should be read to require a close enough relation between overall training, experience, and practices of the expert and that of a defendant physician to assure the witness’ expertise would necessarily extend to standards of care pertaining in the defendant physician’s field.” 963 A.2d at 459. The Court stated further that “the mere fact that two physicians may treat the same condition [is] insufficient, in and of itself, to establish such a relation among their fields of medicine.” *Id.* Although the court noted that in light of its conclusion concerning issue preservation that they need not apply Section 512(e) to the case at hand, the court stated that “those practicing radiation oncology and urology might be surprised to learn of a judicial pronouncement—offered without reference to relevant supporting testimony from those practicing in the respective subspecialties beyond a discussion of a single area of treatment overlap—that their disciplines represent related fields of medicine for the purposes of reform legislation.” *Id.* at 460.

The Superior Court addressed the issue of expert qualification in *Hyrca*, *supra*, where Plaintiff brought a wrongful death and survival action against numerous defendants after the patient died from massive gastrointestinal bleeding. On appeal, Defendants argued that the trial court erred by permitting Plaintiff’s expert, a board certified psychiatrist and neurologist, to testify as to the standard of care applicable to Defendant physician, a board certified physiatrist. *Id.* at 972. The Superior Court affirmed the trial court, finding that the post-operative care of the multiple sclerosis patient, having undergone hip surgery with aspirin and steroids, “was a matter within” the expert’s training, “regardless of specialty.” *Id.* at 973. Further, Plaintiff’s expert testified that his patients often undergo surgery and that he is involved in the post-operative treatment and rehabilitation that includes administration of aspirin, and that he was familiar with the risks involved in prescribing aspirin and steroids together. *Id.*

In *Rettger v. UPMC Shadyside*, 991 A.2d 915 (Pa. Super. 2010), *app. denied*, 15 A.3d 491 (Pa. 2011), the Superior Court held that the trial court did not abuse its discretion by allowing a neurosurgeon to testify as an expert regarding a neurosurgical nurse’s standard of care in responding to a change in the patient’s pupil, as neither the neurosurgeon’s “expertise nor his experience in working with nurses was in any way deficient.” The court also noted that the record establishes that the neurosurgeon spent his entire career practicing in a hospital setting and interacting with nurses daily. *Id.* at 930. In such a situation, a “neurosurgeon whose orders provide daily direction of the activities of the nurses who care for his patients is familiar with the standard of care expected; if he were not, his ability to depend on their observations and judgment would be sharply limited and his professional practice jeopardized as a result.” *Id.*; *Cf. Yacoub v. Lehigh Valley Med. Assocs., P.C.*, 805 A.2d 579 (Pa. Super. Ct. 2002), *app. denied*, 825 A.2d 639 (Pa. 2003) (neurosurgeon not qualified, on basis of overlap or experience in internal medicine or special care unit nursing, to testify as to internists and nurses deviating from applicable standard of care where neurosurgeon rarely practiced in hospital setting, could not remember the last time he interacted with nurses in special care, never published anything regarding nursing, and never practiced internal medicine or read journals on the topic).

In *Wexler v. Hecht*, 928 A.2d 973 (Pa. Super. 2007), Plaintiff brought a medical malpractice action alleging Defendant doctor breached the applicable standard of medical care in treating Plaintiff’s bunion. Defendant sought to preclude Plaintiff’s podiatrist expert on the

grounds that a podiatric surgeon was not competent to testify as to the standard of care of an orthopedic surgeon. *Id.* at 974. The trial court granted Defendant’s motion, relying on the common law “specialized knowledge in the subject matter of the inquiry” standard in addition to section 512(b)(1) of the MCARE Act. *Id.* at 975. The trial court explained that (i) Plaintiff’s podiatrist expert received a degree from a school of podiatric medicine; (ii) the practice of podiatric medicine is limited to the diagnosis and treatment of the foot and those leg structures governing foot function; and (iii) MCARE distinguishes “physicians” from “podiatrists.” *Id.* at 976. Therefore, the trial court concluded that Plaintiff’s podiatrist expert “was not a physician holding an unrestricted license to practice medicine; [and] he was unqualified under [MCARE] Section 1303.512(b)(1) to render an opinion concerning the applicable standard of care pertaining to a medical doctor, such as [Defendant.]” *Id.*

On appeal, the Superior Court affirmed, explaining that “[w]e find that the General Assembly’s reference in Section 1303.512(b)(1) to an expert ‘possessing an unrestricted physician’s license to practice medicine’ unambiguously denotes a medical doctor or osteopath licensed by the state board appropriate to such practices.” *Id.* at 981. The Court further noted that there is no waiver provision regarding the competency requirement of expert testimony of the standard of care. *Id.* Therefore, the trial court was correct in finding Plaintiff’s podiatrist expert unqualified to testify under the MCARE Act. *Id.* See also *Renna v. Schadt*, 64 A.3d 658 (Pa. Super. Ct. 2013) (plaintiff’s oncologist and pathologist experts were allowed to testify as to the standard of care applicable to a surgeon because they practiced in related specialties for purposes of rendering expert testimony as to the specific standard of care at issue); *Carter v. U.S.*, No. 11-6669, 2014 U.S. Dist. LEXIS 15956 (E.D. Pa. Feb. 7, 2014) (holding that there is a close enough relation between the overall training, experience, and practices of experts in pediatrics and those in obstetrics and gynecology to conclude that plaintiffs’ expert witness pediatrician could testify to the standard of care for the defendant-OB/GYN, as to the specific area at issue); *Frey v. Potorski*, 145 A.3d 1171 (Pa. Super. 2016) (holding an expert who was a hematologist could testify against the defendant interventional cardiologist under the MCARE Act, if the expert demonstrated a familiarity with the specific standard of care at issue).

### **Two Schools of Thought**

In those medical malpractice actions in which there is evidence of conflicting schools of thought concerning the proper mode of treatment, Pennsylvania courts traditionally hold that a physician’s decision to use one recognized mode of treatment, rather than another accepted mode of treatment, cannot serve as the basis for a finding of negligence. *Jones v. Chidester*, 610 A.2d 964, 969 (Pa. 1992); *Levine v. Rosen*, 616 A.2d 623, 627 (Pa. 1992) (holding that the “two schools of thought” doctrine does not apply to cases in which the issue concerns a defendant’s failure to diagnose); *Sinclair v. Block*, 633 A.2d 1137, 1141 (Pa. 1993). In *Jones*, the court noted, “[t]he proper use of expert witnesses should supply the answers. 610 A.2d at 969. Once the expert states the factual reasons to support his claim that there is a considerable number of professionals who agree with the treatment employed by the defendant, there is sufficient evidence to warrant an instruction to the jury on the ‘two schools of thought.’” *Id.* The court further opined that, at that point, the question becomes one for the jury who must decide, “whether they believe that there are two legitimate schools of thought such that the defendant should be insulated from liability.” *Id.*

In Gala v. Hamilton, 715 A.2d 1108, 1110-11 (Pa. 1998), the Pennsylvania Supreme Court ruled that defendants in medical malpractice cases do not need medical literature to receive a “two schools of thought” jury instruction. Rather, defendants are able to meet their burden of establishing the alternative “school of thought” as legitimate with expert testimony alone. Id.

In Choma v. Iyer, 871 A.2d 238, 244 (Pa. Super. Ct. 2005), the Superior Court held that the trial court erred in giving the jury the “two schools” instruction, and that this error required a new trial. The case involved reconstructive surgery after a mastectomy, and the question of whether the procedure performed was appropriate given Plaintiff’s obesity and medical history. Id. at 240. Based on Plaintiff’s expert testimony that this procedure was contraindicated and Defendant’s expert testimony to the contrary, the trial court ruled that the “two schools of thought doctrine” applied. Id. at 241.

The Superior Court disagreed, stating that the doctrine did not apply because both parties’ experts agreed that the procedure was not appropriate for a patient that is extremely obese, and it was disputed whether Plaintiff fell into the extremely obese category. Id. The court ruled that “[w]here...the dispute is not to the course of treatment, but rather to a question of fact regarding plaintiff’s condition, the ‘two schools of thought’ doctrine is inapplicable.” Id. What existed in this case did not present divergent opinions on how to treat the patient, just different assessments of her pre-surgery condition with respect to the extent of her obesity. Id. It was for the jury to decide if Plaintiff met the criteria of being extremely obese. Id. If she did, all experts agreed the procedure performed was the wrong one. Id. Because the doctrine did not apply, and the improper “two schools” instruction given to the jury may have contributed to the verdict in favor of Defendant, a new trial on negligence was required. Id.

In Reger v. A.I. duPont Hosp. for Children of the Nemours Found., 2008 U.S. App. LEXIS 400, at \*2 (3d Cir. Jan. 9, 2008), Plaintiffs’ expert testified that there was only one way to perform the procedure at issue. Because Defendants presented multiple experts, who testified that there were other acceptable approaches to perform the procedure, the court submitted the “two schools of thought” charge to the jury. Id. at \*7-8. The court explained, “[w]hen a physician chooses between appropriate alternative medical approaches, harm which results from physician’s good faith choice of one proper alternative over the other, is not malpractice.” Id.

In Barr v. Beck, 21 Pa. D. & C.5th 311, 323 (Pa. C.P. 2011) aff’d, 2011 Pa. Super. LEXIS 3729 (Pa. Super. Ct. July 25, 2011), Plaintiff contended that the foundational requirement for a “two schools of thought” instruction had not been met. Citing Jones, the court stated that “[t]he well-established case law clearly and unequivocally obligates a physician only to present evidence that his or her method ‘is advocated by a considerable number of recognized and respected professionals.’” Id. at 325. The court further stated that the “Pennsylvania Supreme Court has refused to quantify the number of professionals who must accept the method.” Id. Rather, the court noted that a more flexible approach should be used, where “an expert witness who provides factual reasons to support his claim that there is a considerable number of professionals who agree with the treatment employed by a defendant physician ‘suppl[ies] the answers’ and, hence the necessary foundation for the instruction on the ‘two schools of thought.’” Id. at 325-26 (citing Jones, 610 A.2d at 969).

Recently, the Pennsylvania Superior Court reiterated the holding in Levine v. Rosen, 616 A.2d 623, 627 (Pa. 1992), holding that the “two schools of thought doctrine” does not apply to cases in which the issue concerns the defendant’s failure to diagnose. See Tillery v. Children’s Hosp. of Phila., 156 A.3d 1233, 1242-43 (Pa. Super. Ct. 2017). Specifically, the Superior Court affirmed the trial court’s order denying the defendant’s request for a new trial as a result of the trial court’s failure to instruct the jury on the “two schools of thought doctrine”. Id. at 1242. Defendant argued that the evidence established that there were “clearly two schools of thought when it comes to the treatment of suspected bacterial meningitis with steroids”. Id. However, both the trial court and the Superior Court disagreed reasoning that the case concerned whether defendant was negligent in failing to provide necessary testing and treat the bacterial infection. Id. at 1243. Thus, the Superior Court held that the case concerned the failure to diagnose the bacterial meningitis rather than competition theories of treatment and therefore the “two schools of thought” instruction would be inappropriate. Id.

### Causation – Medical Malpractice

It is also necessary for the plaintiff to prove by a preponderance of evidence that the breach of duty was the legal cause of the injury. While this sounds simple enough, it is far more complicated.

### Reasonable Certainty

To establish the element of proximate cause, the plaintiff first has the burden of establishing, with a “reasonable degree of medical certainty,” that the injury in question did result from the negligent act alleged. McMahon v. Young, 276 A.2d 534, 535 (Pa. 1971). Expert testimony fails to meet this reasonable certainty requirement in a medical malpractice action when the plaintiff’s expert testifies that the alleged negligence possibly caused or could have caused the Plaintiff’s injury, that such negligence could very properly account for the injury, or even that it is very highly probable that Defendant’s negligence caused the poor result. Hreha v. Benscoter, 554 A.2d 525, 527 (Pa. Super. Ct. 1989) (citing Kravinsky v. Glover, 396 A.2d 1349, 1355-56 (Pa. Super. Ct. 1979)). Similarly, testimony that a doctor “more likely than not” deviated from the standard of care, and that the plaintiff “more likely than not” suffered harm as a result, is insufficient to state a *prima facie* case of medical malpractice. Corrado v. Thomas Jefferson Univ. Hosp., 790 A.2d 1022, 1031 (Pa. Super. Ct. 2001). In determining whether an expert testified to the requisite degree of medical certainty, the court reviews expert testimony in its entirety. Id. at 1030. “That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty.” Carrozza v. Greenbaum, 866 A.2d 369, 379 (Pa. Super. Ct. 2004), aff’d, 916 A.2d 553 (Pa. 2007).

In Winschel v. Jain, 925 A.2d 782, 798 (Pa. Super. Ct. 2007), the Superior Court granted a new trial on the basis that the jury’s conclusion that Defendant’s negligence was not a factual cause of death bore no rational relationship to the undisputed evidence. The court also held that the trial court did not err in excluding defense expert’s testimony where he testified that an alternate cause might have been responsible for the harm, but never stated this opinion with the required degree of medical certainty. Id. at 795-96. Note, however, that this aspect of the

Winschel court's ruling ignores the well accepted rule stated in Neal by Neal v. Lu, 530 A.2d 103, 109-110 (Pa. Super. Ct. 1987), that a defense expert is not required to testify to a reasonable degree of medical certainty because the defendant does not bear the burden of proof. The court stated:

Absent an affirmative defense or a counterclaim, the defendant's case is usually nothing more than an attempt to rebut or discredit the plaintiff's case. Evidence that rebuts or discredits is not necessarily proof. It simply vitiates the effect of opposing evidence. Expert opinion evidence, such as that offered by [the defendant] in this case, certainly affords an effective means of rebutting contrary expert opinion evidence, even if the expert rebuttal would not qualify as proof. In general, the admission or rejection of rebuttal evidence is within the sound discretion of the trial judge.

*Id.* at 110.

This same well accepted rule is stated in the 2007 Superior Court case, Jacobs v. Chatwani, 922 A.2d 950, 961 (Pa. Super. Ct. 2007): "Pennsylvania law does not require a defense expert in a medical malpractice case to state his or her opinion to the same degree of medical certainty applied to the plaintiff, who bears the burden of proof at trial." *Id.* (citing Neal, 530 A.2d at 110). The Jacobs opinion was filed approximately two weeks before the Superior Court issued its opinion in Winschel.

In Griffin v. Univ. of Pittsburgh Med. Center-Braddock Hosp., 950 A.2d 996, 1005 (Pa. Super. Ct. 2008), the Superior Court held that an expert opinion merely using the words, "within a reasonable degree of medical certainty," by itself is not enough to meet the requirements for admissible expert testimony. In Griffin, the main issue at trial was whether Plaintiff's injury occurred as a result of a grand mal seizure or from forcible restraint. *Id.* at 998. Plaintiff's expert opined that he was fifty-one percent certain that the injury resulted from a restraint, and in turn, he was forty-nine percent certain that the injury resulted from a grand mal seizure. *Id.* The jury ultimately returned a verdict in favor of Plaintiff, and Defendant appealed. *Id.* The Superior Court held that "a '51%' degree of certainty, was akin to an opinion stated to a 'more likely than not' degree of certainty, which is legally insufficient." *Id.* at 1003. The Superior Court went on to further state that "despite Dr. Speer's use of any so-called 'magic words,' the substance and totality of his testimony did not support the proposition, to the legally requisite degree of certainty, that forcible restraint caused Ms. Griffin's shoulder injury." *Id.*

**More recently, in Adams v. Vaughn, 2017 Pa. Super. Unpub. LEXIS 1280, at \*6 (Pa. Super. Ct. April 6, 2017), the Superior Court affirmed the trial court's entry of a compulsory nonsuit in favor of the defendant-physician where plaintiff's medical expert failed to provide his professional opinion to the requisite degree of certainty. The Superior Court, citing the opinion of the trial court, reasoned that an expert fails the standard of certainty if he testifies that the alleged cause "possibly" or "could have" led to the result. *Id.* at \*6. After reviewing plaintiff's medical expert's testimony, the Superior Court found that plaintiff's medical expert contradicted his own opinion when he testified that "it was indeed possible that the injury did not occur during [defendant's] laparoscopic procedure."**

**Id. at \*11. As such, the Superior Court affirmed that holding of the trial court because plaintiff’s medical expert failed to provide a sufficient level of certainty. Id.**

### **Increased Risk of Harm**

It is settled law in Pennsylvania that a plaintiff must establish that his injuries were proximately caused by the acts or omissions of his physician to set forth a case of medical malpractice. See Hamil v. Bashline, 392 A.2d 1280, 1284 (Pa. 1978). Under Hamil, Pennsylvania courts recognized a reduced standard—increased risk of harm—under certain circumstances such as delay in diagnosis, testing, or treatment resulting in a higher risk of harm to the patient. Id. at 1286-88.

Under Section 323(a) of the Restatement (Second) of Torts (1965), a plaintiff has the burden of proof to establish:

1. that the physician deviated from the standard of care;
2. that the deviation increased the risk of harm to the patient; and
3. that the harm in fact occurred.

See Mitzelfelt v. Kamrin, 584 A.2d 888, 894 n.2 (Pa. 1990). Under Pennsylvania law, it is not sufficient to state that a deviation might have or probably increased the risk of harm; rather, the medical testimony must establish to a reasonable degree of medical certainty that the deviation did increase the risk of harm. See Jones v. Montefiore Hosp., 431 A.2d 920, 924 (Pa. 1981).

Only after a plaintiff establishes competent medical expert testimony to support these foundational elements to a reasonable degree of medical certainty is the case permitted to go to the fact finder for a causal determination of whether the harm in fact resulted from the increased risk. See Hamil, 392 A.2d 1280. Expert testimony on the second stage of an increased risk of harm case—the relaxed causation stage—allows an expert to testify that the increased risk may have caused the harm. See id.

In Winschel v. Jain, 925 A.2d 782, 793-95 (Pa. Super. Ct. 2007), the Superior Court granted a new trial after finding that a defense verdict involving a physician’s alleged failure to diagnose the decedent’s occluded left coronary artery was against the weight of the evidence, and that Plaintiff had succeeded in establishing the causation element under the increased risk of harm standard. Plaintiff offered the testimony of two board-certified cardiologists, both of whom testified that Defendant’s deviation from the standard of care in failing to recommend earlier catheterization caused the decedent’s death. Id. at 786. Importantly, Defendant’s own experts agreed that catheterization would have detected the decedent’s occluded artery. Id. at 787.

After the close of evidence, the jury returned a defense verdict due to lack of causation, and Plaintiff appealed. Id. Applying the increased risk of harm standard, the Superior Court found that “the plaintiff must introduce sufficient evidence that the defendant’s conduct increased the risk of plaintiff’s harm.” Id. at 788 (citing Carrozza, 866 A.2d at 380). Clarifying this standard, the Court further explained:

[O]nce the plaintiff introduces evidence that a defendant-physician's negligent acts or omissions increased the risk of the harm ultimately sustained by the plaintiff, then the jury must be given the task of balancing the probabilities and determining, by a preponderance of the evidence, whether the physician's conduct was a substantial factor in bringing about the plaintiff's harm.

Id. at 788-89. Applying this standard, and in considering the strength of Plaintiff's expert testimony (especially in relation to the weak expert testimony proffered by Defendant), the court concluded that the jury's verdict was "irrational" in light of the uncontradicted evidence regarding causation, and remanded the case for new trial. Id. at 793; see also Qeisi v. Patel, 2007 U.S. Dist. LEXIS 9895, at \*36 (E.D. Pa. Feb. 9, 2007) (holding testimony of expert witness that nine-month delay in performance of mammogram was sufficient to establish increased risk of developing cancer for purposes of stating *prima facie* case of negligence); Gannon v. United States, 571 F. Supp. 2d 615 (E.D. Pa. 2007) (holding that: 1) under Pennsylvania law Plaintiffs had to prove both general and specific causation; 2) they needed expert testimony to prove causation; and 3) Plaintiffs' failed to meet the required burden because expert opinion was inconsistent with evidence and he relied only on experiments with rodents).

In Hatwood v. Hosp. of the Univ. of Pa., 55 A.3d 1229, 1242 (Pa. Super. Ct. 2012), the Superior Court affirmed the trial court's judgment as to increased risk of harm. In the case, Plaintiffs' experts opined that an infant sustained a hypoxic brain injury as a result of lack of oxygen brought about by abruption, which caused permanent brain damage. Id. at 1242. The court determined that Plaintiffs were not required to show that Defendants' negligence was the actual 'but for' cause of the plaintiff's harm; rather, under the "increased-risk-of-harm" standard, Plaintiffs needed to introduce sufficient evidence to support that Defendants' conduct increased the risk of harm." Id. at 1241. Under this standard, the trial judge concluded that Plaintiffs presented ample evidence for the jury to conclude that the conduct deviated from the standards of care and increased the risk of harm and caused the harm to the infant. Id. at 1242. The Superior Court affirmed. Id.

In Klein v. Aronchick, 85 A.3d 487, 494 (Pa. Super. Ct. 2014), the Superior Court held that direct causation and increased risk of harm are "alternative theories of recovery," and are not "mutually exclusive." At trial, Plaintiff alleged that Defendant physician was negligent for prescribing medication for an off label-use. Id. at 489. The trial court allowed Plaintiff's experts to testify that the medication was the direct cause of Plaintiff's subsequent kidney disease, but refused to allow her experts to testify that it increased her risk of kidney disease. Id. at 490. On appeal, Defendant, relying on Mitzelfelt v. Kamrin, 584 A.2d 888 (1990), argued that evidence of increased risk is only allowable when it is impossible for an expert to testify within a reasonable degree of medical certainty that the negligence was the direct cause of the harm and that therefore the two theories were mutually exclusive. Id. at 492. The Superior Court disagreed, holding that a plaintiff, at trial, can present evidence that a physician's negligence *either* directly caused the plaintiff's harm *or at least* increased the risk of such harm occurring. Id. at 492.

### **Informed Consent – Medical Malpractice**

The Pennsylvania Supreme Court has upheld the intentional tort battery theory underlying the doctrine of informed consent. See Montgomery v. Bazaz-Sehgal, 798 A.2d 742, 748 (Pa. 2002); Morgan v. MacPhail, 704 A.2d 617, 619 (Pa. 1997); Gouse v. Cassel, 615 A.2d 331, 334 (Pa. 1992); Moure v. Raeuchle, 604 A.2d 1003, 1008 (Pa. 1992). To date, the Supreme Court has declined to recognize a cause of action for negligent failure to obtain informed consent, but the distinction is not always material. For instance, in Fitzpatrick v. Natter, the Supreme Court wrote:

An informed consent action, of course, sounds in battery rather than in negligence....Nevertheless, the distinction between a battery and a negligence tort is irrelevant to the evidentiary question of what sort of evidence is sufficient to establish an element of the claim; logically, the principles governing the admissibility of circumstantial evidence and the weight it may be accorded apply regardless of the nature of the case, and the parties do not argue otherwise.

961 A.2d 1229, 1241 n.13 (Pa. 2008).

### **General Rule**

Under Pennsylvania law, a physician is required to obtain consent from his patient concerning any non-emergency procedure enumerated in the MCARE Act, 40 P.S. § 1303.504. To constitute a valid consent, the patient must be informed of the material risks of the procedure prior to surgery. See Gray v. Grunnagle, 223 A.2d 663, 670 (Pa. 1966). Absent informed consent, the physician may be held liable to a plaintiff under a theory of battery for injuries arising from the undisclosed risk. Id.; see also Cooper v. Roberts, 286 A.2d 647, 651 (Pa. Super. Ct. 1971).

**On June 20, 2017, the Pennsylvania Supreme Court issued an important opinion with far-reaching legal and practical implications regarding the doctrine of informed consent. See Shinal v. Toms, 162 A.3d 429, 453 (Pa. 2017). The Court narrowly construed section 504 of the MCARE Act, ultimately exposing physicians to civil liability for failure to personally obtain informed consent through direct, in-person, communication with the patient. Id. Specifically, the Court held that “a physician cannot rely upon a subordinate to disclose the information required to obtain informed consent.” Id. The Court reasoned that without a direct dialog and “two-way exchange between the physician and patient,” the physician may not be confident that the patients comprehends the risks, benefits, likelihood of success, and alternatives to any procedure. Id. (relying on Valles v. Albert Einstein Med. Ctr., 805 A.2d 1232, 1239 (Pa. 2002) (holding that the duty to obtain informed consent rests solely upon the healthcare provider and not upon a hospital)). Thus, informed consent is a product of the physician-patient relationship. Id.**

### **Expert Testimony Required**

Pennsylvania courts place the burden upon the plaintiff to establish through expert testimony the existence of all risks of the chosen treatment, alternative methods of treatment, and risks of alternatives as well as causation.

In Festa v. Greenberg, 511 A.2d 1371, 1376 (Pa. Super. Ct. 1986), the court specifically held that expert testimony is required to establish the following three elements: (1) the existence of risks in the specific medical procedure; (2) the existence of alternative methods of treatment; and (3) the attending risks of such alternatives. Following Cooper v. Roberts, 286 A.2d 647 (Pa. Super. Ct. 1971), the Festa court stated that once these three elements are established by expert testimony, it is for the trier of fact to determine the materiality of those risks. Id. at 1376-77.

Expert testimony in the context of an informed consent claim is not required, however, with respect to alleged emotional injuries that are obviously connected to surgery to which a patient did not consent. Montgomery v. Bazaz-Sehgal, 798 A.2d 742, 752 (Pa. 2002).

For another example where expert testimony is not required to prove an informed consent claim, see Hartenstine v. Daneshoost, 2008 Pa. D. & C. Dec. LEXIS 60, at \*1-2 (Pa. C.P. Jan. 16, 2008). In Hartenstine, Plaintiff alleged that consent to surgery was obtained following the physician's misrepresentation of the surgical procedure to be performed. See id. The trial court held that in this situation, expert testimony is not required to support a claim based on medical battery. Id. The court explained that a consent obtained through a knowing misrepresentation is ineffective and, therefore, expert testimony is not required regarding alternate treatments and risks of those treatments because the patient's claim is not grounded on the physician's failure to disclose such information but, rather, on the physician's affirmative misrepresentation. See id.

### **The MCARE Act**

Under the MCARE Act, Pennsylvania law now requires the physician to obtain the patient's full, knowing, and voluntary informed consent prior to the following procedures:

- a. Performing surgery, including the related administration of anesthesia;
- b. Administering radiation or chemotherapy;
- c. Administering a blood transfusion;
- d. Inserting a surgical device or appliance;
- e. Administering an experimental medication, using an experimental device or using an approved medication or device in an experimental manner.

See 40 P.S. § 1303.504(a). Informed consent had been likewise required for the same procedures under the predecessor statute, Act 135, now repealed, 40 P.S. §1301.811-A, since January 25, 1997.

Under MCARE, as under the predecessor statute, informed consent results where the physician gives the patient: (1) a description of the procedure, and (2) the risks and alternatives that a reasonably prudent patient would need to consider to make an informed decision as to that procedure. § 1303.504(b). The question of whether the physician obtained his patient's informed consent is still governed under the "prudent patient" standard. Id. As to what constitutes the required "informed consent," it is not necessary for the physician to disclose to the patient all known risks of a given procedure. Fitzpatrick v. Natter, 961 A.2d 1229, 1237 (Pa. 2008). Rather,

Pennsylvania law requires that the patient be advised of those material facts, risks, complications, and alternatives that a reasonable person in the patient's situation would consider significant in deciding whether to undergo the procedure. Id.

To succeed on a claim for lack of informed consent, a patient must prove:

- (1) the physician failed to disclose a relevant risk or alternative before obtaining the patient's consent for a covered procedure, and
- (2) the undisclosed information would have been a substantial factor in the patient's decision whether to undergo the procedure.

Id. at 1237. (citing Hohns v. Gain, 806 A.2d 16, 19 (Pa. Super. Ct. 2002)); see also Gouse, 615 A.2d at 333.

In defending against a claim of lack of informed consent, a physician may present evidence of the description of the procedure at issue and those risks and alternatives that a physician acting in accordance with the accepted medical standards of medical practice would provide. 40 P.S. § 1303.504(b). Expert testimony is also required to determine whether the procedure at issue constituted the type of procedure that necessitates informed consent, and to identify the risks of that procedure, the alternatives to that procedure, and the risks of these alternatives. § 1303.504(c). Under MCARE, as under Act 135, a plaintiff must establish the element of causation to set forth a viable claim for lack of informed consent. § 1303.504(d). Specifically, a physician is liable for failure to obtain informed consent of a patient only if the patient proves that receiving such information would have been a substantial factor in his decision whether to undergo that procedure. Id. at § 1303.504(d)(1).

MCARE, unlike Act 135, also contains a provision stating that a doctor can be held liable for failure to obtain a patient's informed consent if the doctor "knowingly misrepresents to the patient his or her professional credentials, training or experience." 40 P.S. § 504(d)(2). This provision, with respect to procedures performed after MCARE's effective date, effectively overrules the Supreme Court case, Duttry v. Patterson, 771 A.2d 1255, 1259 (Pa. 2001) ("information personal to the physician, whether solicited by the patient or not, is irrelevant to the doctrine of informed consent. Our holding should not, however, be read to stand for the proposition that a physician who misleads a patient is immune from suit.").

### **Decisions Interpreting MCARE**

In Pollock v. Feinstein, 917 A.2d 875, 878 (Pa. Super. Ct. 2007), the court examined whether a certificate of merit needs to be filed for an informed consent claim that alleges an incomplete disclosure of the risks of surgery. The court explained the claim focused on whether Defendant's conduct conformed to a professional standard, "namely '[t]o provide patients with material information necessary to determine whether to proceed with the surgical or operative procedure or to remain in the present condition.'" Id. (quoting Valles v. Albert Einstein Med. Ctr., 805 A.2d 1232, 1237 (Pa. 2002)). Because, at a minimum, Plaintiff needed to produce expert testimony identifying the procedure's risks, alternative procedures, and the risks of alternative procedures, a certificate of merit alleging incomplete disclosure was required. Id. at

879. The court did not address whether a certificate of merit is needed in cases involving the performance of an unauthorized procedure. Cf Leaphart v. Prison Health Servs., 2010 U.S. Dist. LEXIS 135435, at \*37 (M.D. Pa. Nov. 22, 2010) (citing Pollock, and noting, “Pennsylvania caselaw construing this certificate of merit requirement has expressly extended the requirement to malpractice claims like those brought here that are grounded in an alleged failure to obtain informed consent.”).

In Isaac v. Jameson Mem. Hosp., 932 A.2d 924, 926 (Pa. Super. Ct. 2007), the court examined whether a Medicaid regulation governing informed consent procedures necessary to obtain federal reimbursement are relevant to a cause of action regarding informed consent. The court only examined a single set of Medicaid regulations governing reimbursement for sterilization procedures and did not make a blanket conclusion regarding the relevance of all Medicaid regulations to an informed consent claim. Id. at 928-933.

First, the court examined the applicability of Medicare regulations to an informed consent claim against the hospital. Id. at 930. The court examined Fritter v. Iolab Corp., 607 A.2d 1111 (Pa. Super. Ct. 1999), where the court created an exception to the general rule that health care institutions are not liable for a lack of informed consent when a hospital participates in a clinical investigation for the FDA. Id. In contrast, the Isaac court found the particular Medicaid regulations at issue did not place an independent duty on health care institutions to obtain informed consent because Medicaid regulations only set forth the preconditions necessary for federal reimbursement. 932 A.2d at 930.

Next, the Isaac court examined the relevance of the Medicaid regulation on informed consent claims against a doctor. Id. at 930-31. The court stressed that the Medicaid regulation at issue did not relate to the quality of information provided to a patient, only to the timing of a patient’s consent for a sterilization procedure. Id. at 931. The court noted that Plaintiffs were seeking to impose new duties upon a doctor beyond providing material information regarding a medical procedure. Id. The court recognized that the regulations do indirectly benefit patients by assuring that patients have adequate time to fully consider a sterilization procedure, which reduces the risk of coercion. Id. Additionally, the court found that adopting Medicaid regulations for cases where payment is made by Medicaid would lead to an inequity because patients paying for medical services privately would be treated differently than patients paying with Medicaid. Id. at 931. Ultimately, the court concluded the Medicaid regulations in question “do not impose a legal standard relevant to an action for lack of informed consent.” Id.

The Isaac court’s narrow holding does not completely foreclose the possibility that some Medicaid regulations may be relevant to the legal standard for informed consent claims, and the court noted that the decision did not address whether the specific Medicaid regulations at issue were relevant in support of a cause of action for negligence regarding the quality of information provided by a doctor when obtaining informed consent. Id.

The Pennsylvania Supreme Court addressed whether the substantial factor element of an informed consent claim may be established solely through the testimony of the patient’s spouse.<sup>1</sup>

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<sup>1</sup> In this case, the patient was present during most courtroom proceedings and was able to testify on her own behalf but the decision was made for her to not testify.

See Fitzpatrick v. Natter, 961 A.2d 1229, 1247 (Pa. 2008).<sup>2</sup> Id. Plaintiffs filed a professional liability action alleging, in part, battery or lack of informed consent, and loss of consortium after Plaintiff's condition deteriorated following a surgery. Id. At trial, Plaintiff's husband testified that he and Plaintiff made all medical decisions jointly, and that had all risks associated with Plaintiff's surgery been fully disclosed, Plaintiff would have opted against surgery. Id. at 1234. Plaintiff-patient did not testify, although she was present in the courtroom for most proceedings. Id. The jury returned a verdict for Plaintiffs finding, in part, that Defendant failed to obtain Plaintiff's informed consent before performing the surgery, and that information Defendant failed to provide would have been a substantial factor in Plaintiff's decision to undergo the surgery. Id.

The Superior Court affirmed the trial court's decision to grant Defendant's post-trial motion for judgment notwithstanding the verdict, finding that Plaintiffs' informed consent claim failed as a matter of law because the informed consent statute required the patient herself to testify that the allegedly undisclosed information would have been a substantial factor in her decision making. Id. at 1235. Without Plaintiff's testimony, the jury could only speculate as to what her thought process was and whether she had, in fact, provided informed consent to the surgery. Id. On appeal, the Supreme Court considered whether the testimony of a person other than the patient can be sufficient to prove the substantial factor element. Id. The Supreme Court held that, "as in other areas of the law, circumstantial or indirect evidence may suffice for an informed consent patient to prove the elements of her claim." Id. at 1241. Thus, "a patient's decision to refrain from testifying at trial is not fatal to the claim." Id.

In Brady v. Urbas, 80 A. 3d 480, 484 (Pa. Super. Ct. 2013), the Superior Court held that a patient's consent to surgery, and acknowledgement that there are risks associated with the surgery, were inadmissible in the trial of a medical negligence action. Plaintiff filed suit against the defendant podiatrist, claiming he was negligent in the performance of multiple toe surgeries. Id. at 481. The trial court denied Plaintiff's motion to preclude informed consent evidence, and throughout trial, reference was made to Plaintiff's consent to surgery and her knowledge of the risks involved. Id. at 482. Copies of the consent forms were even provided to the jury during its deliberations. Id. The Superior Court held that the trial court erred in admitting that evidence, as the evidence was irrelevant and therefore inadmissible in a negligence action because:

evidence of informed consent is irrelevant in a medical malpractice case. Moreover, assuming *arguendo* that such evidence had some marginal relevance in this case, the evidence clearly could have misled or confused the jury by leading it to believe that Mrs. Brady's injuries simply were a risk of the surgeries and that she accepted such risks, regardless of whether Dr. Urbas' negligence caused the risks to occur.

Id. at 484 (emphasis added). The Court, noting that the evidence was a central component of the defense, held the trial court abused its discretion and reversed and remanding for a new trial. Id.

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<sup>2</sup> It should also be noted that the court, in reaching this decision, interpreted informed consent statute 40 P.S. §1301.811-A, which has been repealed in favor of 40 P.S. § 1303.504, noting that the statutes are materially similar for the purposes of its decision.

Brady was appealed to the Supreme Court where the issue on appeal was whether, in a medical malpractice case, a doctor may introduce evidence that the patient was informed of and acknowledged various risks of surgery, although the complaint did not specifically assert a cause of action based on lack of informed consent. 111 A.3d 1155, 1157 (Pa. 2015). The Supreme Court affirmed, but declined to endorse the broad pronouncement that all aspects of informed consent information were always “irrelevant in a medical malpractice case” because some informed consent information might be relevant to questions of negligence or the standard of care. Id. at 1162. However, the Court held, evidence that a patient affirmatively consented to treatment after being informed of the risks of said treatment, was generally irrelevant to a cause of action sounding in medical negligence. Id. The Court reasoned that the fact that a patient may have agreed to a procedure in light of the known risks does not make it more or less probable that the physician was negligent in either considering the patient an appropriate candidate for the operation or in performing it in the post-consent timeframe. Id. Put differently, there is no assumption-of-the-risk defense available to a defendant physician that would vitiate his duty to provide treatment according to the ordinary standard of care. Id. The patient’s actual, affirmative consent, therefore, is irrelevant to the question of negligence. Id.

In Seels v. Tenet Health Sys. Hahnemann, LLC, a Philadelphia trial court admitted a decedent’s medical consent and release forms. 2016 Phila. Ct. Com. Pl. LEXIS 194, at \*8 (Pa. C.P. June 14, 2016). The decedent passed away from complications related to childbirth after she refused blood transfusions due to her religious beliefs. Id. at \*30-31. The Court permitted consent forms to be introduced at trial because the “unique circumstances of this matter rendered [decedent’s] consent and release forms absolutely relevant...” Id. at \*79. “[R]ather than allowing for misconceptions to arise about [the decedent] ‘consenting’ to substandard medical care at Hahnemann, the consents and releases made clear that [decedent], of her own free will, consistently refused to accept safe, effective, routine, and life-saving medical treatment when she barred doctors from administering blood transfusions, and even refused to collect and store her own blood in the even an emergency arose.” Id. at \*80. **The Superior Court affirmed the trial court’s ruling and noted that the consent forms were used to prove that Plaintiff knowingly refused life-saving treatment. Seels, 167 A.3d 190, 206-07 (Pa. Super. Ct. 2017).**

Recently, the Superior Court reiterated that the lack of informed consent is the legal equivalent to no consent, and a failure to obtain informed consent sounds in battery and not negligence. Pomroy v. Hosp. of the Univ. of Pa., 105 A.3d 740, 746 (Pa. Super. Ct. 2014). The Pomroy court reiterated that a breach of a legal duty is a condition precedent to a finding of negligence. Id. (citing Shaw v. Kirschbaum, 653 A.2d 12, 15 (Pa. Super. Ct. 1994)). The legal duty imposed under the doctrine of informed consent must be carefully distinguished from that imposed under the doctrine of medical malpractice. Id.; see also Montgomery v. Bazaz-Sehgal, 798 A.2d 742, 748-749 (Pa. 2002). The doctrine of informed consent requires physicians to provide patients with “material information necessary to determine whether to proceed with the surgical or operative procedure to remain in the present condition.” Id. (quoting Sinclair by Sinclair v. Block, 633 A.2d 1137, 1140 (Pa. 1993)). Therefore, a claim that a physician failed to obtain the patient’s informed consent sounds in battery, not negligence. Id.; see also Montgomery, 798 A.2d at 748-749. There is no cause of action in Pennsylvania for negligent failure to gain informed consent. Id.

The Superior Court recently recapitulated this notion when it affirmed a trial court's decision refusing to grant plaintiff's request for a jury charge as to the assumption of a duty pursuant to the Restatement (Second) of Torts § 324A in plaintiff's medical malpractice action for lack of informed consent. See Weiss v. Lieber, 2017 Pa. Super. Unpub. LEXIS 386, at \*10-11 (Pa. Super. Ct. Jan 31, 2017). In a footnote, the Superior Court simply stated, "[a]s this Court has explained, '[t]here is no cause of action in Pennsylvania for negligent failure to gain informed consent.'" Id. at \*10 n.6 (citing Pomroy v. Hosp. of Univ. of Pennsylvania, 105 A.3d 740, 746 (Pa. Super. Ct. 2014)).

## Hospital Liability

### Theories of Hospital Liability

Historically, Pennsylvania hospitals were immune from tort liability based on the doctrine of charitable immunity. Benedict v. Bondi, 122 A.2d 209, 212 (Pa. 1956). In 1965, however, the Pennsylvania Supreme Court abolished the doctrine of charitable immunity, thereby eliminating the hospital's shield to liability. Flagiello v. Pa. Hosp., 208 A.2d 193, 208 (Pa. 1965). Today, Pennsylvania courts may impose liability on hospitals based on any one of three theories: (1) respondeat superior; (2) ostensible agency; or (3) corporate negligence.

### *Respondeat Superior* – General Principles and Recent Cases

Under the doctrine of *respondeat superior*, an employer may be held vicariously liable for the negligent acts of its employees if the acts were committed during the course of and within the scope of the employment.

In Tonsic v. Wagner, 329 A.2d 497, 501 (Pa. 1974), the Pennsylvania Supreme Court held for the first time that agency principles should also apply to operating physicians as well as hospitals. Because the hospital's liability is based on principles of agency law, a plaintiff must show the existence of a master-servant relationship between the negligent staff member and the hospital. Id.

Generally, a master-servant relationship will be found where the hospital not only controls the result of the work, but also has the right to direct the manner in which the work shall be accomplished. Valles v. Albert Einstein Med. Ctr., 758 A.2d 1238, 1245 (Pa. Super. Ct. 2000), aff'd, 805 A.2d 1232 (Pa. 2002). In Valles, the court held that a hospital cannot be held vicariously liable for the failure of its physicians to obtain a patient's informed consent. In finding no evidence of control, the court explained:

While we agree...that AEMC had a duty to generally oversee Dr. Allen, nothing in the record indicates that AEMC exercised control over the manner in which he was to perform radiology work, such as the aortogram. We fail to see how AEMC could conduct such oversight, absent having another physician present, in light of the fact that the procedure in question is of a highly specialized nature and requires specific skills, education and training in order to be performed...[i]t is the surgeon and not the hospital who has the education, training and experience necessary to advise each patient of the risks associated with the proposed surgery.

Id. at 1245.

It should also be noted that in Toney v. Chester Cnty. Hosp., 961 A.2d 192, 203 (Pa. Super. Ct. 2008), aff'd, 36 A.3d 83 (Pa. 2011), the Superior Court permitted a plaintiff to bring causes of action for negligent infliction of emotional distress and intentional infliction of emotional distress against a hospital after a doctor allegedly misinterpreted an ultrasound as being normal. Plaintiff claimed severe emotional distress after her child was born with severe birth defects. Id. The Pennsylvania Supreme Court granted an appeal to consider “[w]hether the Superior Court erred in finding a cause of action for negligent infliction of emotional distress exists where emotional distress results from the negligent breach of a contractual or fiduciary duty, absent a physical impact or injury.” 973 A.2d 415, 416 (Pa. 2009).

In a divided opinion, the Supreme Court affirmed the Superior Court, and Justice Baer, who wrote the lead opinion in support of affirmance, wrote:<sup>3</sup>

[W]e would hold that NIED is not available in garden-variety "breach of contractual or fiduciary duty" cases, but only in those cases where there exists a special relationship where it is foreseeable that a breach of the relevant duty would result in emotional harm so extreme that a reasonable person should not be expected to endure the resulting distress. We further conclude that recovery for NIED claims does not require a physical impact.

36 A.3d 83, 84-85 (Pa. 2011). Justice Baer noted that “some relationships, including some doctor-patient relationships, will involve an implied duty to care for the plaintiff's emotional well-being that, if breached, has the potential to cause emotional distress resulting in physical harm.” Id. at 95. Given the sensitive and emotionally charged field of obstetrics, the Justices writing in support of affirmance concluded that Defendants had an implied duty to care for Plaintiff's emotional well-being. Id. Justice Baer also wrote that “[a] plaintiff asserting a special relationship NIED cause of action absent physical injury, however, must still demonstrate the genuineness of the alleged emotional distress, in part, by proving the element of causation.” Id. at 99. On the other hand, in support of reversal, Justice Saylor believed that the Court was improperly engaging in judicial policymaking within the purview of the legislature, and noted “serious reservations about the practical consequences of introducing what is essentially “emotional crashworthiness” liability into the healthcare arena. Id. at 101-02.<sup>4</sup>

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<sup>3</sup> Justice Todd joined in Justice Baer's opinion, but wrote separately noting, among other things, her support for dispensing the requirement of physical impact in negligent infliction of emotional distress claims, because it suggests that we do not trust our juries (and judges sitting as fact-finders) to discern between feigned and genuine claims of emotional harm; she also noted her agreement that a doctor has a duty of care for a patient's emotional well-being under the circumstances presented in Toney. Id. at \*50-51.

<sup>4</sup> Chief Justice Castille departed from Justice Saylor's view concerning “procedural matters,” but wrote, “On the substantive question presented in this case, however, where the Justices favoring affirmance would determine, as a matter of policy, to innovate new liabilities in tort for health care providers, I am entirely in accord with Justice Saylor's views.” Id. at 101.

In Sokolsky v. Eidelman, 93 A.3d 858, 865 (Pa. Super. Ct. 2014) the Superior Court held that a plaintiff need not identify “a specific medical practitioner” to establish a vicarious liability claim against a defendant hospital or managed care facility. Specifically, the court held that “simply because employees are unnamed within a complaint or referred to as a unit i.e., ‘the staff,’ does not preclude one’s claim against their employer under vicarious liability if the employees acted negligently during the course and within the scope of their employment.” Id. at 866. It should be noted that Sokolsky is a review of a legal malpractice case; however, the underlying “case within a case” involves a medical malpractice action. See also Estate of Denmark ex rel. Hurst v. Williams, 117 A.3d 300, 306-07 (Pa. Super. Ct. 2015) (“[W]hen read in the context of the allegations of the amended complaint, [plaintiff’s] references to “nursing staff, attending physicians and other attending personnel” and “agents, servants, or employees” were not lacking in sufficient specificity and did not fail to plead a cause of action against the Mercy entities for vicarious liability.”).

**In a similar vein, the Superior Court recently concluded that the trial did not err when it did not permit a jury to consider whether “other” unnamed hospital staff members or agents were negligent as to assign vicarious liability against the defendant hospital on the verdict sheet. See Seels v. Tenet Health Sys. Hahnemann, LLC, 167 A.3d 190, 208 (Pa. Super. Ct. 2017). At trial, the lower court cited the names of two doctors, not identified as defendants, but identified as agents of the defendant hospital for providing care to the plaintiff. Id. at 208. Plaintiff requested that “other” names, specifically members of the defendant hospital’s PACU staff not known to plaintiff, be present on the verdict sheet in an attempt to secure vicarious liability on the defendant hospital. Id. However, prior to trial the lower court struck all of plaintiff’s allegations of negligence against unnamed agents of defendant *without prejudice*. Id. at 209 (emphasis added).**

**The trial court refused to place the additional unidentified agents on the verdict sheet because after the lower court struck the negligence claims against the aforementioned unnamed agents, plaintiff failed to amend and/or conduct additional discovery to identify those persons. Id. On review, the Superior Court held that the trial court would have erred striking plaintiff’s negligence allegations *with prejudice*. Id. (citing Sokolsky v. Eidelman, 93 A.3d 858, 866 (Pa. Super. Ct. 2014)). However, because the lower court struck the claims without prejudice and the plaintiff failed to revise the allegations, the Superior Court affirmed the trial court’s decision to exclude unidentified agents of the defendant from the verdict sheet. Id.**

### **Ostensible Agency**

In 1980, the Superior Court recognized a second form of hospital liability. Capan v. Divine Providence Hosp., 430 A.2d 647, 650 (Pa. Super. Ct. 1980). Under the ostensible agency theory, a hospital may be held liable for the negligent acts of a staff member who is not an employee but, rather, an independent contractor. See id. at 649.

In finding Defendant hospital liable for the negligent acts of an independent contractor physician, the Capan court recognized that “the changing role of the hospital in society creates a

likelihood that patients will look to the institution rather than the individual physicians for care.” Id. at 649. The theory of ostensible agency is, therefore, premised upon two factors: (1) the patient looks to the institution rather than the individual physician for care; and (2) the hospital “holds out” the physician as its employee. Id. A “holding out” occurs when the hospital acts or omits to act in some way which leads the patient to a *reasonable belief* that he is being treated by the hospital or one of its employees. Id.

The United States District Court for the Eastern District of Pennsylvania has held that a failure to deny agency does not rise to the level of “holding out,” particularly in a non-emergency room setting. Stipp v. Kim, 874 F. Supp. 663, 665 (E.D. Pa. 1995); see also Morales v. Guarini, 57 F. Supp. 2d 150, 154 (E.D. Pa. 1999); Whitehill v. Matthews, 40 Pa. D. & C. 4th 58, 69-70 (Pa. C.P. 1998).

In Yacoub v. Lehigh Valley Med. Assocs., P.C., 805 A.2d 579 (Pa. Super. Ct. 2002), the Superior Court upheld the trial court’s decision to preclude Appellant from introducing evidence that the defendant radiologists were ostensible agents of the hospital with respect to their interpretation of two radiological studies. The Court, citing Goldberg, held that given the facts of this case, to impute liability on the hospital, not only would Plaintiff have had to show that the radiologists were negligent in reading the films at issue, but she would have also have to establish that such negligence contributed to the neurosurgeons making a faulty diagnosis. Id. Since it was ultimately the decision of the neurosurgeons to make the proper diagnosis, and their conduct was found not to be a substantial factor in causing Plaintiff’s harm, the Court held that Plaintiff was precluded from establishing that the radiologists could have affected the jury’s determination as to causation. Id.

Under the MCARE Act, a hospital may be held vicariously liable for the acts of another health care provider through principles of ostensible agency if the evidence shows the following: 1) a reasonably prudent person in the patient’s position would be justified in the belief that the care in question was being rendered by the hospital or its agents; or 2) the care in question was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents. 40 P.S. § 1303.516(a). Further, evidence that a physician holds staff privileges at a hospital shall be insufficient to establish vicarious liability through principles of ostensible agency. See § 1303.516(b). The MCARE Act only applies to causes of action that arise on or after March 20, 2002. See § 1303.501, *et seq.* For cases that fall before March 20, 2002, the subjective standard used in Capan applies.

In Green v. Pa. Hosp., the decedent was treated at a hospital emergency department before he ultimately passed away. 123 A.3d 310, 323 (Pa. 2015). The question on appeal was whether the hospital’s liability for the negligence of a non-hospital employee treating physician should be presented to the jury under a theory of ostensible agency. Id. at 315. In the Court’s view, when a hospital patient experiences an acute medical emergency, such as that experienced by Decedent, and an attending nurse or other medical staff issues an emergency request or page for additional help, it is more than reasonable for the patient, who is in the throes of medical distress, to believe that such emergency care is being rendered by the hospital or its agents. Id. at 323. Accordingly, the Court held that the trial court’s grant of a nonsuit under 40 P.S. § 1303.516(a) (addressing vicarious liability for ostensible agency) was erroneous, and that the

question of whether a reasonably prudent person in Decedent's position would be justified in his belief that the care rendered by the physician was rendered as an agent of the hospital should have proceeded to the jury. Id. Finding that a hospital can be held vicariously liable for the negligence of an on-call doctor based on ostensible agency, even when the on-call doctor is an independent contractor, the Court reversed and remanded the matter for further proceedings. Id.

### **Ostensible Agency under MCARE**

The MCARE Act modifies Pennsylvania's doctrine of ostensible agency for causes of action arising after the statute's effective date. 40 P.S. § 1303.516. Under pre-MCARE case law, plaintiffs were required to satisfy two factors before they could establish a cause of action against a healthcare institution under the ostensible agency theory, even where the alleged offending physician was not a member of the staff of the healthcare institution: (1) plaintiffs had to show that they looked to the health care institution, as opposed to the individual physician, and (2) that the institution "held out" the physician as its employee. See Capan v. Divine Providence Hosp., 430 A.2d 647, 650 (Pa. Super. Ct. 1980). Under the MCARE Act, however, a healthcare provider can be held vicariously liable if the plaintiff shows that a "reasonably prudent person in the patient's position" would believe that the care was being rendered by the hospital or its agents or that the care in question was "advertised or otherwise represented" as being care rendered by the hospital or its agents. 40 P.S. § 1303.516(a). MCARE changes the traditional subjective belief of the patient to a reasonable prudent person standard. Id.

Trial courts have held that a pre-existing patient-doctor relationship, as well as healthcare facility advertisements regarding defendant physician, militate against a finding of ostensible agency.

In Kelley v. Clark, the trial court held that Plaintiff failed to establish an ostensible agency claim pursuant to 40 P.S. § 1303.516(a) where there was no evidence to indicate that Plaintiff believed that Defendant-physician was rendering care as the Defendant-hospital's agent, as there was a pre-existing, independent relationship between the Plaintiff and the physician. See 2012 WL 4865306 (Pa. C.P. Mar. 14, 2012) Further, though Plaintiff argued that the Defendant-hospital's website advertised the physician as its employee or agent, the trial court found that this advertising was not directed to Plaintiff, and consequently held that the Defendant-hospital had not represented to Plaintiff that the physician was its employee or agent. Id.

The same trial court reached an identical conclusion for similar reasons in Leonard v. Samra, 2011 WL 9200793 (Pa. C.P. June 7, 2011).

In Pittas v. Healthcare & Ret. Corp. of Am., 2012 Pa. D. & C. Dec. LEXIS 681, at \*5 (Pa. C.P. July 31, 2012), Plaintiff brought a claim against a skilled nursing facility alleging negligent management of Plaintiff's care, causing her to suffer a stroke and become paraplegic. Plaintiff brought one claim under a theory of ostensible agency for failure to properly supervise physicians or other medical professionals at the time of the Plaintiff's treatment. Id. at \*5. The court stated that Plaintiff's ostensible agency claim failed because MCARE provides claims for ostensible agency against only hospitals pursuant to 40 P.S. § 1303.101. Id. at \*8. The court noted that MCARE provides different definitions for hospitals, nursing homes, and healthcare providers. Id. at \*9. The court also noted that no Pennsylvania appellate case law has extended

the theory of ostensible agency to a nursing facility, and had the legislature intended to extend the theory of ostensible agency to nursing facilities, it like would have drafted a more inclusive provision. *Id.* at \*8. Therefore, the court dismissed the ostensible agency claim. *Id.* at \*9.

The Lackawanna County Court of Common Pleas interpreted *Green v. Pa. Hosp.*, *supra*, in *Oscarson v. Moses Taylor Hosp.*, 2016 WL 409712, at \*1 (Pa. C.P. Feb. 3, 2016). Plaintiff alleged the negligent performance of a needle biopsy at a defendant-hospital by a defendant-pathologist who was not an employee of the defendant-hospital. *Id.* The defendant-hospital sought summary judgment, arguing that the evidence was insufficient to establish that a reasonably prudent patient in Plaintiff's position would have been justified in the belief that the biopsy was being performed or interpreted by the hospital's agent. *Id.* The Court denied summary judgment because (1) Plaintiff's primary physician advised him that he was referring him to the defendant-hospital for a biopsy, (2) Plaintiff was contacted by defendant-hospital staff to schedule the procedure, (3) Plaintiff and defendant-pathologist had no prior relationship (they had never met), (4) upon arrival for his treatment, Plaintiff was directed to a specific floor and room by defendant-hospital personnel, (5) the defendant-pathologist never advised plaintiff that he was an independent contractor and not an employee, and (6) Plaintiff's only interactions with and treatment with defendant-pathologist occurred at defendant-hospital's facility. *Id.* at \*8-9.

### **EMTALA Cases**

In *Torretti v Main Line Hosp., Inc.*, 580 F.3d 168, 170 (3rd Cir. 2009), Plaintiff was referred to Paoli Hospital Perinatal Testing Center ("Paoli") for monitoring of her high risk pregnancy. *Id.* Plaintiff called her obstetrician at Lankenau Hospital with complaints of abnormalities two days prior to a routine monitoring appointment, and was informed that she could come into Lankenau Hospital early, but Plaintiff chose not to do so because she was not under the impression that her condition was emergent. *Id.* The routine monitoring appointment at Paoli revealed abnormalities, and Plaintiff was sent to Lankenau Hospital non-emergently for follow up care. *Id.* at 172. Upon arrival, Plaintiff's condition quickly worsened, and she was rushed to surgery for emergency caesarean section. Plaintiff's child was born with severe brain damage, and Plaintiff brought suit under the Emergency Medical Treatment and Active Labor Act ("EMTALA"). *Id.* The District Court granted summary judgment, holding that Plaintiff failed to offer sufficient evidence to raise a reasonable inference that Defendants knew that plaintiff presented a "medical emergency." *Id.*

The Third Circuit affirmed, holding that the EMTALA does not apply to outpatient visits even if the patient is "later found to have an emergency medical condition and [is] transported to the hospital's dedicated emergency department." *Id.* at 174-75. In so holding the court adopted the reasoning set forth in regulations promulgated by the Department of Health and Human Services' Center for Medicare and Medicaid Services, 42 C.F.R. § 489.24(a)-(b), leaving the door open for a claim under the EMTALA in a situation where an individual comes to a hospital requesting treatment for an emergent condition despite having a pre-scheduled appointment within the hospital for a related or unrelated reason. *Id.* Therefore, because Plaintiff presented to Paoli for a regularly scheduled appointment, she could not maintain an action under the EMTALA. *Id.*

Despite the above holding, the Third Circuit also decided to analyze the substance of Plaintiff's EMTALA claim related to Defendants' failure to stabilize her emergent condition and inappropriate transfer for "future guidance." *Id.* at 175. The Court held that to maintain a stabilization claim under the EMTALA, Plaintiff must show that she: 1) had an emergency medical condition; 2) the hospital actually knew of the condition; and 3) the patient was not stabilized before transfer. *Id.* A plaintiff cannot be successful in a EMTALA stabilization claim unless the defendant has "actual knowledge" of the plaintiff's emergency medical condition. *Id.* Based on the facts outlined above, the court affirmed the lower court and found that "there is no evidence that any of the [Paoli] hospital staff...actually knew that [Plaintiff's] condition was an emergency before directing her to Lankenau for further monitoring." *Id.* at 177.

In *Byrne v. The Cleveland Clinic*, 684 F. Supp. 2d 641, 645-46 (E.D. Pa. 2010), a *pro se* plaintiff brought suit against medical providers under the EMTALA, as well as state law claims for breach of contract. In response to Defendants' motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the court first determined that there was no diversity jurisdiction because Plaintiff and the hospital were residents of Pennsylvania, so Plaintiff was required to sufficiently allege a claim under the EMTALA to establish federal question jurisdiction. *Id.* at 650.

A hospital has two primary obligations under EMTALA: 1) if an individual arrives at an emergency room, the hospital must provide appropriate medical screening to determine whether an emergency medical condition exists; and 2) if the hospital determines an individual has an emergency medical condition that has not been stabilized, it may not transfer the patient unless certain conditions are met. *Id.* at 650-51.

The court, relying on the holding of *Correa v. Hosp. San Francisco*, 69 F.3d 1184 (1st Cir. 1995) (failure to attend to a patient who presents a condition that indicates an immediate and acute threat to life can constitute a denial of an appropriate screening under the EMTALA), found that Plaintiff's chest pains "certainly constituted" an immediate and acute threat to life, and that his allegations that he was ignored for multiple hours were sufficient to meet the pleading standard for an EMTALA screening claim. *Id.* at 652-54. However, although a delay in treating a patient may provide for a screening claim under the EMTALA, a plaintiff who is eventually treated and stabilized cannot bring a stabilization claim under the EMTALA. *Id.* at 655. Accordingly, the court denied Defendants' motion to dismiss the screening claim, and granted their motion with regard to the stabilization claims. *Id.* The court also dismissed Plaintiff's breach of contract claims because under Pennsylvania law, this type of claim is only permissible in the medical malpractice context when the parties have contracted for a specific result, which had not happened in the instant case. *Id.* at 658-59.

In *Kauffman v. Franz*, 2010 WL 1257958 (E.D. Pa. 2010), Defendants claimed that the Court should reconsider its denial of their motion for summary judgment based on the recent Third Circuit Opinion in *Torretti v. Main Line Hosp., Inc.* The court recognized that under *Torretti*, a plaintiff must show that the hospital has actual knowledge of a patient's emergency condition before a plaintiff can be successful under the "stabilization prong" of the EMTALA. *Id.* The court found that the hospital had actual knowledge of the decedent's emergency condition once the decedent told a mental health worker that he was experiencing chest pain,

despite denying the chest pain when asked by the attending later on. Id. As a result, the court denied defendants' motion for reconsideration, holding that even after Torretti, it was unable to determine plaintiff's EMTALA claim at summary judgment.

In Baney v. Fick, 2015 U.S. Dist. LEXIS 21118, at \*4 (M.D. Pa. Feb. 23, 2015), Plaintiffs alleged that the medical team managing Plaintiff's care should have arranged for immediate transport to a tertiary care facility where cardiothoracic surgeons were available. Id. Plaintiffs stated that the "gist of the EMTALA claim was that [Plaintiff] was not 'stabilized' or transferred as required by EMTALA for persons suffering from an 'emergency condition.'" Id. The court stated that the EMTALA "forbids hospitals from refusing to treat individuals with emergency conditions, a practice often referred to as 'patient dumping,'" but "EMTALA[]...is not a federal malpractice statute," and EMTALA was not "intended to create a federal malpractice statute or cover cases of hospital negligence." Id. at \*6 (citing Torretti, 580 F.3d at 169, 178). While EMTALA requires hospitals to provide medical screening and stabilizing treatment to individuals seeking emergency care, Plaintiff did not "fit within EMTALA's scope—a patient antidumping statute" because Plaintiffs did not put forth any evidence or allegations that the elective inpatient spinal procedure was to treat an emergent condition. Id. at \*13-14. Plaintiff's "emergency condition" was really a complication of the elective procedure. Id.

The Baney court relied on Torretti's delineation of the following elements of a "stabilization" claim under EMTALA: (1) the plaintiff "had 'an emergency medical condition; (2) the hospital actually knew of that condition; [and] (3) the patient was not stabilized before being transferred.'" 580 F.3d at 178 (quoting Baber v. Hosp. Corp. of Am., 977 F.2d 872, 883 (4th Cir. 1992)). In distinguishing the applicability to Plaintiff's case, the Baney court observed, "EMTALA's requirements are triggered when an 'individual comes to the emergency department' and an individual only does so if that person is not already a 'patient.'" 2015 U.S. Dist. LEXIS at \*20 (citing Smith v. Albert Einstein Med. Ctr., 378 Fed. Appx. 154, 157 (3d Cir. 2010)).

In Hollinger v. Reading Health Sys., the Eastern District addressed when EMTALA's stabilization requirement ends. 2016 U.S. Dist. LEXIS 91393, at \*11 (E.D. Pa. July 7, 2016). Plaintiff encouraged the Court to adopt the Sixth Circuit's reasoning in Moses v. Providence Hosp. & Med. Ctrs., 561 F.3d 573 (6th Cir. 2009), which extends the EMTALA stabilization period beyond the emergency room to apply even after a patient is admitted as an inpatient, but the court refused to extend the EMTALA stabilization period beyond the emergency room. Id. at \*23-24 (citing Mazurkiewicz v. Doylestown Hosp., 305 F. Supp.2d 437 (E.D. Pa. 2004)).

**However, on January 19, 2017, the District Court for the eastern District of Pennsylvania held that the CMS regulations guidance "make clear that admission for observation does not end a hospital's EMTALA obligations" ultimately denying the defendant medical center's motion for summary judgment arguing that EMTALA's stabilization duties end when it placed plaintiff in observation. See Dicioccio v. Chung, 232 F. Supp. 3d 681, 686 (E.D. Pa. 2017). In Dicioccio, the plaintiff acknowledged the Third Circuit's growing precedent holding that stabilization obligations do not extend beyond the emergency room and the good-faith admission of a patient precludes an EMTALA claim.**

**Id. at 687. Rather, plaintiff argued that “observatoin” differs from “inpatient” such that EMTALA’s stabilization requirements apply. Id.**

The Eastern District agreed relying upon the Center for Medicare & Medicaid Services (“CMS”) regulations interpreting EMTALA. Id. The District Court noted that the CMS regulations provide a limited exception to EMTALA’s obligations, “but only in the event that a hospital ‘admits [an] individual *as an inpatient.*’” Id. (emphasis included). Citing the CMS Final Rule, issued in 2003, the District Court held that CMS interprets “hospital obligations under EMTALA as ending once the individuals are admitted to the hospital inpatient care.” Id. The District Court dismissed the defendant medical facility’s arguments claiming that there is no true distinction between “observations” and “inpatient” stated that the decision to admit a patient or place a patient in observation is made by a physician based upon clinical data. Id. at 691. Therefore, based upon an express reading of the CMS regulations interpreting EMTALA, the District Court held that admission for observation does not end a hospital's EMTALA obligations. Id.

### **Corporate Negligence**

#### **General Rule**

In Thompson v. Nason Hosp., 591 A.2d 703, 708 (Pa. 1991), the Pennsylvania Supreme Court held that a hospital owes a non-delegable duty directly to a patient, and if the hospital breaches that duty, it is subject to direct liability under the theory of corporate negligence. Unlike the theories of *respondeat superior* and ostensible agency, it is not necessary to show the negligence of a third party to establish a cause of action for corporate negligence; rather, it is sufficient to show that the hospital itself acted in a negligent manner. Id. at 708-09. The Court set forth the following four duties that a hospital owes directly to its patients:

1. The duty to use reasonable care in the maintenance of safe and adequate facilities and equipment;
2. The duty to select and retain only competent physicians;
3. The duty to oversee all persons who practice medicine within its walls as to patient care; and
4. The duty to formulate, adopt, and enforce adequate rules and policies to ensure quality care for patients.

Id. at 707. To succeed on a claim of corporate negligence, a plaintiff must show: (1) that the hospital had either actual or constructive knowledge of the defect or procedures that caused the harm; and (2) that the hospital’s negligence was a substantial factor in bringing about the harm. Id. at 708; **see also Shiflett v. Lehigh Valley Health Network, Inc., 2017 Pa. Super. LEXIS 900, at \*55 (Pa. Super. Ct. Nov. 8, 2017) (holding that in “proving corporate negligence, ‘an injured party does not have to rely on and establish the negligence of a third party,’ including a corporate employee.” (citing Thompson 591 A.2d at 707)).**

In Scampone v. Grane Healthcare Co., 11 A.3d 967, 988 (Pa. Super. Ct. 2010), the court upheld an extension of corporate liability to a nursing home facility and the corporation managing the nursing home. In this medical malpractice action, Plaintiff alleged, among other things, a claim for corporate liability based on inadequate staffing and care at the nursing home facility.” Id. Following trial, the jury concluded that the defendant nursing home was liable under theories of corporate and vicarious liability, and the nursing home appealed, arguing, *inter alia*, that (1) corporate liability is limited to hospitals and HMOs, not nursing homes, (2) corporate negligence cannot be premised upon allegations of “understaffing,” and (3) expert testimony is required to prove breach and causation. Id. at 972-73.

In addressing the types of entities which may be held liable under a theory of corporate liability, the court explained that it has previously extended liability to HMOs and medical professional corporations responsible for coordination, which “[assume] responsibility for the coordination and management of all patients.” Id. at 990.

[A] nursing home is analogous to a hospital in the level of its involvement in a patient’s overall health care. Except for the hiring of doctors, a nursing home provides comprehensive and continual physical care for its patients. A nursing home is akin to a hospital rather than a physician’s office, and the doctrine of corporate liability was appropriately applied in this case.

Id. at 976. Likewise, the court concluded that the corporation managing the nursing home is also subject to corporate liability for understaffing. Id. The court noted that the management corporation exercised complete control over all aspects of the nursing home’s operation. Id. at 989-990. Essentially, the management corporation had assumed the responsibility of a comprehensive health center, arranging and coordinating the total health care of the nursing facility residents. Id. The court concluded that issues of staffing fall within the four (4) Thompson duties for which a corporation may be held directly liable, explaining,

[o]ne of the duties expressly imposed under Thompson is to formulate, adopt, and enforce adequate rules and policies to ensure quality care for patients. If a health care provider fails to hire adequate staff to perform the functions necessary to properly administer to a patient’s needs, it has not enforced adequate policies to ensure quality care.

Id. at 990. The court also noted that expert testimony was required to establish that a deviation from the standard of care caused Plaintiff’s harm, which the Plaintiff set forth through the testimony of a nurse practitioner. Id. at 987-88.

The Supreme Court in Scampone v. Highland Park Care Ctr. LLC, 57 A. 3d 582, 584 (Pa. 2012), similarly held that a nursing home and affiliated entities are subject to potential direct liability for negligence, *where the requisite resident – entity relationship exists to establish that the entity owes the resident a duty of care.* Id. (emphasis added). The Court reasoned that it was not expanding the law of corporate negligence to include nursing homes. Id. at 593. Rather, the Court was refusing to give blanket immunity to the nursing home industry for breaching a duty it owed a plaintiff, as immunity from liability is an exception to the general rule. Id. at 599, 607. A

nursing home is no different than any other alleged corporate tortfeasor having an obligation to not breach legal duties it owes to others. *Id.* The Court noted that corporate negligence exists in many areas, citing not only the corporate responsibilities owed by a hospital to its patients as found in *Thompson*, but also the duty of care a corporation owes its customers to maintain its premises in a safe condition, *Gilbert v. Korvette Inc.*, 327 A. 2d 94 (Pa. 1974), and the duty owed to employees to use reasonable care in hiring other employees, *Dempsey v. Walso Bureau Inc.*, 246 A. 2d 418 (Pa 1968). *Id.* at 598. The Court stated that categorical exemptions from liability exist only where the General Assembly has acted to create explicit policy based immunities; otherwise the default general rule of possible liability operates. *Id.* at 599. Ultimately, the Court remanded the matter to the trial court to determine, consistent with its opinion, whether the nursing home and corporate manager owed Plaintiff legal duties or obligations, and to articulate any specific duties it may find. *Id.* at 607.

In *Sokolsky v. Eidelman*, 93 A.3d 858, 870 (Pa. Super. Ct. 2014) the Superior Court expanded on *Scampono*, *supra*, holding that “[w]e read *Scampono* to hold that in order to extend corporate liability to a skilled nursing facility, it is imperative that the trial court conduct an analysis of the following factors:

1. The relationship between the parties;
2. The social utility of the actor's conduct;
3. The nature of the risk imposed and foreseeability of the harm incurred;
4. The consequences of imposing a duty upon the actor; and
5. The overall public interest in the proposed solution.

*Id.* at 870. Failure of a trial court to consider these five factors, in addition to *Thompson*, in malpractice actions involving skilled nursing facilities, is reversible error. *Id.* at 871. As stated above, it should be noted that *Sokolsky* is a review of a legal malpractice case, however, the underlying “case within a case” was a medical malpractice action. *See generally id.*

In *Hall v. Episcopal Long Term Care*, 54 A.3d 381, 384 (Pa. Super. Ct. Sept. 27, 2012), the family of a deceased nursing home resident brought suit against the facility for negligence. In its opinion, the court reiterated *Scampono*’s finding that a nursing home is “analogous to a hospital in the level of its involvement in a patient’s overall health care.” *Id.* at 399. A nursing home, therefore, can be subject to a claim for corporate negligence. *Id.* Additionally, the court held that testimony from former employees is sufficient to serve as evidence that the facility was understaffed, and that the corporate entity had actual or constructive knowledge of the understaffing. *Id.* at 400. Such evidence was sufficient for the trial court to deny Defendant’s motion for JNOV. *Id.*

### **Requirement of Knowledge**

In *Edwards v. Brandywine Hosp.*, 652 A.2d 1382, 1384 (Pa. Super. Ct. 1995), Plaintiff claimed that the hospital’s lab notification procedures were deficient. The Court found that the hospital

had notification procedures in place and that Plaintiff failed to provide any evidence “that a reasonable hospital” would require a different notification procedure. *Id.* at 1387. The court explained that the Thompson theory of corporate liability would not be triggered every time something went wrong in a hospital, reasoning that acts of malpractice occur at the finest hospitals, subjecting hospitals to liability under theories of *respondent superior* or ostensible agency. *Id.* at 1386. The court held that in order to establish corporate negligence, a plaintiff must show more than an act of negligence by an individual for whom the hospital is responsible; rather, Thompson requires “a Plaintiff to show that the hospital itself is breaching a duty and is somehow substandard. *Id.* This requires evidence that the hospital knew or should have known about the breach of duty that is harming its patients.” *Id.* Therefore, the court affirmed dismissal of those corporate liability claims that Plaintiff was unable to support with evidence of a “systemic negligence,” of which the hospital either knew or should have known. *Id.*

In Welsh v. Bulger, 698 A.2d 581, 590 (Pa. 1997), the Pennsylvania Supreme Court addressed “what type of evidence is necessary to establish a *prima facie* claim of corporate liability for negligence against a hospital pursuant to [] Thompson” The Court explained, quoting Thompson:

[I]t is well established that a hospital staff member or employee had a duty to recognize and report abnormalities in the treatment and condition of its patients. If the attending physician fails to act after being informed of such abnormalities, it is then incumbent on the hospital staff members or employees to so advise the hospital authorities so that appropriate action might be taken. When there is a failure to report changes in a patient’s condition and/or to question a physician’s orders which is not in accord with standard medical practice and the patient is injured as a result, the hospital will be liable for such negligence.

*Id.* at 586 n.13. The Welsh Court did not require a showing of “systemic” negligence by the hospital to establish corporate liability. *Id.*

In Krapf v. St. Luke’s Hosp., 4 A.3d 642, 645 (Pa. Super. Ct. 2010), Plaintiffs filed wrongful death and survival actions against the defendant hospital related to allegations that a nurse was administering medications without authorization. A nursing manager and the hospital’s attorney investigated the situation, during which time, employees raised concerns, and after an ongoing investigation, the nurse resigned. *Id.* at 645-646. Employee concerns regarding an unusually high number of patient deaths during this time were apparently ignored. *Id.* at 647. Approximately a year and a half later, the nurse was fired by a subsequent employer for similar allegations, and the nurse ultimately confessed to killing the Plaintiffs’ decedents. *Id.* The plaintiffs filed suit against the hospital, alleging *inter alia*, corporate negligence, and the hospital moved for summary judgment on the basis that Plaintiffs’ claims were barred by the statute of limitations. *Id.* at 648.

On appeal, in affirming the trial court’s decision to deny summary judgment, the Superior Court addressed the sufficiency of Plaintiffs’ corporate negligence claims. *Id.* at 652. The court noted that “[c]orporate negligence is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient’s safety and

well-being while at the hospital.” Id. at 651. Because this duty is non-delegable, “an injured party does not have to rely on and establish the negligence of a third party.” Id. The Court went on to explain:

The hospital’s duties have been classified into four general areas: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.

Id. (citing Thompson, 591 A.2d at 707). Hospital staff and employees have “[a] duty to recognize and report abnormalities in the treatment and condition of [their] patients.” Id. A hospital may be held liable for a breach of the Thompson duties where it has constructive notice – it “should have known” – but fails to act. Id. at 653. Moreover, “[c]onstructive notice must be imposed when the failure to receive actual notice is caused by the absence of supervision. We interpret ‘failure to enforce adequate rules and policies’ as an analog to ‘failure to provide adequate supervision.’” Id. The court concluded that the facts of record, specifically the testimony of the nurse who claimed that their concerns went ignored by hospital supervisors, supported the application of constructive notice. Id.

In Stroud v. Abington Mem. Hosp., 546 F. Supp. 2d. 238, 241 (E.D. Pa. 2008), the court held that under the more liberal federal pleading standards, Plaintiff sufficiently pled a claim of corporate negligence despite failing to allege that Defendant hospital was aware of its inadequate policies and procedures. Plaintiff alleged that Defendant-hospital was negligent for failing to have in place and enforce proper policies and procedures for interdepartmental communication after the decedent died following a knee surgery. Id. at 242. Defendant filed a motion to dismiss pursuant to Federal Rule 12(b)(6), arguing, *inter alia*, that Plaintiff failed to adequately plead that the hospital knew or reasonably should have known of the alleged failings in its patient care procedures. Id. at 245.

Taking into the account the relaxed federal pleading standards, the court held that although Plaintiff had not expressly pled that the hospital actually or constructively knew of the alleged defects in its patient care procedures, the complaint contained a detailed recitation of the facts upon which the corporate negligence claim was predicated, and Plaintiff specifically pled that the hospital failed to have proper rules, policies, and procedures in place concerning communication of critical test results and availability of existing patient medical records from prior admissions. Id. at 246. Plaintiff also specifically pled that the hospital failed to enforce its rules, policies, and procedures concerning such matters, which was sufficient to give notice to the hospital that Plaintiff reasonably asserted that its procedures were deficient, and that this deficiency was the predicate upon which the corporate negligence claim was based. Id. Accordingly, the court concluded that Plaintiff’s corporate negligence claim stated a legally cognizable cause of action under the Federal Rules and denied the hospital motion to dismiss. Id.

### **Expert Testimony Required**

Unless the matter under investigation is so simple and the lack of skill or want of care is so obvious as to be within the ordinary experience and comprehension of even non-professional persons, a plaintiff must produce expert testimony to establish that the hospital deviated from an accepted standard of care and that the deviation was a substantial factor in causing the plaintiff's harm. Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997).

In Rauch v. Mike-Mayer, 783 A.2d 815, 828 (Pa. Super. Ct. 2001), app. denied, 793 A.2d 909 (Pa. 2002), the Superior Court held that where a hospital's negligence is not obvious, to make out a *prima facie* case of medical malpractice, Plaintiff's expert witness must establish the following: (1) that the hospital deviated from the standard of care; and (2) the deviation was a substantial factor in bringing about the harm. Because Plaintiff's experts' reports had fulfilled these requirements, the trial court erred in granting defendant's motion for summary judgment. Id. at 829.

### **Certificate of Merit Required**

A claim for corporate negligence against a hospital (or other qualifying corporate entity) requires the filing of a proper Certificate of Merit stating that an appropriate licensed professional has opined in writing that there is a "reasonable probability" that the care, skill, or knowledge associated with the treatment, practice, or work of the defendant fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm. See Pa. R. Civ. P. 1042.3; see also, Rostock v. Anzalone, 904 A.2d 943, 945 (Pa. Super. Ct. 2006); Weaver v. Univ. of Pittsburgh Med. Ctr., 2008 U.S. Dist. LEXIS 57988, at \*9-10 (W.D. Pa. July 30, 2008). Critically, a Certificate of Merit submitted in support of a corporate negligence claim must allege that the corporate entity *itself* deviated from the appropriate standard of care, not that the corporate entity's liability is based solely upon the actions or inactions of other licensed professionals for whom the hospital is responsible. See id. (emphasis added); see also Stroud v. Abington Mem. Hosp., 546 F. Supp. 2d 238, 247-48 (E.D. Pa. 2008) (holding a proper Certificate of Merit alleging direct corporate negligence must be filed in support of corporate negligence claim, subject to certain equitable considerations).

Of note, in Everett v. Donate, 2010 U.S. Dist. LEXIS 26870, at \*2-3 (M.D. Pa. March 22, 2010) aff'd, 397 Fed. Appx. 744 (3d Cir. 2010), the District Court addressed whether it was required to apply Rule 1042.3 when it was not sitting in diversity and was instead addressing pendent state claims of negligence. The court cited Abdulhay v. Bethlehem Med. Arts, 2005 U.S. Dist. LEXIS 21785, at \*8-9 (E.D. Pa. Sept. 27, 2005), and held that under the Erie doctrine, "federal courts must apply [Rule 1042.3] to state law claims arising under pendent jurisdiction." Id. The court also noted that Plaintiff's incarceration or *pro se* status is not a viable excuse for plaintiff's failure to comply with Rule 1042.3. Id. at \*9. The court further noted that Rule 1042.3 does not require that the moving party allege it suffered prejudice by plaintiff's failure to file a certificate of merit. Id.

### **Limitations on Corporate Liability**

#### **Informed Consent**

In Valles v. Albert Einstein Med. Ctr., 805 A.2d 1232, 1234 (Pa. 2002), Plaintiff sought to impose vicarious liability on Defendant hospital for the alleged failure of one of its employee-physicians to obtain informed consent in connection with cardiac procedure. The trial court had granted summary judgment in favor of Defendant physician and hospital, and the Superior Court had affirmed. Id. at 1234-35. The Supreme Court affirmed, and ruled that a battery based on lack of informed consent was not a type of conduct that occurred within the scope of employment, and held “that as a matter of law, a medical facility lacks the control over the manner in which the physician performs his duty to obtain informed consent so as to render the facility vicariously liable.” Id. at 1239. Consequently, the court held that “a medical facility cannot be held vicariously liable for a physician’s failure to obtain informed consent.” Id. The Court noted, however, that in cases where the hospital specifically assumes the duty to obtain a patient’s informed consent, it will be subject to direct liability. See Friter v. Iolab Corp., 607 A.2d 1111, 1113-16 (Pa. Super. Ct. 1992) (finding hospital liable for the lack of informed consent when it was involved in a clinical investigation on behalf of the FDA because according to federal regulations, the hospital was required to obtain the informed consent of all participants prior to beginning the study).

**In Stalsitz v. The Allentown Hosp., 814 A.2d 766, 774 (Pa. Super. Ct. 2002), the Superior Court, following Valles, stated that the duty to obtain a patient’s informed consent is generally limited to the surgeon who performed the operative procedure. See also Shinal v. Toms, 162 A.3d 429, 453 (Pa. 2017) (holding that a physician cannot rely upon a subordinate to disclose the information required to obtain informed consent). Since the hospital cannot maintain control over the manner in which the physician performs his duty to obtain informed consent, the hospital cannot be held vicariously liable for a battery which results from a lack of informed consent occurring within the scope of employment. Stalsitz, 814 A.2d at 774.**

In Tucker v. Community Med. Ctr., 833 A.2d 217, 224-25 (Pa. Super. Ct. 2003), the Superior Court affirmed the trial court’s dismissal of Plaintiffs’ claim against the medical facility based upon the treating nurse’s alleged failure to obtain informed consent for an invasive procedure. In affirming the dismissal, the court stated:

It is clear that Count IV of the Amended Complaint sets forth a claim of corporate negligence because it alleges that CMC “had a duty to and/or assumed the duty to inform [Husband] of the fact that catheterization was to be performed on him [ ]. Pennsylvania law forbids a claim of corporate negligence against a hospital to be founded upon a theory that the hospital failed to ensure the patient’s informed consent. Accordingly, Count IV of Husband and Wife’s Amended Complaint failed to state a cause of action, and the trial court acted properly when it dismissed the claim.

Id. at 225 (internal citations omitted).

In Cooper v. Lankenau Hosp., 51 A.3d 183, 185 (Pa. 2012), Plaintiff asserted medical battery due to the performance of a cesarean section after the patient had refused consent. Plaintiff appealed from a judgment for the Defendants, alleging that the jury instruction

improperly required the jury to find that the physician who performed the procedure had acted with intent to cause harm. Id. The trial court issued the following jury charge:

A physician must obtain a patient's consent to perform surgery. Consent may be verbal or written. Consent is not required in an emergency. However, even in an emergency[,] surgery should not be performed if the patient refuses consent.

A physician's performance of a surgery in a non-emergency without consent, or the performance of a surgery in an emergency when the patient has refused is considered a battery under the law. A battery is an act done with the intent to cause a harmful or offensive contact with the body of another, and directly results in the harmful or offensive contact with the body of another.

Id. at 186.

The Pennsylvania Supreme Court affirmed, reasoning that it has been long held that “intent,” in the context of battery, does not mean “intent to harm,” but rather “an act done with the intent to cause a harmful or offensive contact with the body of another...” Id. at 189. Whether such contact is harmful or offensive in the context of medical treatment depends on whether the patient has consented to such treatment. Id. The Court did, however, recommend that the Pennsylvania Committee for Proposed Standard Jury Instructions consider developing a standard jury charge for medical battery/lack of consent cases. Id. at 192 n.10.

### **Sovereign Immunity**

In Moser v. Heistand, the Pennsylvania Supreme Court held that a plaintiff cannot proceed with a corporate liability claim against a state-owned medical facility. 681 A.2d 1322, 1326 (Pa. 1996), The Court reasoned that the Commonwealth’s sovereign immunity waiver codified at 42 Pa.C.S.A. § 8522 waived immunity for the negligent acts of specified individuals working at or for a Commonwealth institution, but it did not waive sovereign immunity for individuals who act as the corporate entity. Id.

In Dashner v. The Hamburg Ctr. of the Dept. of Public Welfare, 845 A.2d 935, 939 (Pa. Commw. Ct. 2004), the court explicitly followed Moser in holding that Defendant facility for the intellectually disabled was immune from suit with respect to allegations of negligent hiring, supervision and other claims arising from its administrative policies. The trial court had concluded that the claims fell within the medical-professional liability exception to sovereign immunity, but the Commonwealth Court reversed the trial court’s order denying Defendant’s motion for summary judgment because the sovereign immunity statute immunizes Commonwealth-run medical facilities from liability for their own “institutional, administrative negligence.” Id.

### **Limitations of Corporate Negligence**

In Sutherland v. Monongahela Valley Hosp., 856 A.2d 55, 62 (Pa. Super. Ct. 2004), in a very brief section of its opinion, the Superior Court “declined” Defendant-physician’s “invitation

to extend the negligence principles contemplated by Thompson to the physician's practice. While this opinion was specifically limited "to the case *sub judice*," the reasoning of the court appears to apply more generally:

We note that the policy considerations underlying the Pennsylvania Supreme Court's creation of the theory of corporate liability for hospitals are not present in the situation of a physician's office. In Thompson, the Supreme Court recognized that "the corporate hospital of today has assumed the role of a comprehensive health center with responsibility for arranging and coordinating the total health care of its patients." The same cannot be said for a physician's practice group.

Id. (citations omitted).

However, in Zambino v. Hosp. of the Univ. of Pa., 2006 U.S. Dist. LEXIS 69119, at \*3-4 (E.D. Pa. Sept. 25, 2006), the United States District Court for the Eastern District of Pennsylvania denied Defendants' motion to dismiss Plaintiff's corporate negligence claim against Defendant hospital trustees, health system, and practice group. The court noted that although the Pennsylvania Supreme Court has not addressed the extension of corporate liability to medical providers other than hospitals, other courts (such as the Pennsylvania Superior Court in Shannon v. McNulty 718 A.2d 828 (Pa. Super. Ct. 1998)) have extended this doctrine to other entities in limited circumstances "such as when the patient is constrained in his or her choice of medical care options by the entity sued, and the entity controls the patient's total health care." Id. at \*4. The court held that Plaintiffs were entitled to develop a factual record to support the application of this theory to Defendants, and that they may be able to show that Defendants were hospital entities against whom they could maintain a corporate negligence claim. Id. at \*5.

In Hyrca v. West Penn Allegheny Health Sys., Inc., 978 A.2d 961, 967 (Pa. Super. Ct. 2009), the Superior Court confronted numerous objections raised by Defendant medical providers after a trial on claims sounding in medical malpractice and corporate negligence resulted in the entry of a multi-million dollar judgment against them. One of the arguments the court confronted was whether the jury should have been charged on the issue of corporate negligence with respect to the Defendant professional corporation. Id. at 981-84. The corporation argued that professional corporations are not liable under a theory of corporate negligence. Id. The court acknowledged its prior decision in Sutherland v. Monongahela Valley Hosp., 856 A.2d 55 (Pa. Super. Ct. 2004), in which it declined to extend the doctrine of corporate negligence to physicians' offices. Id. at 982. Ultimately, however, the court concluded that the corporation was more in the nature of a hospital or HMO, as to whom corporate negligence claims have been found viable. Id. at 983. Citing to both Thompson, and Shannon v. McNulty, 718 A.2d 828 (Pa. Super. Ct. 1998), the court concluded that the trial court did not err in charging the jury on corporate negligence. Id. at 984.

By way of additional background, the professional corporation at issue held an agreement with the rehabilitation unit of a hospital, "to provide medical care for patients admitted to its Rehabilitation Unit." Id. at 966. The professional corporation was responsible for the decision to assign the physician to Decedent's care, and Plaintiff theorized that the physician erred in prescribing and continuing Decedent "on two medications, which, in combination, are known to

cause stomach bleeding, without taking appropriate precautions or monitoring her.” Id. at 967. Apparently, Decedent showed signs of gastrointestinal bleeding two days prior to the time that the physician left the professional corporation’s care. Id. Thereafter, the decedent died from gastrointestinal bleeding. Id. Notably, after the physician left the professional corporation’s employ, the professional corporation did not assign another physician to Decedent’s care. Id.

The Superior Court wrestled with whether the corporation was more akin to a Hospital or HMO, or a physician’s office, the latter of which no liability attaches to under a corporate negligence theory. Id. at 983. However, given that the corporation was “responsible for the coordination and management of all patients in the rehabilitation unit at [the hospital], which it independently operated,” and that it “failed to deliver the comprehensive care it was contractually obligated to provide the Decedent,” the Superior Court affirmed the trial court’s decision to charge the jury regarding corporate negligence. Id. at 983-84.

### **HMO Liability**

In Shannon v. McNulty, 718 A.2d 828, 836 (Pa. Super. Ct. 1998), the Superior Court considered whether the corporate negligence doctrine extends to a Health Maintenance Organization (“HMO”). In Shannon, Plaintiffs alleged negligence against an obstetrician for failing to diagnose and treat signs of pre-term labor. Id. at 829. Plaintiffs asserted two grounds of liability against their HMO: 1) vicarious liability for the negligence of its nursing staff in failing to respond properly to Plaintiff-Wife’s complaints; and 2) corporate liability for both negligent supervision of the obstetrician’s care and lack of appropriate procedures and protocols when dispensing “telephonic medical advice” to subscribers. Id.

The Court held that the doctrine of corporate liability should extend to HMOs because HMOs, like hospitals, “play central role[s] in the total health care” of their patients. Id. at 835-36. The court reasoned that Plaintiff was limited in her health care choices by the HMO, which required her to call either her obstetrician or the HMO’s emergency line before receiving medical care. Id. Because HMO subscribers are “given little or no say so in the stewardship of their care,” and because HMO’s “involve themselves daily in decisions affecting their subscriber’s medical care,” the court held that Thompson’s corporate liability duties should “be equally applied to an HMO when that HMO is performing the same or similar functions as a hospital.” Id. at 836.

### **Extension of Corporate Liability**

In Milliner v. DiGuglielmo, 2011 U.S. Dist. LEXIS 64439, at \*3-4 (E.D. Pa. June 8, 2011), a prison inmate injured his back after falling from the top bunk of his cell, requiring him to undergo surgery at an outside hospital, which left him paralyzed from the neck down. Plaintiff eventually filed suit against the doctor who performed the surgery, the hospital at which the surgery was performed, and various other defendants who worked at the correctional facility. Id. at \*4. Plaintiff also filed suit against Prison Health Services, Inc. (“PHS”), a “Delaware corporation [that] contracted with the [Pennsylvania] Department of Corrections to provide health care services to inmates on behalf of the Department of Corrections.” Id. Plaintiff alleged corporate liability on the part of PHS, amongst other claims. Id.

PHS filed a motion to dismiss the corporate negligence claim, arguing that it could not be held liable under the theory of corporate liability because the Thompson rule was limited to entities that play a central role in a patient’s total health care. Id. at \*27. The Court disagreed and denied the motion to dismiss, noting that Plaintiff had sufficiently alleged that PHS was involved with the inmate’s care to such a degree that it did play a “central role” in care. Id. at \*28. Moreover, the Court cited prior Eastern District case law, i.e., Wheeler v. Prison Health Servs., Inc., 2010 WL 3489405, at \*7 (E.D. Pa. 2010), for the proposition that the Pennsylvania Supreme Court “would extend corporate negligence to an institution responsible for an inmate’s healthcare, like PHS.” Id.

## **Peer Review Protection Act (“PRPA”)**

### **HMO Issues**

In McClellan v. Health Maintenance Organization, 686 A.2d 801 (Pa. 1996), the executors of the estate of a patient who died from malignant melanoma sued Decedent’s doctor and Health Maintenance Organization (HMO) for negligence, breach of contract and misrepresentation. McClellan, 686 A.2d at 807 n.1 (Zappala, J.). The Superior Court was presented with the issue of whether the PRPA precluded the discovery of peer review material in an action against an Independent Practice Association HMO. Id. at 803-04. The Court held that since HMOs were not specifically identified by the legislature as health care providers, the PRPA’s protections did not extend to the HMO in this case. See id. at 804.

On appeal, the Supreme Court was evenly divided. Id. at 802. Consequently, the order of the Superior Court was affirmed. Id. Justice Nigro, who wrote in favor of reversal of the Superior Court’s holding, stated that HMOs, like health care facilities, evaluated and reviewed doctors. Id. at 809 (Nigro, J.). Moreover, HMOs conduct peer review to select competent doctors. Id. Since other health care facilities that conduct peer review are protected from producing confidential peer review documents, HMOs should also be protected. Id. Justice Nigro wrote that this conclusion was consistent with the purpose of the Act—to foster candor and frankness at peer review committee meetings. Id. Justice Zappala, who also wrote in favor of reversal and was joined by Justice Castille, stated that hospitals and Individual Practice Association (“IPA”) model HMOs possessed the same duty to select and retain competent physicians. Id. at 807 (Zappala, J.). He concluded that IPA model HMOs merited the same protection as hospitals under the Act. Id.

Those justices who wrote in support of affirming the Superior Court Opinion stated that the definition of “health care provider” in the Act was ambiguous. Id. at 805. Thus, they sought to ascertain the intention of the General Assembly. Id. at 805-06. Using the statutory construction doctrine of *eiusdem generis* (“of the same kind or class”), the Justices concluded that an HMO was not a health care provider or administrator of a health care facility as defined by the Act. Id. at 806. Accordingly, the justices held that an HMO cannot be “embraced by the confidentiality protection of the Act.” Id.

Note that as a plurality opinion, the Supreme Court’s decision in McClellan lacks precedential value. See Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, 83 A.3d 488, 513 (Pa. Commw. 2014). Moreover, McClellan was further abrogated as noted in the

2014 Commonwealth Court decision in Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board. Id. at 514. In Tri-County, the Commonwealth Court noted a 2010 Supreme Court decision, Dechert, LLP v. Commonwealth, 998 A.2d 575 (Pa. 2010), which suggested that the language, “including but not limited to” when preceding more specific language, indicated an intention to broaden a statute, rather than constrain its scope. See id. at 511-12. But see Yocabet v. UPMC Presbyterian, 119 A.3d 1012, 1022-23 (Pa. Super. Ct. 2015) (citing McClellan and refusing to extend the protections of the PRPA to documents created during a Pennsylvania Department of Health investigation).

### **Discovery of Hospital Files**

In Piroli v LoDico, M.D., 909 A.2d 846 (Pa. Super. Ct. 2006), Plaintiff sued a physician and his practice after his wife died following a transforaminal epidural steroid injection during which, Plaintiff alleged, Defendant punctured Decedent’s vertebral artery. Piroli, 909 A.2d at 847. At issue in this case was whether information gathered during a peer review was discoverable under the Peer Review Protection Act (“PRPA”) given that individuals other than health care providers (including a billing manager) were present during the peer review session. Id. The trial court concluded that the PRPA *did not* shield the information in question from discovery because a billing manager, who is not considered a “professional health care provider” according to that term in the PRPA, was present during the review process, thus destroying any protection afforded by the PRPA. Id.

On appeal, the Superior Court reversed the trial court’s judgment and held that the information *was* protected by the PRPA even though non-health care professionals were present at the peer review session. Id. at 852. As explained by the Superior Court, the PRPA protects the confidentiality of information gathered and presented by “review organizations,” defined as:

any committee engaging in peer review . . . to gather and review information relating to the care and treatment of patients for the purposes of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care.

Id. at 849 (quoting 63 Pa. Cons. Stat. § 425.2). Section 425.2 defines “peer review,” furthermore, as “the procedure for evaluation by *professional health care providers* of the quality and efficiency of services ordered or performed by other health care providers . . .” 63 Pa. Cons. Stat. § 425.2 (emphasis added).

Despite the PRPA’s provision that peer review must be conducted by “health care professionals,” however, the Superior Court gave more weight to the purpose of the statute than to the plain language. Piroli, 909 A.2d at 851-52. As explained by the Superior Court, “the PRPA was promulgated to serve the legitimate purpose of maintaining high professional standards in the medical practice for the protection of patients and the general public.” Id. at 850 (quoting Troescher v. Grody, 869 A.2d 1014, 1020-21 (Pa. Super. Ct. 2005)). The court explained, furthermore, that the “‘overriding intent of the Legislature’ is to ‘protect peer review records.’” Id. at 849 (quoting Troescher, 869 A.2d at 1022). The court concluded, in turn, that subjecting

information gathered and presented during a peer review session to discovery simply because non-healthcare professionals were present would defeat the purpose of the PRPA and hinder the advancement of the health care profession in general. Id. at 852. The Superior Court thus concluded that the information sought by Plaintiffs was protected by the PRPA despite the fact that a billing agent was present at the peer review session. Id. at 853.

In Dodson v. Deleo, 872 A.2d 1237 (Pa. Super. Ct. 2005), Defendants sought review of an order of the trial court which held that certain information sought by Plaintiff in medical malpractice litigation against the hospital was discoverable and not protected by the Peer Review Protection Act. Dodson, 872 A.2d at 1240.

Plaintiff alleged that Defendant's performance of a vertical banded gastroplasty and subsequent post-operative care fell below the standard of care for a reasonable physician. Id. at 1239. Plaintiff sought credentialing reports specific to Dr. DeLeo, a physician Plaintiff accused of malpractice. Id. at 1239-40. Defendants maintained that these documents were protected by the Peer Review Protection Act. Id. After an *in camera* review of the disputed documents, the trial court concluded that these documents were not privileged and ordered disclosure. Id. at 1239.

On appeal, Defendants maintained that the trial court erred in concluding that documents memorializing hospital peer review activity with respect to a given physician for a given year, which were generated by a hospital department charged with gathering and generating peer review committee documents, and were used exclusively for purposes of physician credentialing, were not protected by the PRPA. Id. at 1240-41. The Superior Court found that an affidavit from Amy Helmuth, R.N., the administrator of peer review activity within the hospital, established that the documents in question were generated exclusively for peer review purposes and were maintained exclusively with peer review files. Id. at 1243. Therefore the court held that the trial court erred in ordering production of the documents as they squarely fell within the protection of the PRPA. Id. The court stated that the purpose of the PRPA is to facilitate comprehensive, honest and potentially critical evaluations of medical professionals by their peers. Id. Documents used in the determination of staff privileges are the type of documents the legislature contemplated when drafting the Peer Review Protection Act. Id.

It should be noted that the mere utilization of records in peer review proceedings will not automatically prevent a plaintiff from obtaining those records from their original sources. Id. at 1242. PRPA, 63 Pa. Cons. Stat. § 425.4 provides in pertinent part that:

information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee . . . .

63 Pa. Cons. Stat. § 425.4. See also Ellison v. Women & Children's Hosp. of Buffalo, C.A. No. 08-313 Erie, 2010 U.S. Dist. LEXIS 130828, at \*6 (W.D. Pa. Dec. 10, 2010) ("The PRPA does not protect 'information, documents or records otherwise available from original sources' or 'non-peer review business records, even if those records eventually are used by a peer review committee.'" quoting, Dodson, 872 A.2d at 1242-43 (Pa. Super. Ct. 2005)).

## **The PRPA Does Not Bar Discovery of Committee Audiotape in Physician Action for Alleged Misuse of Peer Review**

In Hayes v. Mercy Health Corp., 739 A.2d 114 (Pa. 1999), the Supreme Court of Pennsylvania affirmed in part a trial court order permitting a physician to obtain through discovery an audiotape of a hospital medical board in staff privilege litigation. Hayes, 739 A.2d at 115. The physician claimed that members of the board acted with ulterior motives and marred his record. Id. at 118. The Supreme Court ruled that in the context of this physician's case, the committee tape was not privileged under the PRPA. Id. at 118-19. The court stated in dicta that the privilege would apply where the patient sued the physician or hospital for negligence. See id. at 118.

### **MENTAL HEALTH LAW**

#### **Qualified Immunity Standard**

Mental health providers are entitled to statutory-based qualified immunity pursuant to the Mental Health Procedures Act ("MHPA"). 50 Pa. Cons. Stat. § 7101 et seq. Under the MHPA, providers are immune from both civil and criminal liability absent a showing of gross negligence or willful misconduct for any decisions related to a patient's treatment. Id. § 7114. The Supreme Court of Pennsylvania has set forth the legal elements required to demonstrate liability against a mental health provider.

In Emerich v. Philadelphia Center for Human Development, Inc., 720 A.2d 1032 (Pa. 1998), a case of first impression, the Pennsylvania Supreme Court held that, under certain limited circumstances, mental health professionals have a duty to warn third parties of serious bodily threats made by their patients. See Emerich, 720 A.2d at 1040. The Court discussed certain parameters of the MHPA and carefully reviewed policy issues related to mental health care.

Writing for the majority, Justice Cappy set forth the limitations for the duty to warn:

In summary, we find that in Pennsylvania, based upon the special relationship between a mental health professional and his patient, when the patient has communicated to the professional a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party, and when the professional determines, or should determine under the standards of the mental health profession, that his patient presents a serious danger of violence to the third party, then the professional bears a duty to exercise reasonable care to protect by warning the third party against such danger.

Id. at 1043.

In Emerich, the Court concluded that the defendant psychiatrist had a duty to warn, which he discharged when he warned the non-patient third party to not return to the patient's apartment after the patient told the psychiatrist earlier that day of his specific intent to kill the third party if

she returned to the apartment. Id. at 1044-45. Although the third party disregarded the psychiatrist's advice and was shot by the patient when she went to the apartment, the psychiatrist was not deemed liable as he fulfilled his obligation by warning the intended victim of possible danger. Id.

In a footnote, the Court noted that the MHPA applies to "all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and [to] all voluntary inpatient treatment of mentally ill persons." Id. at 1038 n.7. The Court further noted that it was unclear whether the patient at issue had been treated as an involuntary outpatient, but that if he had, and the MHPA was therefore applicable, "[a]ppellant [third party] may have the additional hurdle of the MHPA's immunity provision which permits liability only for willful misconduct or gross negligence." Id.

Duty to a third party non-patient was addressed again in DeJesus v. U.S. Dept. of Veterans Affairs, 479 F.3d 271 (3d Cir. 2007). Plaintiffs, the wife of the decedent and mother of their two children and the parents of the neighborhood children, filed suit after Decedent killed his two children, two neighborhood children, and then himself. DeJesus, 479 F.3d at 273-74. Decedent had voluntarily entered the Veteran Affairs Domiciliary Program, where he was diagnosed as having intermittent explosive disorder. Id. at 274. He had a history of domestic violence and had previously attempted to hang himself multiple times. Id. Decedent received various mental health treatments while at VA's facilities, including medication, group therapy sessions and one-on-one counseling. Id. at 275.

After about five months, Decedent was transferred to Landing Zone II Transitional Residence ("LZ"), a privately run organization located on VA's grounds and to which VA provides medical and psychiatric services. Id. Decedent was involved in an altercation with another LZ resident in which he wielded a knife. Id. at 276. As a result, LZ and VA decided to discharge Decedent. Id. at 276-77. VA had an opportunity to commit Decedent but ignored warning signs of Decedent's imminent physiologic breakdown. See id. at 277. Within a day of being discharged, decedent shot and killed two of his children, two of the neighbor's children, and then killed himself. Id.

Plaintiffs brought suit asserting claims, among others, of gross negligence, failure to warn and negligent infliction of emotional distress. Id. at 278. The trial court granted Defendants' motion for summary judgment with respect to the failure to warn claim, finding that a mental healthcare provider only has a duty to warn if a patient communicates a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party. Id. With regard to the remaining claims, the trial court held a bench trial and entered judgment for Plaintiffs. Id. at 279.

On appeal, the Third Circuit affirmed the trial court's ruling. Id. at 274. The court, relying on Emerich, found that Decedent never communicated a specific threat of immediate harm. Id. at 280. Accordingly, the court found that Defendants did not have a duty to warn. Id. With regard to the scope of other duties the VA may have owed to the victim children, the Third Circuit agreed with the District Court's conclusions that: 1) liability could not be based on a Pennsylvania common-law duty owed to the victims; 2) the MHPA created a duty to the third-

party victims; and 3) the VA had been grossly negligent and so had violated this duty. See id. at 287-88; see also Francis v. Northumberland Cty., 636 F. Supp. 2d 368, 386-87 (M.D. Pa. 2009) (holding a psychiatrist could be held liable for malpractice in relation to inmate's death by suicide and was not entitled to qualified immunity under MHPA where jury could find that psychiatrist acted with "reckless indifference" with respect to prison's suicide prevention protocol).

In Bayer v. Monroe County Children and Youth Services, 577 F.3d 186 (3d Cir. 2009), the mother of minor children who were removed from her custody brought a section 1983 claim against Monroe County Children and Youth Services ("MCCYS") and two MCCYS employees, alleging that her due process rights were violated after a dependency hearing regarding her children's custody was held more than seventy-two hours after removal. Bayer, 577 F.3d at 188, 190-92. At the close of discovery, the MCCYS employees filed motions for summary judgment on grounds of qualified and absolute immunity and argued that they could not be held liable to Plaintiff as a matter of law. Id. at 191. The trial court denied both motions and the MCCYS employees appealed. Id.

On appeal, the Third Circuit noted that "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Id. at 191 (quoting Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 172 L.Ed.2d. 565 (2009)). Examining the facts of record, the court held that the actions of the MCCYS employees, including the filing and processing of the necessary paperwork for the dependency hearing, were reasonable under the framework set forth by the United States Supreme Court in Pearson. Id. at 192-93. Accordingly, the court held that the MCCYS employees were entitled to qualified immunity as a matter of law and reversed the District Court's denial of the employees' respective motions for summary judgment. Id. at 195. Because the court held that the MCCYS employees were entitled to qualified immunity, it did not reach the issue of absolute immunity. Id.

### **Other Developments**

Thierfelder v. Wolfert, 52 A.3d 1251 (Pa. 2012) (also dealt with, supra). In this case of first impression, the Supreme Court of Pennsylvania examined whether a general practitioner who provided incidental mental health treatment to a patient could be held liable in tort for engaging in a sexual relationship with that patient. Thierfelder, 52 A.3d at 1253.

The case focused on the first element of the tort of professional negligence, the existence of a duty. Id. at 1261. Specifically, the Court contemplated "whether a general practitioner who provides some degree of mental or emotional treatment to a patient should be subject to what has been posed as a mental health professional's 'heightened' standard of care, which, it is further alleged, entails a specific and strict duty to avoid sexual relations with patients." Id. at 1264. The Court noted that it had not yet opined specifically on the topic of whether a specialist is held to a heightened standard of care in that professional's field, although the Superior Court had made such a finding. Id. at 1266. The Court then looked to the findings of courts in other states as instructive, but noted that the treatment of the issue had a wide variance by jurisdiction. Id. at 1266-67.

The Court found that there was no statute or other binding precedent that provides for an action arising in tort law, prohibiting a mental health professional from engaging in sexual relations with a patient. Id. at 1268, 1271. The Court did note that such behavior may be subject to action in front of a disciplinary or ethics board. Id. at 1268 n.14.

The Court then turned to the Althaus factors to determine whether the “gray area” that is incidental mental health care, rendered by a general practitioner, should be subject to a particularized duty to avoid sexual relationships with patients: “(1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk involved and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.” Id. at 1274 (quoting Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000)).

Giving particular weight to the first prong, the Court declined to extend liability in tort to a general practitioner giving incidental mental health care who then engages in a sexual relationship with their patient. Id. at 1275. The Court noted qualitative differences in treatment and the fact that in such situations, the physician is less likely to understand and employ the method of transference as therapeutic treatment. Id. Moreover, the Court did not want to diminish the distinction between the duties of specialists and generalists and thought that any determinations were better left to the policy making entities to handle. Id. at 1278.

In Walsh v. Borczon, 881 A.2d 1 (Pa. Super. Ct. 2005), the mentally ill patient’s doctor was out of town when the patient learned she was pregnant. Walsh, 881 A.2d at 2. She called the defendant hospital to ask if she should stop taking her medications and a physician there recommended she take none until she consulted with her own physician. Id. She did stop taking medications and her mental condition deteriorated. Id. She was hospitalized, released and failed to show at a follow-up appointment. Id. Shortly thereafter, she terminated the pregnancy. Id. She resumed taking her medication, her mental health improved and she then claimed she suffered mental trauma due to her decision to have an abortion. Id. She alleged Defendants had been negligent in suddenly taking her off her medications and in failing to arrange for someone to cover for her vacationing doctor. Id. She argued that the MHPA immunity provisions did not apply because the alleged negligence related to voluntary outpatient treatment. Id. at 4.

The Superior Court held that Plaintiff had not preserved this claim, and also that the trial court had properly dismissed her suit because 50 Pa. Cons. Stat. § 7114(a) required proof that Defendants were grossly negligent. Id. at 6. The facts Plaintiff alleged demonstrated no more than ordinary carelessness and did not indicate behavior that grossly deviated from the required standard of care. Id. at 8. The Superior Court affirmed the order granting summary judgment in favor of Defendants. Id. at 9-10.

In Bell v. Mayview State Hospital, 853 A.2d 1058 (Pa. Super. Ct. 2004), the trial court dismissed an inmate’s purported medical malpractice claim as frivolous. Bell, 853 A.2d at 1060. The inmate alleged that Defendants misdiagnosed his mental condition, which resulted in him receiving a harsher sentence in a previous criminal matter. Id. at 1059-60. On appeal, the Superior Court reviewed his complaint for validity under Pennsylvania Rule of Civil Procedure

240. Id. at 1060. The court held that Plaintiff had failed to allege the existence of any physician-patient relationship that would impose any duty owed to him by Defendants. Id. at 1061. He also failed to assert any breach of duty on the part of Defendants and simply surmised that because a much later evaluation yielded contrary results, the previous one was incorrect. Id. The court held that the complaint failed to state a cause of action for medical negligence and affirmed the trial court's order. Id. at 1062.

In Gormley v. Edgar, 995 A.2d 1197 (Pa. Super. Ct. 2010), Plaintiff motorist appealed a discovery order requiring her to produce emergency room records pertaining to mental health issues, arguing that the records were protected under the Mental Health Procedures Act (50 P.S. § 7101, et seq.), the Mental Health and Mental Retardation Act (50 P.S. § 4101, et seq.) and the Pennsylvania Alcohol and Drug Abuse Act (71 P.S. § 1690.101, et seq.), as well as the Pennsylvania psychiatrist-patient privilege (42 Pa.C.S. § 5944). Gormley, 995 A.2d at 1202-03. Affirming the trial court's order, the Superior Court held that the MHPA, MHMRA and PAADAA did not apply as Plaintiff voluntarily sought mental health treatment and drugs and alcohol were admittedly not at issue. Id. As for the psychiatrist-patient privilege, the court noted that while the privilege is based upon a strong public policy designed to encourage and promote effective treatment, the privilege may be waived in civil actions where the plaintiff places the confidential information at issue in the case. Id. at 1204. Because Plaintiff sought damages for frustration and anxiety, the Superior Court held that the psychiatrist-patient privilege did not apply and concluded that “[Plaintiff] directly placed her mental condition at issue when she alleged that she suffered from anxiety as a result of the accident. Absent other considerations militating against disclosure, the records are discoverable.” Id. at 1206.

## **STATUTE OF LIMITATIONS**

### **General Rule**

A statute of limitations provides that no suit shall be maintained for certain prescribed causes of action unless brought within a specified period of time after the right to bring suit has accrued. Philadelphia, B. & W.R. Co. v. Quaker City Flour Mills Co., 127 A. 845, 846 (Pa. 1925). “The purpose of any statute of limitations is to expedite litigation and thus discourage delay in the presentation of stale claims which may greatly prejudice the defense of such claims.” Ins. Co. of N. Am. v. Carnahan, 284 A.2d 728, 729 (Pa. 1971).

For a medical professional liability action based on negligence or lack of informed consent, the statute of limitations is two years. 42 Pa. Cons. Stat. § 5524(2). The two-year period begins to run on the date the injury is sustained. See Caro v. Glah, 867 A.2d 531, 533 (Pa. Super. Ct. 2004), reargument denied by 2005 Pa. Super. LEXIS 275 (Pa. Super. Ct. Mar. 1, 2005).

### **Discovery Rule**

Pennsylvania law recognizes the discovery rule, which extends the limitations period when the complaining party does not immediately know of, and cannot reasonably ascertain, the existence of an injury. See Fine v. Checcio, 870 A.2d 850, 858 (Pa. 2005); Ayers v. Morgan, 154 A.2d 788, 792 (Pa. 1959); Bickford v. Joson, 533 A.2d 1029, 1030-31 (Pa. Super. Ct. 1987), appeal denied, 544 A.2d 959 (Pa. 1988).

Under the discovery rule, the statute of limitations is not triggered until the plaintiff knows or reasonably should know that (1) he has been injured, and (2) his injury has been caused by the conduct of another. Levenson v. Souser, 557 A.2d 1081, 1086-87 (Pa. Super. Ct. 1989), appeal denied, 571 A.2d 383 (Pa. 1989); Bickford, 533 A.2d at 1032.

The “discovery rule” provides an exception to the general rule that precludes a party from bringing suit once the statutory period expires. Pocono International Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983). The purpose of the discovery rule is to extend the period of time in which the injured party may file suit when there is an inability to ascertain the fact that an injury has been sustained, despite the exercise of due diligence. MacCain v. Montgomery Hosp., 578 A.2d 970, 972 (Pa. Super. Ct. 1990), appeal denied, 592 A.2d 45 (Pa. 1991). Accordingly, the “discovery rule” can serve to ameliorate the harsh effects of the statute of limitations. Morgan v. Johns-Manville Corp., 511 A.2d 184, 186 (Pa. Super. Ct. 1986).

The party claiming the benefit of the “discovery rule” exception to the statute of limitations bears the burden of establishing that he or she falls within it. Cochran v. GAF Corp., 666 A.2d 245, 249 (Pa. 1995). It is clear that mistake or misunderstanding does not toll the statute of limitations pursuant to the discovery rule. Id. A “reasonable diligence” standard applies, which “has some teeth.” Id. at 250. The Pennsylvania Supreme Court has described the required diligence in this setting as follows:

Reasonable diligence is just that, a reasonable effort to discover the cause of an injury under the facts and circumstance present in the case. Long ago we recognized that there are few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence.

Cochran, 666 A.2d at 249 (internal quotations omitted).

The Court stressed that:

Reasonable diligence is an objective, rather than a subjective standard. Under this standard, the plaintiff’s actions must be evaluated to determine whether he exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others.

Id. (internal quotations omitted).

### **Recent Case Law Developments**

In Matharu v. Muir, 29 A.3d 375 (Pa. Super. Ct. 2011) (also addressed, supra), vacated on other grounds, 73 A.3d 576 (Pa. 2013), the defendant, Dr. Muir, did not administer the plaintiff-mother with an injection RhoGAM during her pregnancy in 1998. Matharu, 29 A.3d at 378. RhoGAM is administered in cases in which a pregnant mother’s blood is Rh-negative and

the father's blood is Rh-positive. Id. In these circumstances, future-conceived children could have an Rh-positive blood type, which could cause the mother to create antibodies against the fetus. Id. The administration of RhoGAM can prevent harm in future pregnancies. Id. The Plaintiff-mother became pregnant again, treated again with Dr. Muir, and had no issues. Id.

In March 2003, Dr. Muir sent a letter to the plaintiff-mother ending the treatment and relationship. Id. at 379. Then, in 2005, the plaintiff-mother again became pregnant, and this time did not treat with Dr. Muir. Id. The child was delivered early by C-section and died two days later, on November 12, 2005. Id. The Plaintiffs sued claiming that Dr. Muir and other defendants failed to administer RhoGAM, which in turn caused the issues with this last pregnancy. Id. at 380. The Plaintiffs filed their Complaint on June 26, 2007, within two years of the child's death. Id.

The Pennsylvania Superior Court explained that the statute of limitations for a survival action begins to run on the date of the injury, as though the decedent were bringing her own lawsuit, and that the statute of limitations for a wrongful death action begins "when a pecuniary loss is sustained by the beneficiaries of the person whose death has been caused by the tort." Id. at 383 (citation and quotation marks omitted). Therefore, in the plaintiffs' survival action, the child's right to proceed in a lawsuit against the defendants did not start until the child suffered an injury—either on his birth day of November 10, 2005, or his date of death of November 12, 2005. Id. at 384. Thus, the survival action was brought within the statute of limitations. Id.

As to the plaintiffs' wrongful death action, the plaintiffs did not suffer any pecuniary loss caused by the child's death until at least the date of death of November 12, 2005. Id. As such, the wrongful death claim was also brought within the statute of limitations. Id.

The Defendants contended that to allow a lawsuit like this to go forward could subject a physician to claims well into the future, and that as a matter of public policy, the claim should not be allowed to proceed. Id. The Superior Court recognized the issue, but stated that it was merely interpreting the statute of limitations as it presently existed. Id.

In Massey v. Fair Acres Geriatric Center, 881 F. Supp. 2d 663 (E.D. Pa. 2012), a resident of a nursing home choked on June 24, 2007 and then died on July 17, 2007. Massey, 881 F. Supp. 2d at 665. The Plaintiffs brought suit July 16, 2009. Id. The suit was a civil rights action under 42 U.S.C. § 1983 for violations of the Federal Nursing Home Reform Amendments. Id. The Complaint contained claims under 42 Pa. C.S.A. § 8301 and 8302, which, according to Plaintiff, "serve only as a mechanism for recovery and do not create their own causes of action." Id. at 666.

The Plaintiff argued that his § 1983 claim was timely filed within two years of the nursing home resident's death as required by MCARE. Id. at 667. However, the court found that the plaintiff was not suing for professional malpractice under MCARE, but instead suing for federal rights violations under § 1983; and that under § 1983, the claim was time-barred as the statute of limitations runs from the date of the injury, not the date of death. Id. at 667-69.

In Wilson v. El-Daief, 964 A.2d 354 (Pa. 2009), Mary Wilson filed a writ of summons against Samir El-Daief, M.D., and Montgomery Hospital Medical Center in October of 2003. Wilson, 964 A.2d at 356. The subsequent complaint alleged that Dr. El-Daief negligently lacerated the plaintiff's radial nerve during surgical procedures on her wrist and hand in May and August of 2000. Id. Dr. El-Daief and Montgomery Hospital sought summary judgment, claiming that Ms. Wilson filed her claim beyond the requisite two year statute of limitations. Id. Ms. Wilson argued that the discovery rule applied and tolled the statute of limitations until October 2001, when she first learned from another physician about her injury. Id. at 359. Ms. Wilson noted that, prior to finding out that she was injured, she was treating with Dr. El-Daief and another orthopedic surgeon for approximately thirteen months, and was always told by Dr. El-Daief that there was nothing wrong, even though evidence suggested that the other orthopedic surgeon notified Dr. El-Daief that plaintiff's complications could have been caused by a laceration of the radial nerve. Id. at 358.

The common pleas court awarded summary judgment and explained that Ms. Wilson's cause of action arose after the second surgery in August of 2000, when she experienced constant, persistent, and excruciating pain. Id. at 356. Within several weeks of the second surgery, it was noted that Ms. Wilson's hand contracted into a fist, her right elbow bent inward and her right elbow drew upward. Id. at 356-57. The Superior Court affirmed. Id. at 357-58.

The Pennsylvania Supreme Court reversed, holding that a question of fact existed as to the accrual of the cause of action under the discovery rule, which precluded summary judgment. Id. at 366. The Court noted that there was "evidence of potential sources of confusion, in the asserted unwillingness or inability on the part of Dr. El-Daief to recognize injury or cause." Id. at 365. The Court further held that, "[w]hile we reiterate that knowledge of 'injury' and 'cause' does not require a precise medical diagnosis, we decline to hold as a matter of law, that a lay person must be charged with knowledge greater than that which was communicated to her by multiple medical professionals involved in her treatment and diagnosis." Id.

The Court also held that, "with full appreciation of the additional requirement imposed upon plaintiffs to obtain a certificate of merit under Rule 1042.3, we decline to retool the discovery rule specific to medical malpractice actions in light of the procedural rule. . . . [W]e believe that the rules allow sufficient flexibility to avoid untenable results." Id. at 366. The Court further noted that the current discovery rule was adequate in providing the plaintiffs with their day in court, as well as protecting the defendants from stale claims. Id. at 368.

Justice Baer filed a concurring and dissenting opinion, noting that he agreed with the majority opinion that the action was not time-barred by the statute of limitations. He stated:

I am compelled to write, however, as I believe the convergence of this Court's adoption of the certificate of merit (COM) requirements and our application of the discovery rule in medical malpractice cases has the potential for unbridled mischief. Application of current Pennsylvania Jurisprudence places plaintiffs, like Appellant, in the precarious position of being constrained to file a lawsuit before they know whether resulting symptoms are linked to a physician's malpractice or are common side effects of the procedure performed. Such an absurd consequence

resulting from the application of these two countervailing principles of law should not be countenanced. To avert this fundamental unfairness, we should construe the discovery rule so as to toll the statute of limitations until the plaintiff obtains, or with the exercise of due diligence should have obtained, medical evidence sufficient to enable the plaintiff to link her injury to the acts of the defendant. In the instant case, there is no genuine issue of material fact that the lawsuit was filed within two years of when the Appellant, after diligent investigation, obtained medical evidence connecting her injury to Appellee Dr. El Daief's actions. Thus, in my view, Appellant's action was timely filed as a matter of law . . .

Id. at 370 (Baer, J., concurring and dissenting).

The Supreme Court of Pennsylvania granted a Petition for Allowance of Appeal in the case of Garman v. Heine, 52 A.3d 223 (Pa. 2012), to review “[w]hether the Superior Court erred in interpreting and applying the discovery rule standard set forth in Wilson v. El-Daief, 964 A.2d 354 (Pa. 2009), where it was unknown which of multiple potential causes resulted in injury.” Garman, 52 A.3d at 223. On April 25, 2013, however, the Supreme Court dismissed the appeal as improvidently granted. Garman v. Heine, 65 A.3d 912 (Pa. 2013).

In Kach v. Hose, 589 F.3d 626 (3d Cir. 2009), plaintiff Tanya Kach was a 14-year-old student at Cornell Middle School when she began an intimate relationship with defendant Thomas Hose, a security guard stationed at the school through a private security firm. Kach, 589 F.3d at 630. The Plaintiff then ran away from home and began living with defendant Hose, where she remained for ten years. Id. Authorities removed her from the home in March of 2006, after she revealed her true identity to a friend. Id.

The Plaintiff then instigated a lawsuit in federal district court, suing defendant Hose and his parents, as well as her former school district, a number of its employees, and members of the McKeesport police department, under state law and § 1983 claims. Id. at 630-31. The Defendants moved for summary judgment on the grounds that the § 1983 claims were time-barred and that Hose was not acting under the color of law. Id. at 631. The court granted the motions and then declined to exercise supplemental jurisdiction over the remaining state law claims. Id. at 633. Plaintiff Kach appealed the decision. Id.

Plaintiff Kach alleged that her claims were timely, because the date of accrual of her injury should have been the date when she revealed her actual identity to her friend and was removed from defendant Hose's home. Id. at 635. Plaintiff Kach relied on Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir. 2006), in which the United States Court of Appeals for the Third Circuit “carved out a narrow equitable exception to Kubrick's [U.S. v. Kubrick, 444 U.S. 111(1979)] reasonable person standard for mentally incapacitated persons who, for whatever reason, do not have a legally appointed guardian to act in their stead.” Kach, 589 F.3d at 636 (citation and quotation marks omitted).

Plaintiff Kach alleged that she was without a legal guardian during the time that she was in defendant Hose's home. Id. at 637. The Third Circuit noted that, because Plaintiff Kach reached the age of majority in 1999, even if she had lacked a guardian, she would have to prove

that she was mentally incompetent prior to the government conduct that injured her in order to qualify for the Miller exception. Id.

Additionally, Plaintiff Kach argued that Pennsylvania “recognizes duress as a statute-of-limitations tolling mechanism.” Id. at 639. The Third Circuit disagreed and rejected her argument that Pennsylvania case law supported the proposition that duress was an appropriate reason for tolling a statute of limitations. Id. at 640. The Third Circuit did its own survey of Pennsylvania law and concluded that no cases have even hinted “that duress is a cognizable tolling device under Pennsylvania law.” Id.

Plaintiff Kach also argued that Pennsylvania’s discovery rule tolled the statute of limitations on her claims. Id. According to the Third Circuit, however, Plaintiff Kach seemed to confuse the discovery rule with Pennsylvania’s infancy tolling provision and its 2002 amendment permitting someone who suffered childhood sexual abuse to commence a civil action up to 12 years after reaching the age of 18. Id. at 640-41 & n.16. Nevertheless, the Third Circuit referenced the statutory language, which clearly stated that the amendment is not retroactive. Id. at 641. The Third Circuit therefore held that, because Plaintiff Kach’s claims were already time-barred at the moment the amendment was enacted, she could not rely on the statute to revive her claims. Id.

Plaintiff fared no better with her argument that federal tolling law made her claims timely, because she could not show that Pennsylvania state law conflicted with a federal law or policy. Id. at 643.

As to the issue of whether Defendant Hose was acting under the color of state law, the Third Circuit determined that he did not qualify as a state actor under any of the three tests outlined by the Supreme Court: “‘(1) whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state’; (2) ‘whether the private party has acted with the help of or in concert with state officials’; and (3) whether ‘the [s]tate has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity.’” Kach, 589 F.3d at 646 (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1142 (3d Cir. 1995)).

The Third Circuit found that Plaintiff Kach’s assertions failed the first test, because she put forth no evidence that school security is purely a function of the state. Id. at 647-48. Similarly, the Third Circuit found that Plaintiff Kach’s case failed the third test, because there was no evidence that Defendant Hose’s relationship with her was established and maintained at the direction of any school official. Id. at 648-49. According to the Third Circuit, Defendant Hose’s behavior was of his own accord and in violation of his prescribed duties. Id. at 649. The Third Circuit therefore held that he was not acting under color of law and the plaintiff’s § 1983 claim against him failed. Id. at 649.

Finally, the Third Circuit rejected Plaintiff Kach’s argument that the federal district court should have maintained jurisdiction over the state law claims that she raised against the defendants, who failed to respond to the federal claims. Id. at 650. The Third Circuit examined the pertinent statute which allowed district courts to decline supplemental jurisdiction if “the

district court has dismissed all claims over which it has original jurisdiction.” Id. at 650 (quoting 28 U.S.C. § 1367(c)(3)). Therefore, in light of the text of the statute, the Third Circuit held that the district court was well within its rights to decline supplemental jurisdiction over the state law claims of the defaulting defendants. Id.

In Byrne v. The Cleveland Clinic, 684 F. Supp. 2d 641 (E.D. Pa. 2010), affirmed by 519 Fed. Appx. 739 (3d Cir. 2013), the *pro se* Plaintiff brought suit against the defendants under the Emergency Medical Treatment and Active Labor Act (“EMTALA”), as well as a state law claim for breach of implied contract. Byrne, 684 F. Supp. 2d at 645. The Defendants moved to dismiss on multiple grounds, including the plaintiff’s failure to file within the two-year statutory period. Id.

The court noted that, although a Rule 12(b)(6) motion to dismiss does not specifically include the statute of limitations defense, “the so-called ‘Third Circuit Rule’ allows such a defense to be raised in a 12(b)(6) motion ‘if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.’” Id. at 656 (quoting Zankel v. Temple Univ., 245 Fed. App’x 196, 198 (3d Cir. 2007)).

The court observed that, in the case of a *pro se* litigant who files a complaint and who seeks to proceed *in forma pauperis*, the constructive date of filing is the date that the court clerk receives the complaint—not the date that the filing fee is paid—so long as the fee is eventually paid either by the litigant or the court grants the request to proceed *in forma pauperis*. Id. at 656-57. The court added that the constructive date of filing is not the date the litigant mails the complaint or when the complaint is notarized. Id. at 657.

The court explained that, although the docket listed the complaint as being filed on February 27, 2009, there was a handwritten date of February 14, 2009 on the complaint, one day before the statute of limitations ran. Id. The court acknowledged that, while it was unsure who wrote that date, the possibility existed that it was the court clerk, in which case the complaint had been received, and therefore, constructively filed, within the statute of limitations. Id. Because the court could not make the determination of whether or not the complaint was timely filed based on the pleadings alone, the court held that the Third Circuit Rule did not bar the claim. Id. at 657-58.

For these same reasons, the court concluded it could not dismiss the plaintiff’s breach of contract claim on statute of limitations grounds. Id. at 658. The court, however, dismissed that claim on the basis that the plaintiff alleged merely a delay in treatment and not a breach based on the quality or result of the treatment. Id. at 659.

In Fine v. Checcio, 870 A.2d 850 (Pa. 2005), the Supreme Court of Pennsylvania reviewed two cases, consolidated on appeal, in which the plaintiffs were patients that had sued dentists and alleged dental malpractice. Fine, 870 A.2d at 853. In both cases, the dentist-Defendant moved for summary judgment based on the two-year statute of limitations and the patient-Plaintiff raised the discovery rule and the doctrine of fraudulent concealment. Id. at 853-54. The Supreme Court ruled in both cases that dentist-Defendant was not entitled to summary judgment and issued two important holdings in this course of its opinion. See id. at 854.

In Fine, Dr. Checcio had recommended that the patient-Plaintiff's four wisdom teeth be surgically extracted. Id. The patient-Plaintiff, Fine, accepted this recommendation and signed a consent form with complications and conditions that could follow surgery, including numbness of the lip, tongue, chin and cheeks. Id. Dr. Checcio removed the teeth on July 17, 1998. Id. On that date Fine had numbness on both sides of his face. Id. According to Fine, on the ten occasions he saw Dr. Checcio between the surgery and October 9, 1998, the doctor told him it could take up to six months for the numbness to subside. Id. About a year after the surgery, Fine came to believe the persistent numbness was abnormal. Id.

Fine subsequently commenced suit against Dr. Checcio on August 8, 2000. Id. at 855. Dr. Checcio raised the statute of limitations as a defense in her answer and new matter, and subsequently filed a motion for summary judgment, asserting that the action was time-barred. Id. Fine asserted that there were disputed, material facts as to whether the limitations period was tolled under the discovery rule or the doctrine of fraudulent concealment. Id.

The trial court denied Dr. Checcio's motion. Id. After the trial resulted in a verdict in favor of Fine, and following the trial court's denial of post-trial motions, Dr. Checcio appealed. Id. The Superior Court reversed, ruling that the limitations period began to run on the date of surgery and that Fine's action, therefore, was barred. Id.

In Ward v. Rice, the companion case, the plaintiff-patient, Ward, had her wisdom teeth extracted by Dr. Rice on March 28, 1995. Fine, 870 A.2d at 855. Immediately following the surgery, Ward experienced some numbness and occasional tingling in her lip. Id. at 855-56. Ward told Dr. Rice of her condition, and Dr. Rice assured her it would go away. Id. at 856. Ward continued to treat with Dr. Rice until May 1995, and Dr. Rice continued to assure her the problems she was having would subside. Id. Dr. Rice referred plaintiff to another doctor on September 20, 1995, and her first visit with the new doctor occurred on October 11, 1995. Id.

On September 26, 1997, Plaintiff filed a writ of summons. Id. Dr. Rice thereafter filed a motion for summary judgment based on the statute of limitations, and Ward responded that her action was timely, because the record showed the statute had been tolled under the discovery rule and the doctrine of fraudulent concealment. Id.

The trial court granted the motion. Id. The Superior Court remanded the case for further proceedings, after finding that the discovery rule applied and the trial court had erred in dismissing the lawsuit as time-barred. Id. at 856-57.

Because the cases covered the same issues, the Supreme Court consolidated the appeals. Id. at 857. The Supreme Court reviewed the settled aspects of the discovery rule and then noted that it remained unsettled whether the rule requires that it be determined whether the injury and its cause were reasonably ascertainable *at any point* within the prescribed statutory period. Id. at 857-59. According to the Supreme Court, one school of thought was that if the injury and cause were ascertainable—even if this occurred one day before the statutory period ended—the discovery rule does not apply and the statute is not tolled. Id. at 859. Another camp believed that

the discovery rule always applies to toll the statute if *at the time the injury occurs*, the injury or its cause is neither known nor reasonably knowable. Id.

The Supreme Court held that “the discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises.” Id. To adopt the alternate position, the Supreme Court reasoned, could lead in many instances to unreasonable and arbitrary results. Id. at 860. The Supreme Court explained that such a regime could nullify the recognized purpose of the rule, which is to see to it that persons who are reasonably unaware of an injury that is not immediately ascertainable have essentially the same rights as those who suffer an immediately ascertainable injury. Id.

With respect to the doctrine of fraudulent concealment, that Supreme Court reasoned that this also serves to toll the statute of limitations, but that, “[a]s of yet, we have not directly considered and ruled upon the circumstances under which a defendant, once estopped under the doctrine of fraudulent concealment, may invoke the statute of limitations and commence its running.” Id. The Supreme Court determined that the standard of reasonable diligence, which is applied when the discovery rule is at issue, should also be applied when tolling takes place based on the doctrine of fraudulent concealment. Id. at 861. Consequently, the Supreme Court held that “a statute of limitations that is tolled by virtue of fraudulent concealment begins to run when the injured party knows or reasonably should know of his injury and its cause.” Id.

Applying the applicable principles of law to the cases at hand, the Supreme Court found that, in each case, the dentist-Defendant was not entitled to summary judgment, because the jury needed to determine what the dentist had said to the patient following surgery and whether these statements amounted to fraudulent concealment. Id. at 861-63. The Supreme Court thus held that, in each case, there were genuine issues of material fact with respect to the statute of limitations defense. Id. at 863.

In Santos v. United States, 523 F. Supp. 2d 435 (M.D. Pa. 2007), rev’d, 559 F.3d 189 (3d Cir. 2009), the minor-Plaintiff alleged a failure to diagnose and treat an infection in the plaintiff’s neck area at a federally subsidized health care clinic. Santos, 523 F. Supp. 2d at 436-37. The Plaintiff, unaware that her health care providers were deemed federal employees, filed suit in state court more than two years after the cause of action accrued, but within the time allowed by Pennsylvania’s Minor’s Tolling Statute. Id. at 436. The case was removed to federal court, as it had exclusive jurisdiction over tort claims against federal employees. Id. at 438. Ultimately, the claims were dismissed by stipulation to allow the plaintiff to pursue an administrative complaint. Id. The Plaintiff brought an administrative complaint, but it was subsequently denied. Id.

Pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b)(1), the plaintiff filed an FTCA claim in federal court. Id. at 439. The FTCA requires that a claim be filed within two years from the date on which it accrues. Santos, 523 F. Supp. 2d at 439-40. Unlike Pennsylvania, the FTCA does not contain a minor tolling statute. Id. at 440. However, the FTCA does contain a limited exception to save claims mistakenly filed in a state court within the two-year statute of limitations. Id.

The Defendant filed a motion for summary judgment, claiming that the FTCA claim was barred, because it was not filed within the two-year statute of limitations. Id. at 438. Although the plaintiff admitted that the claim was not brought within the two-year statute of limitations, the plaintiff claimed that the statute of limitations should be equitably tolled. Id. at 439. The Plaintiff explained that she had no reason to believe that the clinic was a federal entity. Id. However, the plaintiff admitted that she took no steps to confirm this assumption. See id.

The federal district court found that the plaintiff did not exercise due diligence and granted the defendant's motion for summary judgment. Id. at 443-44. The court explained that the plaintiff's error did not amount to more than "a garden-variety claim of excusable neglect, to which the Supreme Court has stated that equitable tolling should not extend." Id. (citation and quotation marks omitted).

On appeal, the United States Court of Appeals for the Third Circuit reversed and remanded the case, concluding that there can be equitable tolling of the FTCA's limitation period and that it was warranted in the instant case. Santos v. U.S., 559 F.3d 189, 190 (3d Cir. 2009). The Third Circuit explained that, although the statute of limitations under the FTCA was not tolled due to the plaintiff's status as a minor, it was tolled for purposes surrounding her timely assertion of her rights in the wrong forum, coupled with her exercising due diligence. Id. at 198-99.

The Third Circuit held that the plaintiff diligently and vigorously pursued her claim, albeit prior to realizing that she filed a state court action against a federal defendant. Id. at 198. Evidence in support of the diligence included the fact that she retained diligent counsel, who requested and reviewed medical records, visited the defendant, corresponded with the defendant, performed a public records search on the defendant, and retained experts—all of whom prepared expert reports. Id.

The Government argued that several other circuit courts of appeal held that the equitable tolling rule would not apply in those situations where the plaintiff failed to perform reasonable investigations that would have demonstrated that the defendants had been deemed federal employees covered by the FTCA. Id. at 199. The Third Circuit observed that the federal district court noted that it was not clear whether the plaintiff knew, or should have known, that the defendant received federal funds. Id. at 200.

The Third Circuit reasoned that the plaintiff's belief that the defendant was a state entity was "far from a baseless assumption," given that the defendant resembled a private clinic, and except for FTCA purposes, the clinic and its employees were private actors rather than federal employees. Id. The Third Circuit stated that Plaintiff's attorney also performed a public records search on the defendant and the results showed it to be an apparently private corporation. Id. According to the Third Circuit, the plaintiff's counsel's many visits and discussions with the defendant failed to provide any evidence that the pediatric clinic was, in fact, a Federal entity. Id. at 200-01.

The Government argued, *inter alia*, that the website for the defendant identified it as a “federally-qualified health center.” Id. at 201. The Third Circuit found that, although the defendant received grant support from the United States Department of Health and Human Services:

York Health and its employees did not become employees of the other entities supporting them. With respect to the significance or not of federal aid, we cannot conceive that anyone would contend that on the basis of the common law application of the doctrine of *respondeat superior* the entities contributing to York Health’s funding, including the United States itself, would be liable for York Health’s employees’ malpractice. After all, if making a contribution to an entity could have such a consequence, contributions to many charities . . . would cease.

Santos, 559 F.3d at 201.

The Third Circuit warned that its decision to apply equitable tolling to the FTCA claim was made with “great caution” and was an extraordinary remedy that was rarely applied. Id. at 203. The Third Circuit nonetheless reiterated that equitable tolling would be applied in situations where, as in that case, a reasonably diligent claimant could not discover a defendant’s federal status. Id.

In Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir. 2006), the decedent was a severely retarded, 64-year-old man with the mental age of a four-year-old child. Miller, 463 F.3d at 268. Beginning in 1988, the Decedent resided in a community living home, during which time the defendant-physicians provided psychiatric treatment and prescribed psychiatric medications to the Decedent. Id. at 268-69. On October 4, 1995, the Decedent was admitted to Frankford Hospital with possible acute rhabdomyolysis, a serious condition characterized by muscle breakdown. Id. at 269-70.

While the Decedent was in Frankford Hospital, the plaintiff, who was the Decedent’s sister, discovered from the attending physician that the Decedent’s condition was caused by an adverse reaction to the combination of psychiatric medications prescribed and administered by the defendant-physicians. Id. at 269. The Decedent remained at Frankford Hospital until November 27, 1995 at which time he was transferred to the Philadelphia Geriatric Center. Id. His condition deteriorated rapidly, and he was transferred to Temple University Hospital, where he died on September 24, 1997, with the cause of death listed as sepsis. Id.

The Plaintiff subsequently brought a survival action against the defendants, alleging that the defendant-physicians had negligently prescribed excessive doses of psychiatric medications to the Decedent. Id. Because one of the defendant-physicians was employed by a facility receiving funds from the federal government, the plaintiff sued the United States under the FTCA. Id. The other Defendant-physician was sued under Pennsylvania state law. Id.

The Government raised a statute of limitations defense, arguing that the plaintiff’s claims were time-barred because they were brought more than two years after she learned of the

rhabdomyolysis caused by the improper medication regimen. Id. at 270. Plaintiff responded that the statute ran from his date of death and that the “discovery rule” should toll the statute of limitations until the Decedent’s death. Id. Plaintiff also argued that, in light of the Decedent’s profound mental retardation, the plaintiff’s subjective perspective applied as the “reasonable person” for purposes of determining when the Decedent’s injury was “discoverable.” Id. The federal district court granted summary judgment in favor of Defendants, and plaintiff appealed to the Third Circuit. Id.

In a split panel opinion, the Third Circuit reversed, holding that Pennsylvania’s discovery rule did, in fact, toll the statute of limitations until the Decedent’s death, because a plaintiff exercising reasonable diligence could not have discovered the Decedent’s injury until that time. Id. at 276. The Third Circuit based its decision on dicta contained in the 2005 Pennsylvania Supreme Court’s Fine opinion, supra, which it found required a subjective reasonable person, rather than objective, in evaluating when a decedent should have been able to discover his injury and its cause. Id. The Third Circuit also concluded that, in cases involving the mentally retarded, a “narrow equitable exception” should be carved out under federal law for purposes of determining when an injury is “discoverable” and when the two-year statute of limitations should be tolled. Id. at 275.

In Miller v. Ginsberg, 874 A.2d 93 (Pa. Super. Ct. 2005), the plaintiff, who was born with a congenital defect known as a double ureter, contended that her ureter was negligently cut during an operation on January 18, 1996, and that surgery to repair the cut was negligently performed on January 21, 1996. Miller, 874 A.2d at 95. The Plaintiff had had many prior surgeries, resulting in scar tissue and adhesions to the bowel. Id. The January 1996 surgeries eventually were determined to have caused her injuries of bladder reflux and loss of a kidney. Id. She commenced suit in June 1998. Id.

A first trial resulted in judgment in favor of the defendant-urologist, but that was reversed on appeal. Id. at 95-96. A second trial resulted in a hung jury. Id. at 96. Before the third trial, the parties entered into a high/low agreement. Id. The jury determined that the statute of limitations did not bar the claim, since the plaintiff did not know, or have reason to know, that she had suffered an injury caused by the January 1996 surgeries more than two years before she filed suit. Id. The jury awarded the plaintiff an amount well in excess of the high in the agreement. Id. The trial court denied the defendant’s post-trial motions and reduced the recovery to the agreed upon high. Id. Both parties appealed. Id.

The Defendant argued, in relevant part, that the trial court erred in its statute of limitations determinations and in its statute of limitations jury instruction. Id. Regarding the former, the defendant had contended that the statute of limitations clearly barred the plaintiff’s action. Id. at 97. Concerning the latter, the defendant had maintained that the trial court’s jury instruction on the question of the statute of limitations was truncated and omitted reference to the plaintiff’s burden of proof. Id.

The Superior Court disagreed as to both arguments. Id. The Superior Court noted that, in all three trials, the trial court had determined that the discovery rule was applicable due to the nature of the plaintiff’s injuries and was a question of fact for the jury. Id. The Superior Court

emphasized the trial court's finding that, while the plaintiff may have known her ureter was cut at the time of the January 1996 surgeries, a jury could conclude that it was not until she began treatment with a new doctor in August of 1996 that she became aware her injuries were related to these surgeries—particularly in light of the plaintiff's testimony that the defendant told her that her problems were not related to his treatment. Id. The Superior Court thus held that there was no clear error of law, that the trial court had not abused its discretion in its jury instruction on the statute of limitations, and that the statute of limitations did not bar the claim. Id.

In Devine v. Hutt, 863 A.2d 1160 (Pa. Super. Ct. 2004), the plaintiffs filed their medical malpractice complaint about two weeks before the expiration of the statute of limitations, but did not have the complaint served upon the defendant-physician. Devine, 863 A.2d at 1163. A few days after the complaint was filed, a claims adjuster for the defendant's insurer acknowledged receipt of the complaint and was given a 90-day extension to file an answer. Id. The claims adjuster, however, was not an attorney and did not accept service on the defendant's behalf. Id. The claims adjuster later provided the plaintiffs with the name of an attorney for the defendant. Id. About seven months after the complaint was filed, counsel for the defendant accepted service for the defendant, but expressly reserved the right to assert the affirmative defense of the statute of limitations. Id. at 1164.

After preliminary objections were resolved, the defendant filed an answer, including a notice to plead and asserting a factually detailed defense regarding expiration of the statute of limitations. Id. The Plaintiffs did not reply to the new matter. Id. Several months later, the defendant filed a motion for summary judgment on the basis of the statute of limitations. Id. The Plaintiffs filed no response until seven months after the motion was filed. Id. The Defendant objected to the response as untimely filed. Id. The trial court granted the motion. Id.

On appeal, the plaintiffs raised several arguments as to why their claim should not be barred by the statute of limitations. Id. The Superior Court held that the plaintiffs had waived any defense to the application of the statute by failing to respond to the defendant's new matter. Id. at 1170. The Court further found that the plaintiffs had waived their additional arguments on appeal, because they had not raised them in the court below by way of a timely response to the defendant's motion for summary judgment. Id. Consequently, the Superior Court affirmed the trial court's entry of summary judgment in favor of the defendant. Id.

In Chaney v. Meadville Medical Center, 912 A.2d 300 (Pa. Super. Ct. 2006), the plaintiff brought a malpractice action against Meadville Medical Center ("MMC") and a physician, Dr. Glenn A. Bollard, after her 18-year-old daughter died following a bout of pneumonia and severe hypoxia. Chaney, 912 A.2d at 302. After the plaintiff instituted her action, the defendants moved to have certain paragraphs and subparagraphs stricken from the complaint. Id. The trial court granted the defendants' motion, and the plaintiff subsequently filed a petition for rule to amend the complaint. Id. at 303. The trial court denied the plaintiff's petition and proceeded to enter summary judgment in favor of the defendants. Id.

Plaintiff appealed, arguing that the trial court erred by refusing to allow her to amend her complaint because the proposed amendments were "merely amplifications of facts already

pleaded in the amended complaint.” Id. Affirming in part and reversing in part, the Superior Court noted that:

“[a]n amendment introducing a new cause of action will not be permitted after the Statute of Limitations has run in favor of a defendant.” Only if the proposed amendment merely amplifies, as opposed to altering, the cause of action already averred, will it be allowed if the statute of limitations has run.

Id. at 303-04 (quoting Stalsitz v. Allentown Hosp., 814 A.2d 766, 776 (Pa. Super. Ct. 2002) (alteration in original)).

Given that the statute of limitations had run before the plaintiff moved to amend her complaint, the Superior Court examined the proposed amendments and affirmed summary judgment with regard to the amendments establishing new causes of action against Dr. Bollard, but reversed summary judgment with regard to the proposed amendments that merely amplified or expanded theories of liability that were included in the original complaint. Id. at 304-06. Ultimately, the Superior Court reversed summary judgment because the judge improperly took judicial notice of the meaning of certain medical terms, which normally require expert explanation, and the judge also erred by finding no factual issue on medical causation when the averments clearly explained how certain negligent conduct caused the young woman’s death. Id. at 305.

Recently, in Williams v. Wexford Health Sources, Inc., 199 F. Supp. 3d 917 (E.D. Pa. 2016), the court examined how the discovery rule operated to toll the running of the statute of limitations in a case involving a plaintiff who lapsed into a coma. Williams, 199 F. Supp. 3d at 921. The Plaintiff was an inmate at the Pennsylvania State Correctional Institute at Muncy, Pennsylvania. Id. at 919. She suffered from interstitial pneumonitis, rheumatoid arthritis, and other medical conditions and received treatment from Dr. Gregory Famiglio, who was employed by the defendant. Id. According to the complaint, Dr. Famiglio prescribed large doses of antibiotics and other medications, which damaged the plaintiff’s lungs and put her in a coma for at least forty-five days. Id. When she awoke from the coma, she was advised that she needed a lung transplant. Id. She later confronted Dr. Famiglio who “yelled at” her and refused to answer her questions about the antibiotics that he had prescribed to her. Id. The plaintiff, who at this time was on life-sustaining oxygen treatment, was later paroled and driven home by co-defendants who were employed by the Commonwealth of Pennsylvania. Id. at 919-20. According to plaintiff, these co-defendants left her alone on her porch without her oxygen, and she suffered severe shortness of breath that required an emergency room visit and admittance. Id. at 920.

The federal district court began its analysis by determining that the latest possible day that the statute of limitations could have run was December 22, 2015. Id. at 922. Next, the court determined that plaintiff initiated her lawsuit by filing a Writ of Summons in state court on May 22, 2015, which was within the time period to comply with the statute of limitations. Id. However, she never served this Writ and later filed and served a complaint on January 27, 2016, which was after the running of the statute of limitations. Id. The plaintiff argued that “under Rule 401, she revived her Writ by filing the Complaint, such that she tolled the statute of limitations

as of the date she first filed the Complaint.” Id. The federal district court rejected this interpretation and said that the filing of a Writ will only toll the statute of limitations if the plaintiff makes a good faith effort to effectuate service of the Writ. Id. at 923-24. Since the plaintiff never made any good faith attempts to serve the initial Writ, she had not exercised the necessary due diligence, and her claims were dismissed for failure to comply with the statute of limitations. Id. at 924, 926.

In Delgado v. United States, No. 16-1765, 2016 U.S. Dist. LEXIS 91389 (E.D. Pa. July 14, 2016), the federal district court found that plaintiff’s claim was not barred by the two-year statute of limitations and that there were questions of fact regarding application of the discovery rule. Delgado, 2016 U.S. Dist. LEXIS 91389, at \*18-19. The plaintiff was a U.S. Army veteran whose colonoscopy at the Philadelphia VA Medical Center revealed a rectal mass. Id. at \*1-2. Subsequent testing showed that Mr. Delgado also had a lesion on his liver. Id. at \*2. According to the medical records, Mr. Delgado urgently needed surgery, but there were delays in obtaining the necessary approvals. Id. at \*2-3. After his surgery was finally performed, and while he was in post-op, Mr. Delgado underwent a PET-CT scan that showed the cancer had metastasized to his liver. Id. at \*3.

Mr. Delgado filed a complaint asserting violation of the FTCA on the basis that the VA medical staff treated him negligently because they did not timely schedule his rectal resection surgery and did not properly monitor his liver lesion causing it to progress to liver cancer. Id. at \*4. The United States moved to dismiss based, in part, on the FTCA’s two-year statute of limitations. Id. at \*5. Even though the allegedly negligent treatment occurred in 2011 and 2012, Mr. Delgado argued that he did not become aware of the negligence until May 20, 2014 at a “Disclosure of an Adverse Event” meeting. Id. at \*4, 9. The federal district court found that Mr. Delgado’s cause of action did not accrue until he learned both of his injuries and the cause of his injuries. Id. at \*15-16. Based on the facts alleged in the complaint, the court found that the discovery rule operated to toll the statute of limitations and that Mr. Delgado had acted with reasonable diligence in investigating his claim and asserting his rights. Id. at \*18-19.

Additionally, in Nicolaou v. Martin, 153 A.3d 383 (Pa. Super Ct. 2016), appellants, Nancy and Nicholas Nicolaou appealed the trial court order granting summary judgment in favor of appellees that plaintiffs failed to sue the doctors within the two-year statute of limitations. Nicolaou, 153 A.3d at 385, 387. Plaintiffs brought civil claims against the doctors who initially misdiagnosed her Lyme disease as multiple sclerosis. Id. at 386. Plaintiffs’ Facebook post and subsequent comments from a Facebook friend were offered as evidence that plaintiff was on notice when plaintiff posted “I had been telling everyone for years I thought it was Lyme ...” to which her friend posted “You DID say you had Lyme so many times!” Id. at 392. Plaintiff’s Facebook post was offered as evidence to rebut her contention that she “did not believe” she had Lyme disease. Id. Plaintiffs filed their lawsuit in February 2012, almost two years after the Facebook Post (February 2010) indicated plaintiff had suspected she had Lyme disease “for years.” Id. Plaintiff argued that the statute of limitations did not start until the test results came back on February 13, 2010. Id. at 388. The trial court, as affirmed by the Superior Court, determined that the Facebook post indicated that plaintiff was aware of the possibility that she was suffering from Lyme disease prior to the blood test in 2010, and as such, the 2012 filing of the lawsuit was after the expiration of the statute of limitations. Id. at 394-95.

## **Wrongful Death and Survival Actions**

The discovery rule is generally inapplicable to wrongful death and survival actions. See, e.g., Pastierik v. Duquesne Light Co., 526 A.2d 323, 325 (Pa. 1987); Anthony v. Koppers Co., 436 A.2d 181, 183-85 (Pa. 1981); Moyer v. Rubright, 651 A.2d 1139, 1142-43 (Pa. Super. Ct. 1994). Accordingly, in actions brought under the Wrongful Death and Survival Statutes, 42 Pa. Cons. Stat. §§ 8301-02, the statute of limitations commences, at the latest, upon the death of the individual, and not from the date the survivors knew, or should have known, the cause of death. Pastierik, 526 A.2d at 325; Moyer, 651 A.2d at 1142. The rule applies equally if the deceased person is a child, as the minority tolling statute applies only to living children and does not apply to toll an action until a deceased minor would have reached the age of majority. Holt v. Lenko, 791 A.2d 1212, 1214-15 (Pa. Super. Ct. 2002).

**The Pennsylvania Supreme Court recently re-examined how the discovery rule impacts wrongful death and survival actions involving professional medical negligence in light of Section 513(d) of the MCARE Act. See Dubose v. Quinlan, No. 21 EAP 2016, 2017 Pa. LEXIS 3103 (Pa. Nov. 22, 2017). In Dubose, the decedent Elise Dubose was admitted to Albert Einstein Medical Center after she fell at home and sustained serious head injuries. Id. at \*2. She was later transferred to Willowcrest Nursing Home. Id. Between 2005 and 2007, Mrs. Dubose suffered from numerous bedsores due to the negligence of Defendants. Id. The bedsores resulted in ulcers that required hospitalization from infection. Id. at \*2-3. She died on October 18, 2007 from sepsis and multiple pressure sores. Id. at \*3.**

**The decedent's estate filed its first lawsuit on August 13, 2009 against certain defendants. Id. One month later, on September 14, 2009, the estate filed a second action against additional defendants with additional claims, and the complaint was filed on October 7, 2009. Id. at \*3-4. Defendants argued that the survival claims were barred by the statute of limitations because the decedent and her family members were on notice of defendants' negligence as early as 2005. Id. at \*5. The trial court explained that the survival action was timely pursuant to Section 513(d) of the MCARE Act because it was brought within two years of decedent's death, or, in the alternative, the action was timely because the discovery rule precluded decedent from discovering her injuries because she was in a coma. Id. The case proceeded to trial and resulted in a large verdict for plaintiffs. Id. at \*4.**

**Defendants appealed the verdict and the Superior Court affirmed the trial court's rejection of Defendants' statute of limitations argument based on Section 513(d). Id. at \*10-11. Section 513 is titled "Statute of repose" and it reads as follows:**

**(d) Death or survival actions.—If the claim is brought under 42 Pa.C.S. § 8301 (relating to death action) or 8302 (relating to survival action), the action must be commenced within two years after the death in the absence of affirmative misrepresentation or fraudulent concealment of the cause of death.**

**40 Pa. C.S. § 1303.513(d). The Court laid out the arguments advanced by the parties and then engaged in a statutory construction analysis to “determine whether Section 513(d) is a statute of repose for survival and wrongful death actions or a statute of limitations that modifies the accrual date for survival actions.” See *id.* at \*12-21. After examining the statutory language, the Court held “that Section 513(d) declares that a survival action in a medical professional liability case resulting in death accrues at the time of death, not at the time of decedent’s injury.” *Id.* at \*29. In view of this, the Court affirmed the lower courts and held that Plaintiffs’ claims were timely. *Id.* at \*33.**

## **RULES AND STATUTES REFLECTING TORT REFORM INITIATIVES**

In the mid-1980s, organized medicine sought to reform medical malpractice laws in the legislature. The first statute reflecting this institutional effort was Act 135 in 1996. This was rather short lived, in part, because some of the reforms were declared unconstitutional by the Pennsylvania Supreme Court. Thereafter, the General Assembly enacted Act 13—The MCARE Act—and the Supreme Court created law through interpretation of the statutory language.

### **Pennsylvania’s Apology Law**

Pennsylvania’s “Apology Law,” more formally known as The Benevolent Gesture Medical Professional Liability Act, was signed into law on October 25, 2013, and became effective December 24, 2013. See 35 P.S. §§ 102281.1 to 102281.3 (2013). Essentially, the law protects apologies by health care providers following unwanted or unexpected medical outcomes, barring them from being admitted as evidence in a lawsuit. *Id.* §102281.3. However, the apology must fall within certain parameters. *Id.* Notably, the apology law does not protect an admission of negligence or fault. *Id.* §102281.3(b). The apology must be made prior to the commencement of proceedings. *Id.* §102281.3(a).

### **MCARE Act**

The 2002 Medical Care Availability Act, 40 P.S. §§1303.101 to 1303.1115 (the “MCARE Act”), marked a collective effort on the part of the Pennsylvania General Assembly and the healthcare community to reform the law on medical professional liability. The law sought to “level the playing field” in the area of malpractice litigation by both providing for better regulation in patient safety and reporting, while also attempting to address the crisis of skyrocketing malpractice insurance premiums through stricter punishment for frivolous claims and policies designed to reduce “excessive” verdicts.<sup>5</sup> Most of the MCARE provisions apply only to causes of action arising after March 20, 2002, the date that Governor Mark Schweiker signed the Act into law. The Act offers reforms in the following four categories: (1) patient safety; (2) medical professional liability; (3) malpractice insurance; and (4) administrative provisions.

### **Patient Safety**

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<sup>5</sup> See Rogan Kersh, *The Politics of Medical Malpractice in Pennsylvania 1975-2005*, Jan. 2005, at 26, available at <http://wagner.nyu.edu/files/faculty/publications/PoliticsofMedMalinPAkersh0206.pdf> (last visited Dec. 8, 2017).

MCARE includes numerous provisions seeking to ensure the safety of Pennsylvania patients. Specifically, MCARE created the “Patient Safety Authority,” under the supervision of the Pennsylvania Department of Health, and funded through assessments on licensed medical facilities. 40 P.S. § 1303.303. The Authority was created to facilitate the collection and analysis of data documenting reports of serious events and incidents occurring within Pennsylvania’s health care facilities. Id. The Authority is directed to use the data to make recommendations to the Department of Health and individual institutions for changes in health care practices and procedures which may be instituted for the purpose of reducing the number and severity of serious events and incidents. Id.

Also, pursuant to MCARE’s patient safety provisions, every surgical facility, birth center, and hospital in the Commonwealth is required to develop an internal plan for the purpose of guaranteeing the safety of patients. Id. § 1303.307. Each such plan must, among other things, establish a system for the health care workers of a medical facility to report serious events and incidents, and provide for written notification to patients affected by a serious event within seven days of its occurrence or discovery of the event. Id. §§ 1303.308 to 1303.314.

A serious event is defined as “[a]n event, occurrence or situation involving the clinical care of a patient in a medical facility that results in death or compromises patient safety and results in an unanticipated injury requiring the delivery of additional health care services to the patient.” Id. § 1303.302. In contrast, an incident is defined as “[a]n event, occurrence or situation involving the clinical care of a patient in a medical facility which could have injured the patient but did not either cause an unanticipated injury or require the delivery of additional health care services to the patient.” 40 P.S. § 1303.302. A facility’s failure to report or comply with the reporting requirement may result in an administrative penalty of \$1,000 per day. Id. § 1303.313(f).

### **Medical Professional Liability**

#### **Informed Consent**

Under MCARE, a physician is required to obtain the patient’s full, knowing, and voluntary informed consent prior to the following procedures:

1. Performing surgery, including the related administration of anesthesia;
2. Administering radiation or chemotherapy;
3. Administering a blood transfusion;
4. Inserting a surgical device or appliance;
5. Administering an experimental medication, using an experimental device or using an approved medication or device in an experimental manner.

40 P.S. § 1303.504(a). Informed consent had been likewise required under the predecessor statute, Act 135, 40 P.S. § 1301.811-A (repealed), since January 25, 1997 for the same procedures.

A physician is found to have obtained informed consent under MCARE, as under the predecessor statute, when he or she is found to have provided the patient: (1) a description of the procedure; and (2) the risks and alternatives that a reasonably prudent patient would need to consider to make an informed decision as to that procedure. 40 P.S. § 1303.504(b). The question of whether the physician obtained his or her patient's informed consent remained governed by the prudent patient standard. Id.

As to what constitutes the required informed consent, it is not necessary for the physician to disclose to the patient all known risks of a given procedure. Rather, Pennsylvania law requires that the patient be advised of those material facts, risks, complications, and alternatives that a reasonable person in the patient's situation would consider significant in deciding whether to undergo the procedure.

In Bell v. Willis, 80 A.3d 476 (Pa. Super. Ct. 2013), the Pennsylvania Superior Court found that the MCARE Act did not apply to chiropractors, only physicians. Bell, 80 A.3d at 479. The Superior Court thus held that, even though the MCARE Act expanded the informed consent doctrine to cover certain procedures not included in prior case law, such as blood transfusions and chemotherapy, the expansion did not impose an additional duty on chiropractors, who were governed by the Chiropractic Practice Act, 63 P.S. §§ 625.101 to 625.1106. Id.

The Pennsylvania Supreme Court affirmed a trial court's jury instruction regarding lack of consent, rather than lack of informed consent, in a case involving medical battery. See Cooper v. Lankenau Hosp., 51 A.3d 183, 191 n.8 (Pa. 2012). In Cooper, the plaintiffs alleged that the defendant-physicians committed a battery when they delivered plaintiff's baby via Cesarean section, despite the plaintiff-mother's refusal to consent to this procedure. Id. at 185. The Plaintiffs sought the standard jury charge for lack of informed consent, which focuses primarily on the nature of the consent given by a patient, rather than whether any consent was given at all. Id. at 186.

However, because the plaintiffs' medical battery/lack of consent claim was based on an alleged refusal to give any consent, and did not allege the defendants' failure to secure informed consent, the trial court denied the charge pertaining to informed consent and instead issued the following instruction to the jury:

A physician must obtain a patient's consent to perform surgery. Consent may be verbal or written. Consent is not required in an emergency. However, even in an emergency[,] surgery should not be performed if the patient refuses consent.

A physician's performance of surgery in a nonemergency without consent, or the performance of surgery in an emergency when the patient has refused consent is considered a battery under the law.

*A battery is an act done with the intent to cause a harmful or offensive contact with the body of another,* and directly results in the harmful or offensive contact with the body of another.

If you find the defendant . . . operated on the plaintiff in a nonemergency without consent, or in an emergency where the plaintiff refused consent, then you must find that the defendant . . . committed a battery; otherwise no battery occurred.

Id. (emphasis added).

The Plaintiffs contended that this instruction was an improper statement of the law, because the “intent to cause harm” element of the intentional tort of battery should not have been included in a charge regarding lack of consent to a surgical procedure, and required plaintiffs to prove the *mens rea* of the intentional tort of battery. Id. at 187-88. Specifically, the plaintiffs argued that this instruction improperly conveyed to the jury that a plaintiff in a medical lack-of-consent case must prove the defendant-physician acted with the intent to harm the plaintiff, but the issue in a medical lack-of consent case is simply whether the plaintiff gave permission for the medical procedure. Id. at 188.

The trial court found that its instruction on the law of battery was proper, as it made clear to the jury that the presence or absence of consent controlled the case, and because the plaintiffs did not assert a claim alleging lack of informed consent. Id. at 187. The Superior Court affirmed, holding that a medical lack-of-consent claim sounded in battery, and noting that the element of *mens rea* in battery had not yet been modified in a manner specific to medical consent cases. Id.

On appeal, the Supreme Court recognized that medical lack-of-consent claims constituted battery, a tort that had been described as “unconsented touching that is either harmful or offensive.” Id. at 191 (citing C.C.H. v. Philadelphia Phillies, Inc., 940 A.2d 336, 340 n.4 (Pa. 2008)). In medical battery, the Supreme Court continued, whether a physician’s contact is offensive or harmful depends on whether the patient gave consent. Id. Consequently, the Supreme Court reasoned that a surgery performed without a patient’s consent constituted an intentional and offensive touching and satisfied the elements of battery. Id. The Supreme Court added that “[n]o intent to harm the patient need be established.” Id.

The Supreme Court held that the jury instruction on the lack of consent clearly and adequately set forth the law. Id. at 192. In reaching this conclusion, the Supreme Court found that a plain reading of the jury charge refuted the plaintiffs’ argument that the instruction required proof that defendant performed the Caesarean section with the intent to harm plaintiff, as the charge never employed the term “intent to harm,” but rather correctly defined battery and clearly instructed that if defendant operated without consent, the jury must find a battery was committed. Id. Nonetheless, the Supreme Court suggested, in dicta, that the Pennsylvania Committee for Proposed Standard Jury Instructions should consider developing a particularized standard jury charge for medical battery/lack-of-consent cases, to avoid confusion in the future. Id. at 192 n.10.

In defending against a claim of lack of informed consent, a physician may present evidence of the description of the procedure at issue and those risks and alternatives that a physician acting in accordance with the accepted medical standards of medical practice would provide. 40 P.S. § 1303.504(b). Expert testimony is required to determine whether the procedure at issue constituted the type of procedure which necessitated informed consent and to identify the risks of that procedure, the alternatives to that procedure and the risks of these alternatives. Id. § 1303.504(c). Like Act 135, the MCARE Act provided that a plaintiff must establish the element of causation in order to set forth a viable claim for lack of informed consent. See id. § 1303.504(d). Specifically, a physician is liable for failure to obtain informed consent of a patient only if the patient proves that receiving such information would have been a substantial factor in his or her decision whether to undergo that procedure. Id.

Unlike Act 135, however, the MCARE Act contains a provision stating that a doctor can be held liable for failure to obtain a patient's informed consent if the doctor "knowingly misrepresents to the patient his or her professional credentials, training or experience." Id. § 1303.504(d)(2). This provision apparently overruled the Supreme Court case of Duttry v. Patterson, 771 A.2d 1255 (Pa. 2001), with respect to procedures performed after the MCARE Act's effective date. See Duttry, 771 A.2d at 1259 (finding that evidence that a physician lied about his level of experience in performing a particular procedure is irrelevant to an informed consent claim).

Federal informed consent law does not preempt 40 P.S. § 1303.504. See Mack v. Ventracor, Ltd., No. 10-cv-02142, 2011 WL 890795, 2011 U.S. Dist. LEXIS 24567, at \*38-40 (E.D. Pa. Mar. 9, 2011)., The Mack case arose when the Decedent, as part of his elective participation in an FDA study that evaluated the safety of an implantable cardiac device that was in the early stages of FDA approval, was killed when the device allegedly malfunctioned after implantation. Id. at \*10. The Plaintiff, the Decedent's widow, brought suit against the defendant-physicians for failure to obtain informed consent pursuant to 40 P.S. § 1303.504. Id. at \*8.

The Defendants attempted to remove the case to federal court, alleging that federal jurisdiction was appropriate because: (1) federal courts have jurisdiction over state law claims that turn on substantial questions of federal law; and (2) the plaintiff's battery claim turned on a substantial question of federal law as it required an interpretation of federal regulations<sup>6</sup> governing informed consent. Id. at \*13-16

The Plaintiff contended that removal was inappropriate since her claim solely involved state statutory and common law. Id. at \*13. In particular, the plaintiff argued that her informed consent claim did not refer to or rely on federal law, but rather asserted a claim that was governed solely by MCARE. Id. at \*12-13. Further, the plaintiff contended that the relevant inquiry was whether Congress intended federal regulations to confer federal question jurisdiction. Id. at \*16. The Plaintiff averred that Congress had not intended to create a federal

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<sup>6</sup> The federal regulations at issue were 21 C.F.R. §§ 50.1 to 50.27 and 45 C.F.R. §§ 46.101 to 46.124. Id. at \*16. These regulations pertained to the protection and informed consent of human subjects during clinical investigations, like the study at issue in this case. Id.

private right of action, because the regulations were not phrased in terms of persons benefited.<sup>7</sup> Id. The Plaintiff thus maintained that, as Congress did not create a federal right of action, removal was inappropriate. Id. at \*16-17.

The federal district court determined that, in applying the MCARE Act, the only potential significant federal issue was whether the topic of informed consent for human research subjects had been preempted by federal law. Id. at \*19, 33. “If Congress intended to preempt this area of law,” the federal district court reasoned, “then it would be impermissible for the MCARE Act to impose additional or different informed consent requirements for human research subjects.” Id. at \*35.

The federal district court observed that the federal regulations did not expressly preempt state law requirements, thus suggesting that those regulations did not preempt the MCARE Act. Id. at \*36. The federal district court found further support for this conclusion, given that “the federal statute on informed consent does not provide civil enforcement provisions” and “the FDA regulations make clear that state and local authorities have retained the power to create civil enforcement provisions.” Id. at \*38.

In light of the foregoing, the federal district court determined that Congress did not intend informed consent for human research subjects to be a significant federal issue to be resolved by federal courts. Id. at \*39. Consequently, the federal district court held that the MCARE Act’s informed consent provisions were not preempted by federal law and no federal question was presented to support federal question jurisdiction. Id. at \*39-40.

**Recently, the Pennsylvania Supreme Court held that a physician may not delegate his or her obligation to provide sufficient information in order to obtain a patient’s informed consent. Shinal v. Toms, 162 A.3d 429 (Pa. 2017). In Shinal, the Court held that the trial court committed an error of law when it instructed the jury to consider information provided by a surgeon’s staff when deciding the merits of a medical malpractice action premised upon lack of informed consent. Id. at 454-55.**

### **Punitive Damages**

The MCARE Act also made changes to Pennsylvania’s law related to the imposition of punitive damages. Pursuant to the statute, punitive damages may be awarded for conduct that is the result of the health care provider’s “willful or wanton conduct or reckless indifference to the rights of others.” 40 P.S. § 1303.505(a). A showing of gross negligence is insufficient to support punitive damages. Id. § 1303.505(b). Furthermore, punitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury, “unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages.” Id. § 1303.505(c).

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<sup>7</sup> More specifically, the regulations state: “This policy does not affect any state or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.” 45 C.F.R. § 46.101(f).

Except in cases alleging intentional misconduct, any punitive damage award shall not exceed two hundred percent (200%) of the amount of compensatory damages awarded. Id. § 1303.505(d). For causes of actions arising after March 20, 2002, MCARE allocated twenty-five percent (25%) of the punitive damage award to the Medical Care Availability and Reduction of Error Fund, while the remaining seventy-five percent gets paid to the prevailing party. Id. § 1303.505(e). (The MCARE Fund is discussed in greater detail below.)

A case in the Eastern District of Pennsylvania addressed the issue of punitive damages in a medical malpractice action. See Stroud v. Abington Mem'l Hosp., 546 F. Supp. 2d 238, 257 (E.D. Pa. 2008). In Stroud, the defendants argued that the plaintiff's claims, which were based upon the defendants' alleged failure to diagnose the Decedent's obstructed bowel, amounted to negligence at most and, therefore, did not support punitive damages. Id. at 241-42. As such, the defendants filed a Motion to Dismiss the plaintiff's punitive damages claim.<sup>8</sup> Id. at 241. The Plaintiff countered that his pleading was sufficient to support a claim for punitive damages. Id. The Plaintiff also asserted that he was further entitled to a claim for punitive damages based upon the defendants' alleged "cover up" of their prior negligence. Id.

The federal district court held that the plaintiff had sufficiently pled a claim for punitive damages to survive a motion to dismiss. Id. at 256-57. The federal district court found that, although the MCARE Act and Pennsylvania case law imposed a substantial burden on a plaintiff seeking to prove his entitlement to punitive damages, the plaintiff had sufficiently pled a claim for punitive damages, pursuant to the notice pleading requirements of the Federal Rules of Civil Procedure. Id. at 257. The federal district court emphasized, however, that its ruling was without prejudice and that the defendants would be entitled to seek further consideration of the punitive damages question at the appropriate later stage of the proceedings. Id. at 257-58.

With respect to the plaintiff's contention that the defendants' actions "covering up" their alleged negligence supported a claim for punitive damages, the federal district court concluded that any alleged "covering up" of negligence by the defendants was independent from the underlying tort claims upon which the plaintiff's recovery was premised. Id. at 259. Citing Pennsylvania law, the federal district court noted that punitive damages are "merely an additional element of damages that may be recovered on an appropriate cause of action." Id. at 258. Thus, and guided by the Superior Court and the Third Circuit, the federal district court granted the defendants' Motion to Dismiss and dismissed the plaintiff's claim for punitive damages premised on the theory the defendants acted to cover up their prior negligence. Id. at 259.

In James v. City of Wilkes-Barre, No. 3:10-CV-1534, 2011 WL 3584775, 2011 U.S. Dist. LEXIS 90575 (M.D. Pa. Aug. 15, 2011), reversed on other grounds by, 700 F.3d 675 (3d Cir. 2012), the plaintiff alleged that, over her protests, personnel at the defendant-hospital bound her to a gurney, forcibly withdrew blood from her and injected her with sedatives, while the defendant-police officers laughed. James, 2011 U.S. Dist. LEXIS 90575, at \*9. The Plaintiff further contended that the hospital personnel kept her in restraints for several hours, despite knowing that this was not necessary. Id. at \*10-11. After the plaintiff filed a complaint in state court, the defendants removed the case to federal court. Id. at \*12-13. The Defendant-hospital

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<sup>8</sup> The District Court in Stroud also addressed the adequacy of Plaintiff's Certificate of Merit. Id. at 247-48. The court's analysis and holding with respect to the Certificate of Merit issue is addressed in another section.

then filed a Motion to Dismiss, arguing, in relevant part, that the complaint failed to state a claim for punitive damages under Pennsylvania law. Id. at \*13, 24.

The federal district court disagreed, finding that the plaintiff had made allegations of outrageous conduct sufficient to survive the Motion to Dismiss. Id. at \*37. Specifically, the federal district court concluded that the plaintiff's allegations were sufficient to allow for discovery to examine the motives and results of the defendants' alleged mistreatment, and to examine whether evidence existed to support the plaintiff's claim that the defendant-hospital knew of and permitted the alleged outrageous conduct to occur. Id.

Similarly, the defendant-hospital and Defendant-physician in Lasavage v. Smith, 23 Pa. D. & C.5th 334 (C.P. Lackawanna 2011), filed preliminary objections, asserting that the allegations in the Complaint were insufficient to support a claim of reckless conduct or a right to punitive damages. Lasavage, 23 Pa. D. & C.5th at 335-36. In this regard, the Complaint had alleged that the defendant-physician: failed to ensure that the Decedent received two anti-clotting medications that were ordered after a heart catheterization; discharged the Decedent with instructions to take these medications, without issuing the Decedent any prescriptions for these medications; and failed to consult on the Decedent's care when called, after the decedent was re-admitted to the hospital the same night he was discharged by the defendant-physician. Id. at 337-38.

The trial court held that plaintiff's allegations were sufficient to support a claim for punitive damages against the defendant-physician, because it was arguable that he had a subjective appreciation of the risk of clotting to which the Decedent was exposed, and failed to act, in conscious disregard of this serious risk. Id. at 342-43. The trial court, however, struck the punitive damages claim against the defendant-hospital, as the Complaint failed to allege that the defendant-hospital was aware of the defendant-physician's actions with regard to the decedent's care and that it nonetheless allowed this care to occur. Id. at 344-45; see also Beloff v. Seaside Palm Beach, No. 13-100, 2013 WL 3488978, 2013 U.S. Dist. LEXIS 97219, at \*9-10 (E.D. Pa. July 11, 2013) (finding that the plaintiff's allegations against health care principal were insufficient to support claim for punitive damages, because the plaintiff did not allege that the principal had knowledge of or permitted the conduct of the individual physicians).

In Mellor v. O'Brien, No. 11 CV 5741, 2012 Pa. Dist. & Cnty. Dec. LEXIS 172 (C.P. Lackawanna Jan. 11, 2012), the trial court, in ruling upon the defendant-hospital's preliminary objections to the plaintiff's punitive damages claim, found that the plaintiff specifically alleged that the defendant-hospital was aware of its agents' reckless conduct—namely, the agents' discharge of patients despite tests indicating life-threatening conditions, and nonetheless allowed this conduct to continue. Id. at \*30. The trial court determined that the plaintiff's punitive damages claim was further supported by the Complaint's separate corporate recklessness claim, which specifically alleged that the defendant-hospital had actual notice of many systemic defects, but allowed these defects to cause the Decedent's death. Id. The trial court therefore overruled the defendant-hospital's preliminary objections regarding the plaintiff's punitive damages claim. Id.

Recently, in Estate of Goldberg v. Nimoityn, No. 14-980, 2016 U.S. Dist. LEXIS 79021 (E.D. Pa. June 17, 2016), the defendant sought summary judgment regarding plaintiff's claim for punitive damages. Estate of Goldberg, 2016 U.S. Dist. LEXIS 79021, at \*26-28. The plaintiff argued that the defendant-physician "intentionally ignored signs that his patient was incompetent to make a decision regarding placement of the PEG tube and instead willfully relied on what he believed were the decedent's wishes while disregarding the wishes of decedent's family." Id. at \*27. The federal district court disagreed, finding that the record that the defendant's conduct did not "amount[] to more than professional negligence." Id. at \*28. As a result, the court dismissed plaintiff's punitive damages claim. Id.

### **Collateral Source Rule**

The MCARE Act also made noteworthy changes to the collateral source rule, which, prior to the enactment of the statute, often permitted double recovery of economic damages by plaintiffs. Under the MCARE Act, a plaintiff is precluded from recovering damages for past medical expenses or past lost earnings, to the extent the loss is paid by public or private insurance prior to trial. 40 P.S. § 1303.508(a). While the plaintiff has the option to introduce into evidence the total amount of medical expenses he or she actually incurred, the right to recover is limited to only the total of those expenses for which the plaintiff is personally responsible. Id. § 1303.508(b).

Additionally, an insurer has no right of subrogation or reimbursement from a plaintiff's tort recovery. Id. § 1303.508(c). However, there are many kinds of payments that do not reduce recoverable medical bills. Exceptions to the revised collateral source rule (and thus recoverable by the plaintiff) include: life insurance benefits, pension and profit sharing payments; deferred compensation arrangements; social security benefits; medical assistance payments which are subject to repayment to the Department of Public Welfare ("DPW"); and public benefits paid under a program to which ERISA and other federal law preempts state law. Id. § 1303.508(d)(1)-(4).

In Cleaver v. United States, No. 08-425, 2012 WL 912729, 2012 U.S. Dist. LEXIS 35679 (W.D. Pa. Mar. 15, 2012), the defendant's Motion *in Limine* sought to preclude introduction of the plaintiff's medical bills that exceeded the Medicare billing rates for past and future expenses, and requested that the plaintiff's recovery for past and future medical expenses be limited to the amount actually paid by Medicare and accepted by his providers as full payment for their services. Cleaver, 2012 U.S. Dist. LEXIS 35679, at \*1-2. The federal district court recognized that the MCARE Act generally precludes a medical malpractice plaintiff from recovering past medical expenses paid by a collateral source. Id. at \*5.

The federal district court explained, however, that the MCARE Act provided limited exceptions in which a claimant is permitted to recover damages for past medical expenses despite payments made by a collateral source. Id. According to the federal district court, "[o]ne of the limited exceptions under the MCARE Act will be applied if the claimant's medical expenses are paid by '[p]ublic benefits paid or payable under a program which under Federal statute provides for right of reimbursement which supersedes State law for the amount of benefits paid from a verdict or settlement.'" Id. (quoting 40 P.S. § 1303.508(d)(4)). Because the right to reimbursement of Medicare payments superseded state law for the amount of benefits

paid from a verdict or settlement, the federal district court reasoned that the plaintiff was entitled to recover damages for past medical expenses paid by Medicare. Id.

The federal district court also found that, pursuant to a plain reading of the MCARE Act, the plaintiff would be permitted to introduce into evidence the total amount of past medical expenses he actually incurred. Id. at \*5-6 The federal district court posited, however, that the plaintiff's recovery "will be limited to the Medicare billing rates that healthcare providers accepted as full payment." Id. at \*6. As such, the federal district court denied the defendant's Motion *in Limine*. Id.

Courts have also implemented limiting instructions to discourage jury confusion regarding the damages that plaintiff may be awarded. See Dieffenbach v. Trevouledes, No. 10-00016, 2012 WL 1379473 (C.P. Lycoming Jan. 18, 2012). In Dieffenbach, the plaintiffs moved to introduce the full amount of the plaintiff-wife's medical bills for treatment rendered as a result of the defendant's alleged negligence, but the defendant countered that the plaintiffs should be limited to introducing only the expenses paid by the wife's insurance providers. Citing the MCARE Act's aim of ensuring reasonable compensation for a plaintiff injured due to medical negligence, the trial court held that submitting to the jury the medical expenses billed, rather than the medical expenses paid, would not ensure reasonable compensation for the plaintiffs, but instead might lead to a windfall for them.

The trial court, however, agreed with the plaintiffs that the full amount of expenses were relevant to demonstrate the extent of the wife's pain and suffering, and held that the legislature intended for the introduction of such expenses to clarify this aspect of damages for the fact-finder. Consequently, in order to comply with 40 P.S. § 1303.508(a) and because of the risk of jury confusion, the trial court stated that it would give the jury a limiting instruction, both at the initial introduction of the expenses and in the final jury charge, that the jury was barred from awarding these medical expenses to the plaintiffs.

Another notable case is Deeds v. Univ. of Penn. Med. Ctr., 110 A.3d 1009 (Pa. Super. Ct. 2015). Deeds is discussed at length, *infra*. In Deeds, the Superior Court reversed a jury verdict in favor of defendants in a claim for medical negligence brought on behalf of a minor. Deeds, 110 A.3d at 1010-11. The Superior Court was persuaded that a new trial was warranted in light of the fact that the defense, on multiple occasions, informed the jury of collateral sources of compensation to Deeds for Deeds' care. Id. at 1012-13. The Superior Court further observed that:

The overall effect of these comments was to suggest that Deeds' medical costs were being covered by Medicaid and the Affordable Care Act, and that she did not require (and accordingly could not properly seek) any additional compensation. This is a patent violation of the collateral source rule. In this case, the violation requires remand for a new trial.

Id. at 1013. The Superior Court determined that the appellee-plaintiff was not adequately shielded from the inappropriate references to collateral sources of recovery by the trial court,

which made no curative or limiting instructions, despite sustaining more than one objection. Id. at 1014.

Recently, in Bernheisel v. Mikaya, No. 3:13-cv-01496, 2016 U.S. Dist. LEXIS 104554 (M.D. Pa. Aug. 9, 2016), the court relied on Deeds and rejected the defendant's request to preclude plaintiff's life-care plan expert from testifying. Bernheisel, 2016 U.S. Dist. LEXIS 104554, at \*12-13. The federal district court also declined defendant's request to mold any damages award finding that the concept of molding "does not appear to have any application where the basis on which it is sought is contrary to the collateral source rule." Id. at \*13-14; **see also Welker v. Carnevale, No. 3:14-cv-149, 2017 U.S. Dist. LEXIS 5218, at \*5-9 (W.D. Pa. Jan. 17, 2017) (relying on Deeds and granting plaintiffs' motion in *limine* to preclude defendants and their experts from presenting opinion and calculations based upon the Affordable Care Act with respect to damages for future life care costs).**

### Calculation of Damages

For causes of action arising after March 20, 2002, the MCARE Act changed the manner in which judgments, including future lost earnings and future medical expenses, were calculated. Instead of the former calculation method where future inflation was deemed to be equal to future interest rates, future lost income is reduced to present value based upon the return that the claimant can earn on a reasonably secure fixed income investment. 40 P.S. § 1303.510. Expert evidence will still be admissible with regards to the effects of productivity and inflation over time. See id.

The MCARE Act also changed the manner in which judgments, including future medical expenses, are paid. Under the statute, future medical expenses are paid quarterly based upon the present value of the expenses awarded, with adjustments for inflation and the life expectancy of the plaintiff. Id. § 1303.509(b)(1)-(2). These periodic payments terminate upon the death of the plaintiff. Id. § 1303.509(b)(5). Each party liable for all or a portion of the future damages shall contribute funding to the awarded periodic payments by means of an annuity contract, trust, or other court-approved funding plan. Id. § 1303.509(b)(6). An award for future medical expenses is paid in a lump sum where the plaintiff stipulates that the expenses, without present value reduction, do not exceed \$100,000. Id. § 1303.505(b)(8).

In Sayler v. Skutches, 40 A.3d 135 (Pa. Super. Ct. 2012), appeal denied, 54 A.3d 349 (Pa. 2012), the jury in a medical negligence action awarded a verdict in favor of the plaintiff, but found the Decedent 35% contributorily negligent for her own death. Sayler, 40 A.3d at 137. The parties disputed whether the plaintiff's attorneys' 40% contingency fee should be calculated from the total potential award for future damages, reduced by the Decedent's contributory negligence, or whether the counsel fees should be calculated from the amount of that award actually accrued before the Decedent's death. Id. at 140.

The Superior Court found that the defendant's liability to the plaintiff terminated upon the Decedent's death, at which time the Decedent had accrued \$165,750.00 in damages under the court's award, pursuant to 40 P.S. § 1303.509. Id. The Superior Court thus determined that the present value of the plaintiff's future damages was \$165,750.00, and her attorneys' fees must be calculated based on that award. Id.

The Superior Court concluded that the plain language of 40 P.S. § 1303.509 did not entitle the plaintiff to attorneys' fees in addition to that award. Id. The Superior Court additionally reasoned that, had the Legislature intended for 40 P.S. § 1303.509 to provide a basis for the award of attorneys' fees, the General Assembly would have done so explicitly. Id. at 140-41. The Superior Court added that its holding was consistent with one of the MCARE Act's underlying policies—namely, to limit jury awards in medical malpractice suits in order to ensure affordable health care premiums. Id. at 141.

### **Preservation and Accuracy of Medical Records**

In another effort to protect the safety of patients, the MCARE Act required that all entries into a patient's chart must be made simultaneously with the rendering of the treatment to be documented, or as soon after as practically possible. 40 P.S. § 1303.511(a). Subsequent, additional, and/or reversionary entries into the patient's chart must be clearly identified with the date and time of their entry. Id. § 1303.511(b)(2).

Additionally, MCARE addressed the consequence of an intentional alteration or destruction of a patient's medical records. Id. § 1303.511(c). The license of a medical professional who engages in such prohibited activity is subject to suspension or revocation. Id. § 1303.511(d). Furthermore, if a plaintiff can prove an intentional alteration or destruction of a medical record or entry, a jury may be instructed that such alteration and/or destruction constitutes a negative inference. Id. § 1303.511(c).

This issue was addressed by the Philadelphia County Court of Common Pleas in Bugieda v. University of Pennsylvania Hospital, No. 005216, 2007 Phila. Ct. Com. Pl. LEXIS 36 (C.P. Phila. Feb. 6, 2007), aff'd, 951 A.2d 1203 (Pa. Super. Ct. 2008). In this case, the defendant-hospital argued that, pursuant to 40 Pa. P.S. § 1303.511(c), a claimant must prove by a preponderance of the evidence that there was an intentional alteration or destruction of medical records before the jury is instructed on adverse inference due to lack of medical records produced. Bugieda, 2007 Phila. Ct. Com. Pl. LEXIS 36, at \*7.

The trial court rejected this argument, holding that there was no indication that the charge set forth in the MCARE Act was intended to replace the charge given in medical malpractice actions, as noted by the Superior Court in Magette v. Goodman, 771 A.2d 775 (Pa. Super. Ct. 2001), appeal denied, 790 A.2d 1017 (Pa. 2001). Id. at \*6, 8. The trial court reasoned that the general rule regarding an adverse inference in medical malpractice actions applies when a party fails to produce the records that would be in its interest to produce, and does not necessarily depend on the destruction or alteration of medical records. Id. at \*8.

### **Expert Qualifications**

In order to be qualified to give expert medical testimony at a medical malpractice trial, the proposed expert must possess sufficient education, training, knowledge and experience to provide credible, competent testimony. 40 P.S. § 1303.512(a); see, e.g., Wexler v. Hecht, 928 A.2d 973, 975 (Pa. 2007). Additionally, the MCARE Act established additional standards for qualification of an expert in a medical liability case. 40 P.S. § 1303.512(b). Under the Act, in

order to qualify as an expert, a physician must possess an unrestricted medical license in any state (including the District of Columbia), and have been engaged in active clinical practice or teaching within the previous five years. Id. § 1303.512(b)(1)-(2). The expert must also be familiar with the applicable standards for the care at issue, and the expert must have practical experience in the same subspecialty as the defendant physician, or be board-certified by the same or similar approved board as the defendant doctor. Id. § 1303.512(c).

A court may waive the subspecialty requirement for an expert, if the defendant-physician provided care for a condition not within the defendant-physician's specialty. Id. § 1303.512(d). Under such circumstances, a court will certify a proposed expert where that proposed expert is trained in the treatment of the condition for which the defendant-physician actually treated (where such condition is outside of the specialty of the defendant doctor). Id.

However, many of these qualifications may be waived, if a court finds that the expert otherwise "possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full time teaching of medicine in the applicable subspecialty," thus leaving the competency of the witness largely within the discretion of the trial judge. Id. § 1303.512(e).

Pennsylvania courts are willing to inquire into the specifics of a proposed expert's teaching or clinical practice, in conformity with 40 P.S. § 1303.512(b). In Kling v. Waciuma, 2012 Pa. Dist. & Cnty. Dec. LEXIS 580 (C.P. Lycoming Sept. 28, 2012), the defendant filed a Motion *in Limine*, seeking to preclude the plaintiff's expert, Michael Golding, M.D., from testifying based upon Dr. Golding's alleged failure to be engaged in or retired within the previous five years from active clinical practice or training, in supposed contravention of 40 P.S. § 1303.512(b)(2). Kling, 2012 Pa. Dist. & Cnty. Dec. LEXIS 580, at \*1-2, 4. The trial court observed that, according to his deposition transcript, Dr. Golding last performed surgery in 1986, and although he was currently a professor emeritus, his position as a full-time instructor had ended in 1998. Id. at \*4. The court noted that Dr. Golding also testified during his deposition that his recent "teaching" consisted of occasional lectures on various subjects, and that he saw patients not to render treatment, but to provide second opinions for former patients. Id. at \*4-5. Indeed, the court indicated that Dr. Golding stated during his deposition that he had not provided treatment for the last ten years or more. Id. at \*5. In light of the foregoing, the trial court granted the defendant's Motion *in Limine*, classifying Dr. Golding's recent lectures as an insufficient "*de minimus* level of teaching," and finding that he had not been actively engaged in either clinical practice or teaching for more than five years. Id. at \*6.

Indeed, courts will closely scrutinize whether an expert possesses the specific expertise required in a medical malpractice case. In Locker v. Henzes, No. 05-CV-3174, 2011 WL 7177002 (C.P. Lackawanna Dec. 20, 2011), the defendant-hospital challenged the qualifications of the plaintiff's purported expert, pathologist Mary Pascucci, D.O., under 40 P.S. § 1303.512. The case involved the alleged erroneous implantation of a device during a total hip replacement surgery, and the defendant-hospital contended that Dr. Pascucci was not qualified to render opinions regarding orthopedic implants, because she was not certified by any specialty boards that dealt with the specialty of orthopedic medicine.

In deciding the defendant-hospital's Motion *in Limine*, the trial court explained that, under Pennsylvania law, pathologists are generally held to possess the knowledge, training and expertise necessary to testify about the cause and effect of injuries, as well as the nature of a plaintiff's pain and suffering. The trial court found that, since Dr. Pascucci was duly licensed, actively practiced and taught medicine and had the necessary education, skill and experience, she had sufficient medical knowledge, training and experience to opine upon the harm caused by the implant, as mandated by 40 P.S. § 1303.512.

However, the court held that Dr. Pascucci's opinions regarding "improper implantation" of the device addressed standard of care issues and were thus subject to the more stringent requirements of 40 P.S. § 1303.512(c). Because Dr. Pascucci was not board-certified in, and did not practice in, the same subspecialty as the defendant-physician, or a subspecialty with a substantially similar standard of care with respect to total hip replacements, the court barred her from testifying about the "improper implantation" of the device.

The Lackawanna Court of Common Pleas also extended the waiver provision of 40 P.S. § 1303.512(b) to a non-physician. In Locker, *supra*, the defendants asserted that the plaintiff's expert, Tarun Goswami, D.Sc., a biomedical engineer, should be barred from offering causation testimony, because he did not possess a medical license or any specialized training or expertise with regard to the care at issue. The trial court noted that, while no court had applied the qualifications waiver of Section 512(b) to a non-physician seeking to address causation and medical matters in a malpractice suit, Pennsylvania courts have permitted non-physicians to testify regarding certain medical issues in cases that predated the MCARE Act.

Based upon this precedent, the trial court reasoned that "a properly qualified biomedical or biomechanical engineer may opine how an orthopedic implant functions mechanically in a patient's body and reacts with surrounding structures following implantation." Locker, 2011 WL 7177002. The trial court found that Dr. Goswami was sufficiently qualified to testify that the trial component caused increased stress shielding and resulted in bone remodeling and loss of cortical bone in the plaintiff. The trial court thus waived the requirements that Dr. Goswami possess a medical license and be currently or recently engaged in practice or teaching to testify as an expert witness in a medical malpractice action, as permitted by 40 P.S. § 1303.512(b) because he was otherwise competent to testimony about the issues by virtue of his education, training and experience. The court, however, barred Dr. Goswami from rendering opinions as to the cause of the plaintiff's alleged injuries, as he was not qualified under 40 P.S. § 1303.512(c) to render such medical standard of care and causation testimony.

In Renna v. Schadt, 64 A.3d 658 (Pa. Super. Ct. 2013), the plaintiff alleged that the defendant-surgeon deviated from the standard of care in performing fine-needle biopsy instead of CT guided core biopsy of her breast lesions. Renna, 64 A.3d at 661. The Defendant-surgeon filed a summary judgment motion on the basis that the plaintiff's two expert witnesses lacked the proper qualifications to render opinions on the standard of care. Id. The trial court disagreed, finding that both experts were qualified under Section 512(e) given that their fields of medical practice were related to the specific care at issue. Id. The trial court therefore denied the summary judgment motion. Id.

At the ensuing trial, the plaintiff was permitted to introduce the testimony of a pathologist and oncologist regarding the standard of care applicable to a surgeon at trial. Id. at 662-63. The jury ultimately returned a verdict in favor of the plaintiff. Id. at 663. On appeal, the defendant-surgeon argued that the trial court had erred in permitting the testimony of the plaintiff's expert witnesses, because they did not meet the requirements of 40 P.S. § 1303.512. Id. at 664. The Pennsylvania Superior Court held the trial court properly admitted the testimony of the plaintiff's experts, as they were both familiar with the selection of biopsy procedures for breast cancer as a result of their practice in the fields of pathology and oncology, and because the litigation did not involve the "surgical process," but rather the decision to select a particular procedure. Id. at 667-68.

In the wake of Renna, the United States District Court for the Eastern District of Pennsylvania issued its decision in Carter v. United States, No. 11-6669, 2014 WL 512064, 2014 U.S. Dist. LEXIS 15956 (E.D. Pa. Feb. 7, 2014). There, the plaintiffs instituted an action against the federal government under the Federal Tort Claims Act in their own right as parents and as natural guardians of their minor daughter, raising a claim of medical malpractice. Carter, 2014 U.S. Dist. LEXIS 15956, at \*1. The Plaintiffs alleged that, when pregnant with her daughter, the plaintiff-mother received prenatal care from a clinic that was part of the Public Health Service. Id. The Plaintiffs contended that the clinic's negligent failure to promptly notify the plaintiff-mother or the hospital where the child was delivered of certain prenatal laboratory test results caused the child to suffer a brain injury and other damages. Id. at \*1-2.

The federal government proceeded to move for summary judgment on various grounds, including that the plaintiffs' expert witness was not competent to testify that the clinic breached the required standard of care in failing to inform the plaintiff-mother of her test results before her scheduled follow-up visit. Id. at \*17-18. The federal district court denied the motion. Id. at \*28-29. The federal district court explained that the competency of a witness to testify in a civil case in federal court is a function of state law when the claim or defense is predicated upon state law. Id. at \*18. The federal district court observed that Pennsylvania substantive law applied to a claim brought against the federal government under the Federal Tort Claims Act, and that the MCARE Act provided rules to determine the competency of experts in a medical malpractice matter. Id. at \*19. The federal district court thus held that it was bound to apply the terms of the MCARE Act. Id.

Turning to the MCARE Act, the federal district court noted that, while an expert testifying on the standard of care in a Pennsylvania medical malpractice action must always be "substantially familiar with the applicable standard of care for the specific care at issue," as required by Section 512(c)(1), Section 512(e) provides a limited exception to the subspecialty requirement of subsection (2) and the board certification requirement of subsection (3). Id. at \*19-20. The federal district court observed that, to determine whether a proffered expert has "active involvement in . . . a related field of medicine" for purposes of Section 512(e), the expert's field and the defendant-physician's field "must be 'assessed with regard to the specific care at issue' and not in a general sense." Id. at 20 (quoting Vicari v. Spiegel, 989 A.2d 1277, 1284 (Pa. 2010)).

The federal district court explained that the physician who handled the plaintiff-mother's test results practiced in obstetrics and gynecology ("OB/GYN"), for which he was board certified. *Id.* at 21. The court indicated that, by contrast, the plaintiffs' expert, Dr. Saiman, was board certified in pediatrics and pediatric infectious diseases, and practiced medicine in those subspecialties. *Id.* The federal district court reasoned that, as Dr. Saiman was neither board certified nor practiced as an OB/GYN, she could be competent to testify in that case only if there was evidence that she had "sufficient training, experience and knowledge as a result of active involvement in . . . a related field of medicine" under Section 512(e) of the MCARE Act. *Id.*

The federal district court opined that, although the Pennsylvania Supreme Court had not addressed the substance of Section 512(e) since its decision in *Vicari*, the Pennsylvania Superior Court had recently confronted the issue in *Renna*. *Id.* at \*23. Viewing the *Carter* case as similar to *Vicari* and *Renna* in "many important respects," the federal district court concluded that "there is a 'close enough relation between the overall training, experience, and practices' of experts in pediatrics and those in obstetrics and gynecology 'to assure the witness's expertise would necessarily extend to standards of care pertaining in the defendant-physician's field' as to the specific care at issue." *Id.* at \*25-26 (quoting *Vicari*, 989 A.2d at 1283).

The federal district court further determined that there was evidence to demonstrate that Dr. Saiman had "the overall training, experience, and knowledge to testify as to the specific standard of care at issue." *Id.* at \*26 (quoting *Vicari*, 989 A.2d at 1285). The federal district court therefore held that Dr. Saiman's "training, experience, and knowledge" of the use of GBS test results to prevent neonatal GBS disease made her competent to testify as to the standard of care for notifying a patient of a GBS test result that was obtained specifically to ensure the health of a newborn child. *Id.* at \*27; *see also*, *Krock v. United States*, No. 5:14-cv-3683, 2015 WL 4601130, 2015 U.S. Dist. LEXIS 100121, at \*15-16, 23-24 (E.D. Pa. Jul. 31, 2015).

In *Estate of Goldberg v. Nimoityn*, No. 14-980, 2016 U.S. Dist. LEXIS 79021 (E.D. Pa. June 17, 2016), discussed *supra*, the defendant contended that plaintiff's expert was not competent to testify under MCARE because he was not board certified. *Estate of Goldberg*, 2016 U.S. Dist. LEXIS 79021, at \*9. Because Plaintiff's expert was in the process of being recertified for his board certification, the federal district court's analysis of his competency to testify assumed that he was not board certified. *Id.* at \*11. The threshold inquiry involved a determination of whether MCARE's section 512 applied in federal court where matters of expert qualification were ordinarily determined by Fed. Rule of Evidence 702. *Id.* In ruling that section 512 was applicable, the federal district court relied on Fed. Rule of Evidence 601, which provides that "with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competency of a witness shall be determined in accordance with state law." *Id.* (quoting Fed. R. Evid. 601).

Next, the federal district court examined the defendant's argument that "although section 512 permits a court to waive board certification in the *same* filed as a defendant physician, a testifying expert must nonetheless hold *some* board certification." *Id.* at \*14 (emphasis in original). In proposing this argument, defendant relied on dicta from the Pennsylvania Supreme Court's decision in *Vicari v. Spiegel*, 989 A.2d 1277 (Pa. 2010) (discussed *supra*). The federal district court disagreed with this analysis and found that the *Vicari* decision's use of the word

“same” completely changed the meaning of Section 512 in a way that was not intended by the MCARE Act. Id. at \*15. Ultimately, the court found that plaintiff’s expert was competent to testify under MCARE and emphasized that his deficit in board certification was a technicality caused by ministerial bureaucratic issues. Id. at \*17-18.

Recently in Deleon v. Wise, 2017 Pa. Super. Unpub. 2649 (Pa. Super. Ct. 2017), the plaintiff alleged that the defendant physician negligently prescribed an antibiotic called Flagyl to treat the plaintiff’s vaginal infection which caused her to have a miscarriage five days later. Id. At \*1. The trial court concluded the plaintiff’s expert witness should be excluded on the eve of trial because he did not meet the standards set by the MCARE Act. Id. At \*2. The plaintiff’s expert was a pharmacist and not an OB/GYN. The trial court granted summary judgment after the plaintiff’s expert was excluded. Id. The Superior Court affirmed the trial court’s dismissal of the plaintiff’s suit and citing the 2007 Supreme Court ruling in Wexler v. Hecht stating that there is no provision in the MCARE Act that allows for the waiver of the licensed physician requirement for expert testimony regarding standard of care. Id. At \*4. The Superior Court stated that a pharmacological expert may be more apt to discuss the risks of a drug to a certain patient, but the MCARE Act makes it clear that such an expert is not qualified to establish the appropriate standard of care of an OB/GYN. Id.

In Tillery v. Children's Hosp. of Phila., 156 A.3d 1233 (Pa. Super 2017), the Superior Court affirmed the trial court’s denial of the defendant’s post trial motion regarding plaintiff’s expert testimony. Id. At 1240. Defendants argued that the trial court should have granted their motion for JNOV because plaintiff’s experts offered opinion based solely on expertise not on science of empirical evidence. Id. The Superior Court held that the trial court properly observed that the plaintiff’s expert testimony was provided within a reasonable degree of certainty. Id. Plaintiff’s had presented multiple experts that relied on hospital record, peer review journals, and pediatric textbooks. Id. at 1241.

### Statute of Repose

For causes of action arising on or after March 20, 2002, a seven-year statute of repose generally will apply. 40 P.S. § 1303.513(a). This provision typically will bar the commencement of a lawsuit asserting medical malpractice more than seven (7) years from the date of the alleged tort or breach of contract. Id. The Statute of Repose affects the influence of the “discovery rule.” Again, the “discovery rule” tolls the two-year statute of limitations for personal injuries until the patient becomes aware of the alleged tort, or reasonably should have become aware of the alleged tort.

Prior to the enactment of the MCARE Act, the discovery rule was available to delay the expiration of the statute of limitations for several years under certain circumstances. However, MCARE now limits the amount of time that the discovery rule can toll the statute of limitations. In most cases, the MCARE act requires that suits be brought within seven (7) years, despite a possibly later deadline previously available under the discovery rule.

It is worth noting that the MCARE Act's Statute of Repose does not apply to situations where foreign objects are unintentionally left in the patient's body, or for affirmative misrepresentation or fraudulent concealment of the cause of death in wrongful death or survival actions. Id. § 1303.513(b), (d). Furthermore, minors may commence a lawsuit alleging a tort or breach of contract within seven (7) years under the Statute of Repose, or until their 20th birthday, whichever is later. Id. § 1303.513(c).

Wrongful death<sup>9</sup> and survival actions<sup>10</sup> must be commenced within two (2) years after the death, in the absence of affirmative misrepresentation or fraudulent concealment of the cause of death. Id. § 1303.513(d). In, Matharu v. Muir, 29 A.3d 375 (Pa. Super. Ct. 2011) (en banc), vacated on other grounds, 73 A.3d 576 (Pa. 2013), the Pennsylvania Superior Court found that the statutes of limitations delineated by 40 P.S. § 1303.513(d) (the MCARE Act) trumped more general statutes of limitations that preceded the MCARE Act. In Matharu, the plaintiffs brought wrongful death and survival claims on behalf of their son, whose death in 2005 was allegedly caused in part by the defendants' failure to administer a necessary dose of Rh immunoglobulin.

This alleged negligence occurred in 1998, and was known to the plaintiffs at that time, but they did not file their lawsuit until 2007. Relying on 42 Pa. C.S. § 5502(a), the defendants argued that the applicable two-year statute of limitations for wrongful death and survival actions began to run when the alleged negligent act had been done, in 1998. The Plaintiffs countered, and the Superior Court agreed, that the specific language of 40 P.S. § 1303.513(d) controlled over the general statutory language of 42 Pa. C.S. § 5524, and consequently, the plaintiffs had properly commenced their wrongful death and survival action within two (2) years after the death of their child. Matharu, 29 A.3d at 382.

The Superior Court also found that even under the more general statutory language found in the Judicial Code, the defendants' statute of limitations argument would not prevail. Id. at 383. The Superior Court concluded that the survival claim did not begin to run at the earliest until the child's birth. Further, regarding the wrongful death claim, the Superior Court held that the claim was not time-barred because no pecuniary harm was present until the child's death. The Court concluded that both the wrongful death and survival claims could be brought on behalf of the child. Id.

In Osborne v. Lewis, 59 A.3d 1109 (Pa. Super. Ct. 2012), appeal denied, 70 A.3d 812 (Pa. 2013), the Superior Court addressed the Statute of Repose set forth in the MCARE Act. In Osborne, the defendant doctor performed LASIK surgery on the plaintiff on June 1, 2000. Id. at 1110. On August 10, 2004, the plaintiff returned to see defendant complaining of decreased vision. Id. Defendant confirmed that the plaintiff was losing his vision, but did not tell him the reason for the loss. Id. Thereafter Mr. Osborne saw a number of specialists and was advised that the LASIK performed by the defendant was the cause of the deterioration of his vision and commenced a medical malpractice action within two (2) years of learning the cause. Id. In addition to allegations of medical malpractice, plaintiff alleged fraudulent concealment against the defendant doctor. Id.

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<sup>9</sup> Claims brought under 42 Pa.C.S. § 8301

<sup>10</sup> Claims brought under 42 Pa.C.S. § 8302

After the close of pleadings and discovery, the defendant moved for summary judgment arguing the provisions of the seven-year statute of repose provided in the MCARE Act precluded plaintiff's claim. Id. The trial court denied the motion for summary judgment. Id. The Defendant filed an interlocutory appeal to the Superior Court. Id. at 1111.

On appeal, the Superior Court reversed, holding that the plaintiff's claims were barred by the Statute of Repose. Id. at 1110. The Superior based its ruling upon the distinction between the date of the occurrence of a tort, and the date that a cause of action arises. Id. at 1113. Under Pennsylvania law, a cause of action accrues when "Plaintiff could first maintain an action to a successful conclusion." Id. The Superior court held that even an injured plaintiff may not pursue a claim for damages until he or she exhibits some physical manifestation of harm resulting from the injury. Id. at 1114. Here the "cause of action" arose not on the day of the tort (the June 1, 2000 LASIK surgery), but rather when the harm resulting from the LASIK surgery physically manifested itself. Before that date, the plaintiff could not have pursued an action. Id. at 1115. There was no dispute that the plaintiff testified at deposition that he became aware of his decreasing vision in "late 2003/ early 2004" and started to see a specialist. Id. Thus, the Court ruled that the cause of action arose after the March 20, 2002 implementation date and therefore the Statute of Repose did apply. Id.

The Superior Court also addressed the plaintiff's claim that the defendant's fraudulent concealment interfered with bringing the action. Id. at 1116. The Superior Court held that the doctrine of fraudulent concealment does not apply to the MCARE Act's general provisions of the Statute of Repose, as the plain language of the MCARE Act evidences that the Legislature did not intend it to apply. Id. at 1117. The Superior Court noted that paragraph (d) of the Statute of Repose expressly provides an exception for fraudulent concealment when addressing its application to wrongful death and survival actions. Id. However, within paragraph (a) setting forth the general rule for the statute of repose, there is no exception made for fraudulent concealment. Id. Thus, the Superior Court concluded that the Legislature did not intend that a fraudulent concealment argument avoid the seven year statute of repose in medical malpractice cases that were not wrongful death or survival actions. Id. See also Frohnapfel v. North Penn Hospital Corp., No. 3077, 2012 WL 359522 (C.P. Phila. Jan. 13, 2012),<sup>11</sup> aff'd, 75 A.3d 564 (Pa. Super. Ct. 2013) (holding that 40 P.S. § 1303.513 was limited by 2002 Pa. Laws 13 § 1303.5105, which stipulated that the statute of repose was applicable only if the triggering event, i.e., the alleged tort, arose on or after the MCARE Act's enactment on March 20, 2002)

The Pennsylvania Superior Court applied the holdings of Matharu and Osborne in Bulebosh v. Flannery, 91 A.3d 1241 (Pa. Super. Ct. 2014), appeal denied, 105 A.3d, 734 (Pa. 2014), but reached a different conclusion. In Bulebosh, Plaintiffs commenced a medical malpractice action against a Defendant doctor by a Writ of Summons on February 2, 2005. The Plaintiffs subsequently filed a Complaint, alleging that the defendant was negligent in performing unsuitable surgeries to implant STA-peg devices in both of the plaintiff wife's feet in 1985 and 1989, respectively. The Plaintiffs further contended that during a surgery to remove the

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<sup>11</sup> By way of additional background, the trial court judge determined that the case was improperly before her, because the appealed Order was neither a final order, nor an appealable order subject to interlocutory or collateral review.

device from the plaintiff wife's left foot in 2000, the defendant doctor negligently failed to remove the entire device. The Plaintiffs also alleged that the defendant doctor failed to provide informed consent prior to the 1985 and 1989 surgeries. The Plaintiff wife claimed that she first became aware of the defendant doctor's negligence and her lack of informed consent, after an August 8, 2003 surgery performed by another doctor.

The Defendant doctor filed an Answer and New Matter, raising the affirmative defense that the plaintiffs' negligence claim was barred by the MCARE Act's statute of repose. The Defendant doctor later filed a Motion for Summary Judgment which was denied by the Trial Court. The Defendant doctor renewed the summary judgment request by means of a Motion *in Limine*/Motion in Reconsideration/Petition to File an Interlocutory Appeal, asking the trial court to reconsider its denial of summary judgment in light of the Superior Court's rulings in Osborne and Matharu, both of which had been issued after the trial court denied the prior motion. The trial court again denied the motion, and the defendant doctor appealed.

On appeal, the Superior Court affirmed the denial of the Motion for Summary Judgment based upon the Statute of Repose. Id. at 1247. Pursuant to Osborne and Matharu, a cause of action in a medical malpractice action arises when the negligent act results in a discernible injury, for purposes of determining the applicability of the MCARE Act's statute of repose. Id. at 1246. The Superior Court held that Osborne and Matharu did not apply because in those cases, the statute of repose governed "since the cause of action arose after its effective date when the 'physical manifestation of harm' resulted from the pre-MCARE tortious conduct." Id. Additionally, unlike the present case, in Osborne and Matharu, the negligent act or omission predated the MCARE Act, but the manifestation of the harm post-dated the effective date of the statute. Id. As such, the Superior Court posited that the causes of action in Osborne and Matharu arose *after* the effective date of the statute of repose, and therefore, the statute applied. Id. However, in the instant matter, the Superior Court held that there were no ascertainable negative effects when the surgeries were performed, but instead, the injury (*i.e.*, the physician manifestation of the harm) occurred years later when the plaintiff wife experienced pain that necessitated additional surgeries to remove the STA-pegs in 1992 and 2000. Id. The Superior Court determined that, in contrast to Osborne and Matharu, both the negligence act and the ascertainable injury predated the effective date of the MCARE statute of repose. Id. The Superior Court thus held that the statute of repose was inapplicable and summary judgment was properly denied on that basis. Id. at 1246-47.

In a recent case, the Philadelphia Court of Common Pleas applied the MCARE statute of repose to a claim brought under the Unfair Trade Practices and Consumer Protection Law. Hammerquist v. Banka, 2016 Phila. Ct. com. Pl. LEXIS 245 (Phila. Cnty. Ct. Com. Pl. Jul. 28, 2016). In August of 2007, the plaintiff underwent a coronary artery stent procedure. Id. at \*4. In April of 2013, the plaintiff received a letter from the defendant hospital indicating that they had discovered that a portion of the defendant doctor's patients had undergone placements of coronary artery stents that may not have been necessary according to test results. Id. In June 2013, the plaintiff had a cardiac catheterization study performed and was informed that her coronary artery stent procedure was indeed unnecessary. Id. In November of 2015, Plaintiff brought multiple claims against the defendant physician and Defendant Health-care entities. Id. One of the plaintiff's claims was brought under the Unfair Trade Practices and Consumer

Protection Law (UTPCPL). Id. Shortly after, the defendants moved for a judgment the pleadings. The Trial Court granted the motion and dismissed the plaintiff's complaint as time-barred under the MCARE statute of repose. Id. at \*2. The Plaintiff appealed. Id.

On appeal, the plaintiff alleged trial court improperly applied the statute of repose to the claims under the UTPCPL, which were not claims of "medical professional liability claims" as defined under the MCARE Act. Id. The Superior Court affirmed the Trial Court's ruling. The Superior Court explained that Plaintiff's claims for damages arose from the medical issue of the stent procedure and "the UTPCPL claim is still a claim seeking the recovery of damages from a health care provider causing injury result from the furnishing of health care services." Id. at \*8. The Superior Court reasoned that the legislative intent in creating the MCARE Act was to reign in the cost of malpractice insurance and the MCARE statute of repose was created to provide a limitation on claims. Id. at \*10.

More recently, in Yanakos v. UPMC (Allegheny Cnty. Ct. Com Pl. November 3, 2016), an organ recipient challenged the MCARE statute of repose claiming it protects plaintiffs who had sponges left in their body, but does not protect people who are given problematic organs. In Yanakos, the plaintiff son donated a lobe of his liver to his plaintiff mother in 2003. The plaintiffs claimed that the plaintiff son underwent multiple tests in 2003 that showed his liver was not properly functioning and should not have been considered as a donor to his mother. Plaintiffs' claimed that they were not made aware of these test results until 2014 and thereafter brought suit in 2015 alleging negligence and lack of informed consent. The defendants sought summary judgment arguing the case should be dismissed since it was brought after the seven-year state of repose. The trial court granted summary judgment noting that the MCARE Act was clear and the plaintiffs did not fall into the limited MCARE statute of repose exception. The court noted it did not intend to expand any duty upon doctors that was not formally legislated or previously outline by the courts.

**On appeal, the Superior Court affirmed the trial court decision that the plaintiff could not proceed with his lawsuit against UPMC over live transplant that occurred 13 years before he filed suit. Yanakos v. UPMC, 2017 Pa. Super Unpub LEXIS 2856 (Pa. Super 2017). On appeal the plaintiffs contended that the limited exemption to the statute of repose violated the equal protection clause of the constitution. Id. At \*5. The court rejected this argument stating that there was a specific goal to the timeframe of the statute of repose to ensure medical injuries are discovery promptly. Id. At \*9 The court held that expanding delayed discovery to potential negligence outside the foreign object classification would expose health care providers to further liability. Id. at \*13. It would undermine the goal of keeping medical professional liability insurance affordable. Id.**

In Dubose v. Quinlan, 2017 Pa. LEXIS 3103 (Pa. 2017), the plaintiff's son brought a suit on behalf of his mother and care and treatment she received in 2007 at the defendant nursing home. The plaintiff alleged his mother was admitted to the facility in 2005 after a sting at Albert Einstein Medical Center. She died of organ failure slightly over two years in the nursing home, having suffered from bedsores, dehydrations, malnutrition, and bone infections. In 2013, a jury awarded the family \$1,000,000 on a survival claim, \$125,000 on a wrongful death claim, and another \$875,000 in punitive damages. Id. At \*4. On appeal, the

Superior Court the affirmed allowing the verdict to stand. *Id.* The Supreme Court allowed appeal to address whether the Superior Court correctly applied the MCARE Act statute of limitations. *Id.* At \*3. The attorneys for the defendants argued that the plaintiff's claim should be time barred because it came more than two years after the family became aware of the alleged mistreatment in the nursing home. The Court held that the for a professional liability claim, the statute of limitations is two years from the date of the persons death. *Id.* at \*6 The Court stated it is within the legislatures power to enact a more specific statute of limitations for medical professional liability negligence that results in death. *Id.* At \*31. The dissent held that the majority had extended the statute of limitations for these types of claims for potentially several years therefore granting the personal representatives more rights than the plaintiff would have possessed while alive. *Id.* At \*33.

### Venue

Significant changes have been enacted with respect to the propriety of venue in medical malpractice actions in Pennsylvania. First, the MCARE revised existing law regarding venue. Specifically, section 5101.1 of the MCARE Act relates to venue in medical malpractice actions. 42 P.S. § 5101.1. While previous venue principles essentially permitted an action to be filed in a county in which any defendant conducted business or had sufficient contacts, Section 5101.1(b) specifically provided that a medical professional liability action may only be filed in the county in which the cause of action arose. *Id.* § 5101.1(b).

The Pennsylvania Commonwealth Court has deemed 42 P.S. § 5101.1 unconstitutional. See *N.-Cent. Pa. Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550 (Pa. Commw. Ct. 2003) (*en banc*). In *North-Central*, the Petitioners alleged that the provisions of Act 127, the act that gave rise to Section 5101.1, violated Article V, Section 10(c) of the Pennsylvania Constitution pertaining to the Supreme Court's power to prescribe general procedural rules governing operation of the courts. The *en banc* Commonwealth Court held that Section 5101.1 was procedural in nature, because it affects the procedure by which the rights of an individual claiming an injury caused by medical negligence may be effectuated but does not create, define, or regulate substantive rights. *Id.* at 558.

Further, the Commonwealth Court reasoned that, in the absence of a countervailing constitutional provision authorizing the legislature to act in regard to venue in a particular area, the matter of venue is committed to the exclusive authority of the Supreme Court, pursuant to Article V, Section 10(c) of the Pennsylvania Constitution. *Id.* at 559. Consequently, the Commonwealth Court concluded that Act 127 exceeded the authority of the Legislature, to the extent that Act 27 purported to change the general rules about venue in medical professional liability actions, and was therefore unconstitutional. *Id.*

The Superior Court, however, has declined to be bound by the Commonwealth Court's holding in *North-Central*. *Connor v. Crozer Keystone Health Sys.*, 832 A.2d 1112, 1116 n.3 (Pa. Super. Ct. 2003) (noting that the Superior Court is not bound by any decision of the Commonwealth Court and declining to further address the constitutionality of 42 P.S. § 5101.1).

Secondly, as noted above, the Pennsylvania Rules of Civil Procedure have been revised to conform to the General Assembly's changes set forth in the MCARE Act. Rule 1006, relating

to change of venue, provides that a medical malpractice action may be brought against a health care provider only in a county in which the cause of action arose. Pa. R. Civ. P. 1006(a.1). By an Amending Order, dated March 3, 2003, the Pennsylvania Supreme Court ruled that Rule 1006 “shall apply to medical professional liability actions filed on or after January 1, 2002 and not to such action filed prior to that date.” However, a 2011 amendment to Rule 1006(a.1) provides that it does not apply to actions arising outside the Commonwealth. The revisions provide that, if an action to enforce a joint or joint and several liability claim against two or more defendants includes one or more medical malpractice claims, the action must be brought in any county in which venue may properly be laid against any defendant under subdivision (a.1). Pa. R. Civ. P. 1006(c)(2). Further, Section (f)(2) of the Rule stipulates that, if one or more of the causes of action stated against the same defendant is a medical malpractice claim, the action must be brought in a county required by subdivision (a.1). Pa. R. Civ. P. 1006(f)(2).

The revisions to Rule 1006 as applied to individual defendants are incorporated into the following other Rules of Civil Procedure: 2130 (Partnerships as Parties); 2156 (Unincorporated Associates as Parties); 2179 (Corporations and Similar Entities as Parties). Pa. R. Civ. P. 2130; Pa. R. Civ. P. 2156; Pa. R. Civ. P. 2179. Significantly, the Commonwealth Court, in holding Section 5101.1 unconstitutional, made no ruling concerning the constitutionality of the amended Rule 1006. N.-Cent., 827 A.2d at 550-60; see also Forrester v. Hanson, 901 A.2d 548, 552 n.3 (Pa. Super. Ct. 2006).

One venue case of interest, however, does not involve a medical malpractice claim. In Zappala v. Brandolini Property Management, Inc., 849 A.2d 1211 (Pa. Super. Ct. 2004), aff'd & remanded, 909 A.2d 1272 (Pa. 2006), rev'd sub nom. Zappala v. The James Lewis Group, 982 A.2d 512 (Pa. Super. Ct. 2009). The Plaintiff, a Delaware County resident, was injured in a slip and fall accident that occurred in Chester County. The Plaintiff filed suit in Philadelphia County naming two groups of defendants, one set of defendants from Chester County who owned the land in Chester County, and another set of defendants from Philadelphia County who were allegedly responsible for maintaining the land in Chester County. After discovery was completed, all of the Philadelphia Defendants were dismissed from the case, pursuant to unopposed motions for summary judgment, and only the Chester County Defendants remained.

The initial trial judge, the Honorable Mark I. Bernstein, granted the Chester County Defendants' Motion to Transfer Venue, finding venue improper in Philadelphia because the Chester County Defendants did not conduct business in Philadelphia and the Philadelphia Defendants had been dismissed from the action. The Plaintiff appealed, and the Superior Court vacated the venue transfer order, finding that an objection to venue was waived since the Chester County Defendants did not challenge venue by way of preliminary objections. The Superior Court noted that the Chester County Defendants claimed that the Philadelphia Defendants were “sham” Defendants, and that “[w]hile we are not entirely unsympathetic to [Defendants'] position, we are not at liberty to rewrite a rule which has been promulgated by the Supreme Court.” Id. at 1214. The Supreme Court granted Defendants' Petition for Allowance of Appeal.

The Supreme Court stated there are only three bases which a defendant can challenge venue: (1) improper venue by preliminary objection; (2) *forum non conveniens*; and (3) inability to hold a fair and impartial trial. See Zappala v. Brandolini Prop. Mgmt., Inc., 909 A.2d 1272,

1281 (Pa. 2006). The Supreme Court explained that, when examining improper venue by preliminary objection, a court must examine whether venue is proper by taking a snapshot at the time the complaint is filed. Id. The Supreme Court stated, if venue is proper at the time the complaint was filed, then venue technically remains proper throughout litigation. Id.

The Supreme Court noted that challenges to venue via *forum non conveniens* and inability to hold a fair and impartial trial can be raised at any time before trial. Since the Chester County Defendants did not challenge venue pursuant to *forum non conveniens*, the Supreme Court remanded the case to the trial court to proceed, stating in a footnote that:

[A]ny resolution of a subsection d [*forum non conveniens*] petition lies within the trial court's discretion, which, as noted would necessarily involve balancing the inconvenience or fairness of maintaining the case in the plaintiff's given forum, particularly in light of the fact that the Chester County Defendants do not have any connection thereto, against the fact that significant litigation in the chosen forum has already occurred.

Id. at 1285. The Supreme Court also stated in another footnote that “[w]e disapprove of forum shopping and explain in detail that a defendant aggrieved by such a strategy has recourse either through *forum non conveniens* in accord with Rule 1006(d)(1) or through averment that absent a transfer there cannot be a fair and impartial trial.” Id. at 1286.

Upon remand to the trial court, the Honorable Arnold L. New granted the Chester County Defendants' Petition to Transfer Venue pursuant to *forum non conveniens*. The trial court noted that the forum on Philadelphia was vexatious, even considering the extent of the court's involvement with the case. The trial court stated that “Plaintiff's claims against the Philadelphia County Defendants were tenuous at best when this action was brought.” *Zappala v. James Lewis Group*, 982 A.2d 512, 522 (Pa. Super. Ct. 2009) (citing Trial Court Opinion, 1/16/08, at 9). The trial court also stated that Plaintiff claimed both the Philadelphia and Chester County Defendants had a responsibility or ownership interest in the land where the accident occurred, but “[n]othing on the record, beyond Plaintiff's bald assertions in her complaint, supports this claim against [the Philadelphia] Defendants.” Id.

The trial court only pointed to one defendant, who stated “trial in Philadelphia County would create problems with staffing and unnecessary costs and time expenditure.” The trial court also stressed that it is important to note that the summary judgment motions against the Philadelphia Defendants were dismissed without opposition. Additionally, the trial court noted, but did not comment upon, the defendants' argument that Philadelphia County juries are more liberal in awarding damages to plaintiffs in personal injuries suits, which results in cases settling at higher figures. The trial court acknowledged that there is a right to “legitimate” forum shopping, but that the plaintiff here “created” a forum by suing an unwarrantedly broad choice of parties. The trial court stated, even if Plaintiff had support for her claims against the Philadelphia Defendants, the consideration of forum shopping would still be an appropriate factor to consider in deciding a petition to change venue based upon *forum non conveniens*. Id.

This the holding by the trial court seemingly opens the door for non-Philadelphia defendants to successfully transfer venue whenever Philadelphia defendants are dismissed from a case, even if the defendants cannot argue that the Philadelphia defendants were “sham” defendants. The trial court also stated that even if the defendants do not allege forum shopping, it is proper for a court to address forum shopping to determine whether the forum was designated to harass the defendants.

In Zappala v. The James Lewis Group, 982 A.2d 512 (Pa. Super. Ct. 2009), the Superior Court reversed Judge New’s decision on remand and transferred the case back to Philadelphia. While the Superior Court agreed with Judge New’s analysis that improper forum shopping can provide a basis for a change of venue *forum non conveniens* under Rule 1006(d)(2), the Superior Court held that the Chester County Defendants failed to present sufficient evidence to the trial court demonstrating that venue in Philadelphia County was harassing, oppressive, or vexatious such that transfer to Chester County was warranted. *Id.*

More specifically, the Superior Court held that, despite their assertions to the contrary, the Chester County Defendants failed to present sufficient evidence to support their claim that the plaintiff had initially named the Philadelphia Defendants as parties to the action solely for the purpose of obtaining venue in Philadelphia, with the expectation that the Philadelphia Defendants would ultimately be dismissed without opposition. *Id.* at 521. In short, the Superior Court found that the Chester County Defendants failed to make a *prima facie* showing of improper forum shopping on the part of the plaintiff to support a finding of *forum non conveniens* in Philadelphia County under Rule 1006(d)(2). *Id.* However, it should be noted the Superior Court reiterated that, as a matter of law, improper forum shopping *can* provide grounds for *forum non conveniens* if the proper evidentiary showing is made. *Id.*

In Bilotti-Kerrick v. St. Luke’s Hospital, 873 A.2d 728 (Pa. Super. Ct. 2005), the Superior Court applied the amended venue rule regarding medical malpractice actions and held that the trial court did not abuse its discretion in transferring venue from Northampton County to Lehigh County, which is where the cause of action arose. The patient at issue in this case had become ill and been taken to a hospital where the doctor recommended transfer of the patient to St. Luke’s Hospital for immediate cardiac catheterization. The doctor contacted a cardiologist from St. Luke’s, who was at his home in Northampton County at the time, and the cardiologist agreed to accept the patient upon her arrival and perform the needed procedure by 6 a.m. Instead, the patient was taken to the critical care unit at St. Luke’s, and the cardiologist did not see her until much later in the day. After the catheterization and surgery, the patient died. Plaintiff argued venue was proper in Northampton County because that is where the cause of action arose, based on the fact that the cardiologist’s residence was there and it was from there that he managed her care before he came to St. Luke’s.

The Superior Court held, however, that “for venue purposes the cause of action arose in the county where the negligent act or omission of failing to provide the needed care occurred.” *Id.* at 731. Plaintiff’s allegations of negligence were based on delay in the performance of the cardiac catheterization and in the overall care at St. Luke’s, which is in Lehigh County. As such, St. Luke’s was the location of the negligent act or omission, even though the cardiologist had

given orders over the phone from his Northampton County home. Those orders were to be carried out in Lehigh County. Venue was only proper, therefore, in Lehigh County.

In Forrester v. Hanson, *supra*, the plaintiff motorist brought a personal injury action against the driver of a commercial vehicle and the driver's employer. The Defendants subsequently filed a joinder complaint against the plaintiff's treating physician, alleging that the physician's negligent treatment of the plaintiff was the true cause of plaintiff's injuries. Critically, the defendants did not assert a separate cause of action against the physician, but rather sought a jury determination of the physician's portion of the liability should the defendants be found negligent.

After joinder was granted, the physician objected to venue, arguing that the case should be transferred from Philadelphia County to Montgomery County, because all of the allegedly negligent acts, as set forth in the joinder complaint, took place at the physician's office in Montgomery County. The trial court granted the physician's motion and transferred the case to Montgomery County, pursuant to Rule 1006(a.1). The Plaintiff appealed, arguing that the trial court abused its discretion by transferring the case, because the defendants did not bring any "medical professional liability claim" in the joinder complaint as defined by the MCARE legislation.

The Superior Court determined that the defendants did not assert a "medical professional liability claim" against physician, because "[the defendants'] joinder complaint did not seek to recover damages or loss directly from [Defendant]." Forrester, 901 A.2d at 553. Rather, the Superior Court noted that the defendants merely sought a jury determination of the physician's portion of the liability. *Id.* Because the defendants' joinder complaint did not assert a medical professional liability claim within the meaning of the statute, the Superior Court determined that Rule 1006(a.1) did not apply and that the trial court misapplied the law when it transferred the case to Montgomery County. *Id.* at 554.

In Olshan v. Tenet Health System, 849 A.2d 1214 (Pa. Super. Ct.), *appeal denied*, 864 A.2d 530 (Pa. 2004), the plaintiff appealed an order of the Philadelphia County Court sustaining preliminary objections filed by the defendants, corporate health care providers and a doctor, regarding venue and transferring the case to Montgomery County for trial.

The Plaintiff's mammogram had been taken and read by a doctor in Montgomery County. A cancerous lesion was missed in this reading, resulting in a much more serious cancer when finally diagnosed. The Plaintiff sued the doctor for malpractice. The Plaintiff also sued the corporate providers who were located in Philadelphia County, alleging corporate liability in failing to retain competent physicians and failing to implement adequate rules and policies and failing to supervise. The patient had received no treatment in Philadelphia County. All treatment occurred in Montgomery County.

The Superior Court held that the trial court properly transferred venue to Montgomery County, because all of the medical care was furnished to the patient in Montgomery County, and therefore, the "cause of action arose" in Montgomery County. Olshan, 849 A.2d at 1216. In so holding, the Superior Court examined Rule 1006. *Id.* The Superior Court also looked at the

MCARE Act, which defines “medical professional liability claim,” in part, as “resulting from the furnishing of health care services”. Id. (citation and quotation marks omitted). The Superior Court concluded that venue is created not by where alleged corporate negligence occurred, but where the action affected the patient, *i.e.*, where the care was “furnished.” Id. See also, Cohen v. Furin, 2007 Phila. Ct. Com. Pl. LEXIS 265 (Phila. Cnty. Ct. Com. Pl. Aug. 22, 2007), aff’d, 946 A.2d 125 (Pa. Super. Ct. 2008) (holding that venue does not lie in the county where corporate action took place, but in the county where the action affected the patient.)

In Searles v. Estrada, 856 A.2d 85 (Pa. Super. Ct. 2004), appeal denied, 871 A.2d 192 (Pa. 2005), the parties all resided in Pennsylvania. The surgical procedure from which the action arose occurred in a New Jersey hospital. The Plaintiffs filed their complaint in Pennsylvania and the defendant-physician filed preliminary objections in the nature of a motion to dismiss on the basis of improper venue. The trial court denied this motion.

On appeal, the defendant-physician contended that the trial court had erred in failing to dismiss the action pursuant to Rule 1006(a.1). The Superior Court concluded that the newly amended Rule 1006 applied to the case and that, because the cause of action arose in New Jersey, venue was not proper in any county in Pennsylvania. Id. at 89-90. The Superior Court reasoned that, since there was no county in Pennsylvania to which the trial court could properly transfer the case, the only alternative available was dismissal. Id. at 91-92. Consequently, the Superior Court held that the trial court erred in failing to sustain the defendant-physician’s preliminary objections based on improper venue and in failing to grant his motion to dismiss. Id. at 93.

In Peters v. Sidorov, 855 A.2d 894 (Pa. Super. Ct. 2004), the Superior Court held that venue is proper where the alleged acts of negligence occurred, and not where the alleged injury to the patient occurred.

There, the plaintiff received outpatient medical care from the defendant-physicians in Montour County. The Plaintiff alleged that the defendant-physicians negligently prescribed a drug which caused her to suffer an allergic reaction at her home in Columbia County. The Plaintiff filed suit in Luzerne County. The Defendant-physicians then filed a petition to transfer venue to Montour County where they argued the cause of action arose. The trial court found that venue in Luzerne County was improper, but transferred the case to Columbia County, where Plaintiff had suffered the injury.

On appeal, the Superior Court stated the issue was where the cause of action arose and noted that Pennsylvania courts have defined “cause of action” to mean the negligent act or omission, as opposed to the injury which flows from the tortious conduct. Id. at 896. The Superior Court further stated that it would be unfair to hold that a person could seek medical attention from a physician in one county, receive a prescription from that physician, and then go to any county to ingest that medication and have the physician be subject to venue in whatever county that happens to be. Id. at 899. The Superior Court held that the correct county for venue is the county where the alleged negligence occurred and ordered the case transferred to Montour County. Id. at 900.

In Fratz v. Gorin, 2012 Phila. Ct. Com. Pl. LEXIS 204 (Phila. Cnty. Ct. Com. Pl. June 18, 2012), the plaintiff brought a medical malpractice action in the Philadelphia County Court of Common Pleas. The Plaintiff alleged that she suffered significant injury after developing an infection following a dental procedure. The only medical care at issue, taking place in Philadelphia County, was the dental procedure. The remainder of the care at issue took place in Montgomery County. The trial court held that Pa. R. Civ. P. 1006 only applies to “healthcare providers,” as defined by the MCARE Act, and that a dentist is not a healthcare provider under the MCARE Act. As such, the trial court transferred the case to Montgomery County where “all of the medical professional negligence occurred.”

In Nees v. Anderson, 28 Pa. D.&C 539 (Phila. Cnty. Ct. Com. Pl. Apr. 10, 2013), the trial court rejected the defendant-physician’s preliminary objections to whether venue was appropriate, among other things. The Decedent, a minor, passed away while engaged in athletic activity, and it was alleged that the defendant-physician failed to place any restrictions on his athletic activities, despite tests revealing cardiac abnormalities. The Defendant-physician only maintained an office and saw patients, including the Decedent, who died at 15 and whom he had seen since he was 4, in New Jersey. However, the defendant-physician was employed by the Children’s Hospital of Philadelphia (“CHOP”) and his office was known as a “CHOP Specialty Care Center.” Notably, bills for services rendered were sent and received in Pennsylvania, and certain testing when the Decedent was 13 years old took place at CHOP in Philadelphia.

The Defendants, including the defendant-physician, challenged venue on the basis that the statutory basis for venue was unconstitutional. The action was brought in Philadelphia County pursuant to Rule 1006(a.1) of the Pennsylvania Rules of Civil Procedure, which again provides:

(a.1) Except as otherwise provided by subdivision (c), a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in a county in which the cause of action arose. This provision does not apply to a cause of action that arose outside the Commonwealth.

The last sentence was added in 2011. The Defendants contended that the latter sentence resulted in “arbitrary” and “statewide” venue for out-of-state healthcare professionals because the venue limitation placed on their in-state counterparts didn’t apply. However, the trial court concluded that the rules as amended was rationally related to a legitimate state goal, did not arbitrarily discriminate against out-of-state healthcare providers, and should survive constitutional scrutiny.

The Defendant-physician additionally argued that, irrespective of whether Rule 1006(a.1), as amended, withstood constitutional scrutiny, venue against him was improper. Because the trial court found that venue against Defendant CHOP was appropriate in Philadelphia, and as Rule 1006(c) of the Pennsylvania Rules of Civil Procedure provides that, “an action to enforce joint or joint and several liability against two or more defendants, except actions in which the Commonwealth is a party defendant, may be brought against all defendants in any county in which venue may be laid against any one of the defendants under the general

rules of subdivisions (a) and (b),” the trial court declined to find venue against the defendant-physician inappropriate.

In so holding, the trial court rejected the defendant-physician’s challenge to venue on the basis that he was not alleged to be “jointly liable” with Defendant CHOP, given that the theory against CHOP appeared to be one of vicarious liability. The trial court “decline[d] to interpret Rule 1006(c) such that cases involving vicarious liability cannot be venued together even where cases involving joint liability could. It is clear that the appropriate definition of “‘joint liability’ in this context is the generic one, which ‘subsumes the concept of vicarious liability.’” The trial court subsequently amended its order to allow an immediate appeal, owing to the presence of a substantial issue of venue (as well as jurisdiction).

In Friedman v. Manor, 2016 Pa. Super. Unpub. LEXIS 3694 (Pa. Super. Ct. 2016) (non-precedential opinion), the plaintiff, acting individually and as executory of the decedent’s estate, appealed the order of the trial court granting the defendants’ motion to transfer the suit from Philadelphia County to Chester County. Id. at \*2. The Decedent was treated at a nursing facility in Chester County, where Plaintiff alleged the Decedent was given the wrong medication which caused the worsening of the Decedent’s Lewy Body Disease and accelerated her death. Id. The Plaintiff brought also brought claims on his own behalf in the form of NIED and IIED, which the plaintiff claimed were caused when he discovered the true cause of the Decedent’s symptoms while researching in a medical library in Philadelphia. Id. at \*3.

The trial court granted defendants’ motion to transfer venue to Chester County, where the decedent was treated and where the nursing facility was located. Id. at \*5. The Plaintiff appealed claiming that transfer of venue was improper because his emotional distress occurred in Philadelphia County. Id. The Superior Court ruled that Pennsylvania Rules of Civil Procedure 1006(a.1) required that any medical professional liability claim, which the court defined as, a claim seeking recovery for any tort resulting from the furnishing of healthcare service, be brought in the county which the cause of action arose. Id. at \*7. The Court further noted that Rule 1006(f)(2) addressed complaints alleging multiple causes of action where one is a claim for medical professional liability. Id. at \*11. Rule 1006(f)(20) requires these claims to be brought in the county where the claim as arose as provided in Rule 1006(a.1). Id. The Court ruled that because the plaintiff’s claims arose out of care administered to the decedent in Chester County, the lower court was correct in granting the transfer of venue there. Id. at \*13.

**In Wentzel v. Cammarano, 2016 Phila. Ct. Com. Pl. LEXIS 314 (Phila. Cnty. Ct. Com. Pl. Aug. 18, 2016) the trial court held that sending test results “does not rise to the level of rendering healthcare services” that would make Philadelphia County the proper venue for a lawsuit. Wentzel v. Cammarano, 166 A.3d 1265, 1266 (Pa. Super. Ct. 2017). On appeal the Superior Court reversed holding the transfer of venue was improper. Id. The case involved the alleged negligent failure of a resident cardiologist at Philadelphia’s St. Christopher’s to timely the plaintiffs diagnosis and treatment plan to Reading Hospital. Id. The Superior Court held that the transmittal of an echocardiogram was sufficient for the rendering of health care services. Id. At 1272. The Court held that involvement of the Philadelphia Defendant extended beyond the mere offer of advice from a remote location and thus venue in Philadelphia would be proper. Id. At 1272.**

For additional venue cases not involving medical malpractice, see Zampana-Barry v. Donaghue, 921 A.2d 500 (Pa. Super. Ct.), appeal denied, 940 A.2d 366 (Pa. 2007) (discussed in detail in the “Legal Malpractice” section of these materials); Walls v. The Phoenix Ins. Co., 979 A.2d 847 (Pa. Super. Ct. 2009) (holding the defendant failed to present sufficient evidence in *forum non conveniens* petition to demonstrate that venue in Philadelphia was both oppressive and vexatious such that case should be transferred to Monroe County); McMillan v. First Nat’l Bank of Berwick, 978 A.2d 370 (Pa. Super. Ct. 2009) (holding trial court did not abuse its discretion in finding that proper venue in malicious prosecution case against bank was in county where bank brought underlying claim against plaintiff); **Medley v. Dynamic Therapy Servs., 2017 Phila. Ct. Com. Pl. LEXIS 249 (Phila. Cnty. Ct. Com. Pl. 2017) (holding the MCARE venue rules applied and was suit was improperly brought in Philadelphia when alleged negligence took place in Reading PA)**; **Alessio v. I-Flow Corp., 2017 Pa. Super Unpub LEXIS 4386 (Pa. Super. Ct. 2017) (holding trial court abused its discretion transferring case from Philadelphia to Montgomery County because part of the cause action arose in Philadelphia County)**.

### **Remittitur**

Where a health care provider challenges a verdict on the basis of its excessiveness, the MCARE Act establishes a standard for the court’s evaluation of the challenge. 40 P.S. § 1303.515. The trial court shall consider whether the health care provider’s satisfaction of the verdict will impact the availability of the community’s access to medical care. Id. § 1303.515(b). If it is determined that the verdict results in a limitation of the community’s availability to healthcare, then the trial court may reduce award accordingly. Id. If the trial court has not adequately considered the impact of paying the verdict upon availability and access to health care in the community in denying remittitur, an appellate court can find that the trial court abused its discretion. Id. § 1303.515(c). Also, a trial court or appellate court may limit or reduce the amount of the security that the defendant health care provider must post to prevent execution, if the either court finds that requiring a bond in excess of the insurance policy limits would effectively deny defendant’s right to an appeal. Id. § 1303.515(d).

There have been no significant case citing § 1303.515(c) since 2009. For notable decisions see Vogelsberger v. Magee-Women’s Hospital, 903 A.2 540 (Pa. Super 2006) (the Superior Court upheld a trial court granting of remittitur under § 1303.515(c)); McManamon v. Washko, 906 A.2 1559 (Pa. Super. 2006) (holding § 1303.515(c) does not apply to claims of ordinary negligence).

## **C. Rules**

### **Certificate of Merit**

Pennsylvania Rules of Civil Procedure 1042.3 requires certificates of merits to be filed in any professional liability case in which it is alleged that the professional deviated from required professional standard. The rule requires the following:

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

Pa. R. Civ. P. 1042.3(a). A separate certificate of merit must be filed as to each professional against whom a claim is asserted. Pa. R. Civ. P. 1042.3(b)(1) If the claim is one of vicarious liability, a certificate of merit must be filed as to any professional who is alleged to have deviated from the standard of care, whether or not such professional is named as a defendant. Additionally, if a claim is raised under section (a)(1) and (a)(2) against the same defendant, a separate certificate of merit shall be filed for each claim raised or a single certificate stating the claims are being raised under both subdivision. Pa. R. Civ. P. 1042.3(b)(2). A defendant who files a counterclaim asserting a claim of professional responsibility is required to file a certificate of merit. Pa. R. Civ. P. 1042.3(c)(1).

A defendant or an additional defendant who has joined a licensed professional as an additional defendant or asserted a cross-claim against a licensed professional is not required to file a certificate of merit unless the joinder or cross claim is based on acts of negligence that are unrelated the original claim. Pa. R. Civ. P. 1042.3(c)(2)

If a plaintiff files a certificate of merit stating that no expert testimony is required, absent exceptional circumstances, the plaintiff will be precluded from presenting expert testimony regarding the standard of care and causation. Note to Pa. R. Civ. P. 1042.3(a)(3). See also McCool v. Dep't of Corr., 984 A.2d 565 (Pa. Commw. Ct. 2009), appeal denied, 742 A.2d 678 (Pa. 2009) (Plaintiff was bound to certificates of merit that indicated that expert testimony was not necessary and as such, his complaint failed to state a claim for professional malpractice without expert testimony).

The “appropriate licensed professional” referred to in the certificate of merit does not have to be the same person that the plaintiff uses as an expert at trial, but this “appropriate” person must, in a medical malpractice case, meet the qualifications for an expert set forth in Section 512 of the MCARE Act. No discovery, other than a request for production of documents

and things, or entry upon property for inspection and other purposes, may be sought by plaintiff prior to the filing of a certificate of merit. Pa. R. Civ. P. 1042.5.

If a certificate of merit is not signed by an attorney, the party signing the certificate of merit, must attach to the certificate of merit, the written statement from an appropriate licensed professional as required under Pa. R. Civ. P. 1042.3(a)1 and (2). If the written statement is not attached, the defendant may file a written notice of intent to enter a judgment of non pros for failure to file a written statement. Pa. R. Civ. P. 1042.3(e) (rules regarding notice of intent to enter a judgment of non pros explained below). See Renz v. Ingles, 2016 Pa. Super. Unpub. LEXIS 431, (Pa. Super. Ct. 2016) (holding *pro se* plaintiffs were bound to the procedural rules of Pa. R. Civ. P. 1042.3(e) and cannot be excused for a failure to file required written statement from an appropriate licensed professional); Gudalefsky v. Nipple, 2015 Pa. Super. Unpub. Lexis 1766 (Pa. Super. Ct. 2015)(entering a judgment of non pros when a *pro se* plaintiff filed a document “certificate of qualified an expert” and failed to follow the procedural rules laid out in Pa. R. Civ. P. 1042.3(e)).

(a) **Is it a Professional Negligence Claim**

The preliminary question regarding certificate of merits is, are the needed for this particular cause of action? In Dental Care Associates, Inc. v. Keller Engineers, Inc., 954 A.2d 597 (Pa. Super. Ct. 2008), appeal denied, 968 A.2d 233 (Pa. 2009) the Superior Court determined whether a certificate of merit was needed for a cause of action filed against an incorporated engineering firm. The court stated that Plaintiff’s claims, although couched as ordinary negligence, were “inextricably intertwined with the propriety of assessing the professional engineering services [Defendant] provided in the storm water management plan and civil design of [Plaintiff’s] property.” Id. at 602. The court placed particular emphasis on the expert report Plaintiff attached to the Petition to Open Judgment of *Non Pros* which stated Defendant’s storm management report for the property was found to be “thorough in scope and of sound engineering methods.” The court explained that the excerpt from the expert report addressed “topics ‘beyond the realm of common knowledge and experience’ that would require expert testimony to explicate.” Id. Accordingly, the court held a certificate of merit against the engineering firm was required and the entry of a judgment of *non pros* was proper. See also Zokaites Contracting, Inc. v. Trant Corp., 968 A.2d 1282 (Pa. Super. Ct.), appeal denied, 985 A.2d 972 (Pa. 2009), (stating a certificate of merit was required for allegations against an engineering firm where the Complaint sounded in professional liability, not breach of contract, because the Complaint’s averments related to the engineering firm’s overall exercise of care and professional judgment, not specific contractual duties and obligations.)

In French v. Commonwealth Associates, Inc., 980 A.2d 623 (Pa. Super. Ct. 2009), the court addressed whether a certificate of merit was required in a death action brought against an engineering firm alleging negligence, products liability, and breach of warranty. The Superior Court found that the trial court erred in dismissing Plaintiff’s entire complaint, without evaluating which claims sounded in professional negligence and which ones sounded in products liability/breach of warranty, to ensure that only the professional negligence claims were dismissed. The court rejected the trial court’s legal generalization that “if an expert is needed to sustain any cause of action included in the complaint, then the entire complaint is necessarily one

for professional liability. Such a blanket statement is too inclusive, where expert opinion is often relevant and admissible in a variety of contexts, not just in claims for professional negligence.” Id. at 635. The court vacated the trial court’s order and remanded to the trial court to determine which counts of the complaint sounded in professional negligence.

Importantly, and as the United States District Court for the Western District of Pennsylvania has emphasized, the certificate of merit is only required when a professional is sued for violating professional standards. Ferencz v. Medlock, 905 F. Supp.2d 656 (W.D. Pa. 2012). In Ferencz, Defendant healthcare provider moved to dismiss Plaintiff’s wrongful death and survival claims due to a failure to file a certificate of merit; Plaintiff countered that a certificate of merit was not required because her claims were not premised upon professional negligence. The court first noted, in distinguishing medical negligence from ordinary negligence, the court must consider whether the claim pertains to conduct that occurred in the context of a professional relationship and whether the claim raises questions of medical judgment beyond the realm of common knowledge and expertise. Id. at \*14. The Court, looking to the substance of Plaintiff’s Complaint, held that a certificate of merit was not required because plaintiff’s wrongful death and survival claims did not sound in medical negligence. Id. at \*15.

In Merlini v. Gallitzin Water Authority, 934 A.2d 100, (Pa. Super. Ct. 2007), aff’d, 980 A.2d 502 (Pa. 2009), the Superior Court addressed the distinctions between a claim of professional negligence and a claim of ordinary negligence. In Merlini, Defendants installed a water line on Plaintiff’s property without proper permission. Essentially, Plaintiff alleged that Defendants had a duty to determine the position of any easements and rights-of-way, and breached that duty in installing the water line. Plaintiff never filed a certificate of merit within 60 days of filing the complaint, and a judgment of *non pros* was entered in Defendants’ favor. The trial court denied Plaintiff’s petition to open the judgment of *non pros*, and Plaintiff appealed.

On appeal, Plaintiff maintained that the trial court erred in refusing to open the judgment of *non pros*. Specifically, Plaintiff argued that she was asserting an ordinary negligence claim, not professional liability, as the trial court had indicated. In addressing this argument, the Superior Court noted that it had embraced the Michigan Supreme Court’s method of distinguishing ordinary negligence from medical malpractice as illustrated in Bryant v. Oakpointe Villa Nursing Center, 684 N.W.2d 864 (Mich. 2004). The Court applied the Bryant method to apply to professional negligence, explaining:

There are two questions involved in determining whether a claim alleges ordinary as opposed to professional negligence: (1) whether the claim pertains to an action that occurred in the course of a professional relationship; and (2) whether the claim raises questions of professional judgment beyond the realm of common knowledge and experience.

Id. at 105. The Court held that, although the alleged breach occurred during the performance of professional services, the allegations did not raise questions of professional judgment beyond that of common knowledge and experience. The Supreme Court affirmed the judgment of the Superior Court. Merlini v. Gallitzin Water Auth., 980 A.2d 502 (Pa. 2009). The Supreme Court focused on Plaintiff’s failure to allege that Defendants’ actions fell below a professional

engineering standard. The Court stated Plaintiff's allegations essentially constituted ordinary negligence and trespass. The Court explained that the issues raised by Plaintiff were not issues involving professional judgment beyond the scope of common knowledge and experience, despite the fact that the alleged negligence occurred during the performance of professional services. Accordingly, no certificate of merit was required.

Krauss v. Claar, 879 A.2d 302 (Pa. Super. Ct. 2005), appeal denied, 889 A.2d 1217 (Pa. 2005), is another legal malpractice case that addresses the certificate of merit rules. Defendant in this case was an attorney that had represented sellers in a transaction in which the buyers were the successful bidders on property they wanted to use for logging. The buyers filed suit when problems arose with the sale and included the sellers' attorney as a defendant. The attorney maintained that the claims against him were for professional malpractice and filed a Praecipe for Judgment of *Non Pros* based on Plaintiffs' failure to file a certificate of merit. Plaintiffs filed a motion to strike this praecipe, which the trial court denied.

On appeal, the Superior Court found that the Complaint did not raise any claims concerning the attorney's duties as a licensed professional attorney. The allegations against him were in connections with claims for negligent misrepresentation, intentional misrepresentation, promissory estoppel and tortious interference with contractual relations. These allegations did not assert that he had deviated from an acceptable professional standard, and so did not set forth a professional liability claim. Consequently, no certificate of merit was required. The Court also noted that a claim against a lawyer for legal malpractice could be brought only by a client of that lawyer. The order of the trial court was reversed. See also Quinn Construction, Inc. v. Skanska USA Building, Inc., No. 07-0406, 2008 WL 2389499 (E.D. Pa. June 10, 2008) (where the district court held in a case involving claims of negligent misrepresentation against an architect, the key issue was whether Plaintiff alleged the architect deviated from any professional standard, which would mandate the filing of a certificate of merit.)

In Perez v. Griffin, No. 1:06-CV-1468, 2008 U.S. Dist. LEXIS 45240 (M.D. Pa. June 9, 2008), aff'd, 304 Fed. Appx. 72 (3d Cir. 2008), Plaintiff, while incarcerated at the Schuylkill Federal Correctional Institution, suffered a severe asthma attack and alleged that he received inadequate treatment. Plaintiff allegedly retained an attorney to pursue a claim against federal prison officials for the medical treatment administered during the asthma attack. Plaintiff commenced the suit *pro se*, and the attorney never entered an appearance. A Motion for Summary Judgment was filed against the plaintiff, and he forwarded the papers to the attorney. The Motion was extended after the attorney failed to oppose the Motion, and the plaintiff eventually prepared and filed an opposition without the attorney's assistance. The federal district court entered summary judgment against the plaintiff. Plaintiff then commenced an action, *pro se*, for legal malpractice, breach of contract, and fraud against the attorney, and failed to file a certificate of merit or a motion for an extension within the 60-day period following the filing of the Complaint.

The court examined whether a certificate of merit is necessary, where, as in that case, the plaintiff alleges that his attorney breached a contract and committed fraud. The court explained that Plaintiff had attempted to "cloak a claim based upon breach of professional negligence in the language of ordinary negligence, breach of contract, or fraud." The court held a certificate of

merit was needed for Plaintiff's claims of fraud and breach of contract because the claims arose from the professional duties defendant owed to Plaintiff and were "beyond the realm of common knowledge and experience of laypeople." See also Levi v. Lappin, 2009 WL 1770146 (M.D. Pa. June 22, 2009) (stating Plaintiff prisoner's mistaken belief he was proceeding on Eighth Amendment claim of denial of medical care, not medical malpractice claim, and erroneous belief a certificate of merit claim was not required, is not a reasonable excuse for not timely filing a certificate of merit). But see Davis v. U.S., 2009 WL 890938 (M.D. Pa. March 31, 2009) (holding a certificate of merit was not needed to proceed on a claim against a prison warden, when plaintiff alleged MRSA infection was caused by the warden's failure to follow guidelines and provide a reasonably safe place of confinement).

In Campbell v. Sunrise Senior Living Management, 2009 WL 4258070 (E.D. Pa. Nov. 29, 2009), the court addressed whether Plaintiff, an independent contractor of the defendant long-term care facility, asserted a claim for professional liability. Plaintiff was a certified nursing assistant who was attacked by a patient of the long-term care facility. Plaintiff alleged the long-term care facility knew of a patient's violent propensities, but failed to correct them. The court stated that the long-term care facility's professional duties are to its patients, not every invitee who enters their building. The court noted the long-term care facility only owed ordinary duties to Plaintiff, which only required a duty to warn of a known danger or to take steps to prevent injury from a known danger. The court denied the long-term care facility's motion to dismiss, holding Plaintiff's lawsuit sounded in ordinary negligence and did not require the filing of a certificate of merit. See also Zatuchi v. Richman, 2009 WL 1886118 (E.D. Pa. June 30, 2009) (stating intermediate care facility resident did not need to file certificate of merit for claim against care center operator, who was not a health care provider, which alleged that Plaintiff was entitled to more therapy and support than she received—including a power wheelchair and augmentive communication device).

In Stroud v. Abington Memorial Hospital, *supra*, the court examined whether an entry of judgment of *non pros* for a corporate negligence claim against a hospital was proper, where Plaintiff only filed a timely certificate of merit setting forth claims of vicarious liability against the hospital. The court explained that, while Plaintiff filed an amended certificate of merit supporting the corporate negligence claims, this certificate of merit was filed after the defendant hospital filed a motion to dismiss (which is the federal mechanism for enforcing the failure to file a certificate of merit). The court found that Plaintiff had properly pleaded a claim of corporate negligence against the hospital, but Plaintiff's certificate of merit supporting a corporate negligence claim was filed more than 60 days after the filing of the Complaint and after Defendant's motion to dismiss. The court held Plaintiff did not file a timely certificate of merit regarding the corporate negligence claim, and the claim would be dismissed unless Plaintiff could establish a reasonable explanation or legitimate excuse for not timely filing a certificate of merit. The court dismissed Plaintiff's corporate negligence claim, without prejudice, and allowed Plaintiff leave to seek reinstatement to present evidence of a reasonable explanation or legitimate excuse for not filing the certificate of merit.

In Pollock v. Feinstein, 1 Pa. D. & C.5th 38 (Phila. Cnty. Ct. Com. Pl. 2006), *aff'd*, 917 A.2d 875 (Pa. Super. Ct. 2007), Plaintiff brought suit against her physician after sustaining a laceration to her anterior abdominal wall during a laparoscopic tubal ligation and IUD removal.

Plaintiff claimed that Defendant failed to provide her with material information regarding the procedure, such as risks, consequences, and alternatives necessary for her to determine whether to proceed with the surgery, and that Defendant was therefore negligent for failing to obtain her informed consent.

In response, Defendants argued that failing to obtain informed consent constitutes a deviation from acceptable medical standards, and that Plaintiff was therefore required to file a certificate of merit in order to maintain her cause of action. Given that Plaintiff failed to timely file a certificate of merit, Defendant moved for the entry of a judgment of *non pros*. Plaintiff countered by arguing that she was not required to file a certificate of merit, because her malpractice action was based solely on lack of informed consent.

The Court of Common Pleas ultimately ruled in favor of Defendant, analyzing the doctrine of informed consent under Pennsylvania law and holding that,

[a] medical provider complie[s] with the consent requirements if he or she disclose[s] risks and alternatives *in accordance with acceptable medical standards*. Hence . . . a claim of lack of informed consent falls within the boundaries of Pa. R. Civ. P. § 1042.3(a). As such, a Certificate of Merit is required.

Id. at \*6. Plaintiff appealed to the Superior Court. Pollock v. Feinstein, 917 A.2d 875 (Pa. Super. Ct. 2007).

On appeal, the Court affirmed the lower court's decision. The Court explained that “[a]t its core, this action required a showing that [defendants] failed to conform to a specific acceptable professional standard, namely ‘[to] provide patients with material information necessary to determine whether to proceed with the surgical or operative procedure, or to remain in the present condition.’” Id. Thus, the trial court correctly found that a Rule 1042.3 certificate of merit was required for a claim of lack of informed consent.

### **Non Pros/Failure to Timely File/Substantial Compliance**

If a plaintiff fails to file a certificate of merit within the required time, and no extension has been obtained or requested, a judgment of *non pros* is to be entered by the Prothonotary upon praecipe of the defendant following Rule 1042.6. Rule 1042.6 provides that a defendant seeking judgment of *non pros* must file a written notice of intention to file a praecipe for *non pros* no sooner than the thirty-first day after filing the complaint. Rule 1042.6 also provides, after a defendant files a notice of intention to seek judgment of *non pros*, a plaintiff may file a motion seeking a determination by the court whether a certificate of merit is necessary. The filing of this motion tolls the time period within which a certificate of merit must be filed. If the court rules a certificate of merit is necessary, a plaintiff must file a certificate of merit within twenty days of the entry of the order or the original time period, whichever is longer. Rule 1042.6 also provides that a plaintiff cannot raise the issue whether a certificate of merit was necessary after the entry of a judgment of *non pros*.

Specifically, Rule 1042.6 provides, in pertinent part,

(a) Except as provided by subdivision (b), a defendant seeking to enter a judgment of *non pros* under Rule 1042.7(a) shall file a written notice of intention to file the praecipe and serve it on the party's attorney of record or on the party if unrepresented, no sooner than the thirty-first day after the filing of the complaint.

(b) A judgment of *non pros* may be entered as provided by Rule 1042.7(a) without notice if

(1) the court has granted a motion to extend the time to file the certificate and the plaintiff has failed to file it within the extended time, or

(2) the court has denied the motion to extend the time.

(c) Upon the filing of a notice under subdivision (a) of this rule, a plaintiff may file a motion seeking a determination by the court as to the necessity of filing a certificate of merit. The filing of the motion tolls the time period within which a certificate of merit must be filed until the court rules upon the motion. If it is determined that a certificate of merit is required, the plaintiff must file the certificate within twenty days of entry of the court order on the docket or the original time period, whichever is later.

Pa. R. Civ. P. 1042.6 (Official note omitted). Rule 1042.6 provides a sample form for the Rule 1042.6 notice.

#### **Failure to Timely File/Excuses for Delay**

In Nuyannes v. Thompson, No. 11-2029, 2011 WL 5428720, at \*1 (E.D. Pa. Nov. 8, 2011), the federal district court held that a party's difficulty in obtaining counsel may constitute good cause to extend time for the filing of a certificate of merit. In Nuyannes, the plaintiff filed a *pro se* Complaint, alleging medical negligence, on September 19, 2011, but did not obtain counsel until immediately preceding the filing of his First Amended Complaint on September 19, 2011. In granting the plaintiff's request for an extension of time in which to file a certificate of merit, the federal district court found that, once the plaintiff obtained counsel, this counsel had taken all appropriate steps to promptly move the case forward. Id. at \*3. Further, the federal district court reasoned that the plaintiff's extension should be granted because, notwithstanding the delay occasioned by plaintiff's *pro se* status, nothing in the case's procedural history suggested that the plaintiff would hinder the progress of the suit by seeking a series of extensions. Id.

When a plaintiff does file a certificate of merit, the court will nonetheless dismiss those certificates it deems inadequate. In Horan v. U.S., No. 4:CV-08-00529, 2009 WL 700630 (M.D. Pa. Mar. 12, 2009), the plaintiff filed a Complaint alleging medical negligence and filed what he termed a "certificate of merit" in which he stated he was unable to obtain a licensed professional to supply a written statement corroborating his claims. To that end, the plaintiff requested the federal district court use medical reports in support of his claim. The federal district court found that the defendants were entitled to summary judgment with respect to the plaintiff's medical

negligence claim because the plaintiff's statement and request did not satisfy the requirements of Rule 1042.3 and the time for filing a certificate of merit had long passed. *Id.* at \*12, \*13, \*20.

Decisions involving acceptable excuses demonstrate the courts' stringent adherence to the requirements of Rule 1042.3. In *Brito v. U.S.*, No. 3:09-CV-1257, 2010 WL 936561 (M.D. Pa. Mar. 15, 2010), the plaintiff offered two excuses for his failure to provide a certificate of merit. First, the plaintiff alleged he asked the Bureau of Prisons ("BOP") for the license number of the defendant-physician, which the BOP failed to provide. Without this license number, the plaintiff alleged, he could safely assume that the defendant-physician was not licensed, relieving the plaintiff of the duty to file a certificate of merit. *Id.* Alternatively, the plaintiff contended that the medical notes of two physicians, who each recommended appropriate treatment for plaintiff that defendant allegedly and negligently failed to recommend, constitute a certificate of merit.

The federal district court rejected both of these excuses, first noting that the plaintiff's claim that he did not know if the defendant-physician was a licensed doctor was belied by the plaintiff's own exhibits, which referred to the defendant-physician as a doctor. *Id.* at \*4. Further, the federal district court found that the medical notes of the two other physicians did not satisfy the requirements of Rule 1042.3, because neither doctor opined that the defendant-physician's treatment fell outside professional standards and was a cause in bringing about the plaintiff's harm. *Id.* (citing Pa. R. Civ. P. 1042.3(a)(1)).

In *Refosco v. U.S.*, No. 10-1112, 2011 WL 1833374 (W.D. Pa. May 13, 2011), the plaintiff, in response to the defendant's motion to dismiss for failure to file a timely certificate of merit, offered the following "reasonable explanation" for this failure. According to the plaintiff, prior to filing the lawsuit, her counsel had obtained an expert's medical report to support the certificate of merit. However, shortly after filing suit, counsel contracted a rare cancer and was unable to attend to his practice while undergoing treatment. During counsel's absence, there was a "breakdown of communication" that resulted in counsel's erroneous belief that others in his law practice had filed the certificate of merit, while co-counsel believed the certificate had been filed prior to counsel's illness. New lead counsel from the firm assured the federal district court there would be no further delay. In light of the foregoing, the federal district court held that the plaintiff had proffered a reasonable excuse for counsel's failure to timely file the certificate of merit and consequently found the certificate adequate to support plaintiff's vicarious liability claim. *Id.* at \*7; see also *Vianello v. Bey*, 2017 Pa. Super. Unpub. LEXIS 3754 (Pa. Super. Ct. 2017) (holding the trial court properly entered a judgment of *non pros* when the plaintiff failed to file certificates of merit for a claim that sounds in medical malpractice).

### **Timeliness Of Notice Of Intent To Enter Judgment of *Non Pros***

The *Nuyannes* court also provided guidance regarding when a party may file a Notice of Intent to Enter Judgment of *Non Pros* in the event the opposing party fails to file a Certificate of Merit. As noted above, plaintiffs filed a Complaint alleging malpractice on March 24, 2011, and then a First Amended Complaint on September 19, 2011. Defendants filed Notices of Intent to Enter Judgment of *Non Pros* on September 23 and 30, 2007. Plaintiffs challenged these Notices as premature because they were submitted prior to the elapse of 31 days after the filing of plaintiff's First Amended Complaint.

The court disagreed with plaintiffs, holding because that the term “filing” in Rule 1042.6(a) refers to the “initial commencement of an action,” *i.e.*, the date the original Complaint was delivered to the court, the filing of an amended complaint did not afford the plaintiff an additional 60 days in which to file a certificate of merit. Nuyannes, 2011 WL 5428720, at \*2 (citations omitted). Consequently, as the original Complaint was filed on March 24, 2011, and the certificate of merit is required to be filed within 60 days of the filing of the original complaint, defendants were free to file the Notices any time after April 23, 2011. Id. at \*2.

If a plaintiff files a certificate of merit, even if untimely, before a defendant moves to dismiss pursuant to Rule 1042.3, dismissal is inappropriate. In Vojtecky v. U.S., No. 12-388, 2012 WL 4478367 (W.D. Pa. Sept. 27, 2012), plaintiff filed a Complaint on March 28, 2012, and a certificate of merit on July 24, 2012, and then defendant moved to dismiss the Complaint based upon Rule 1042.3. The court recognized that failure to file a timely certificate of merit, alone, was not fatal to plaintiff’s suit. Id. at \*4. Indeed, judgment against a plaintiff is not permitted if the certificate of merit is filed before the defendant files a motion to dismiss. Id. at \*5 (citing Pa. R. Civ. P. 1042.7(a)(2)). Consequently, the court denied the motion to dismiss. Id.

### **Substantial Compliance**

In Ditch v. Waynesboro Hospital, 917 A.2d 317 (Pa. Super. Ct. 2007), aff’d, 17 A.2d 310 (Pa. 2011), the complaint alleged that the decedent, who had suffered a stroke and been taken to the emergency department at the defendant hospital, fell from her hospital bed, struck her head on the floor, and suffered a fractured skull and subdural hematoma, from which she died three days later. Plaintiff, the administratrix of the patient’s estate, alleged that the patient’s death was caused by the negligence of the hospital, in failing to properly restrain the patient, failing to train the staff on proper procedures in transporting patients, and in leaving the patient alone while she was being transported.

Defendant filed preliminary objections based on lack of specificity and failure to file a certificate of merit. Plaintiff filed an amended complaint, but did not file a certificate of merit. The hospital filed a Praecipe for Judgment of *Non Pros* pursuant to Rule 1042.6, and judgment was entered. About one week later, Plaintiff filed a petition to open this judgment and also filed a certificate of merit. The trial court denied the petition, finding that the complaint raised a professional negligence claim and so required a certificate of merit.

On appeal, Plaintiff argued that her complaint contained only claims of ordinary negligence, of a “slip and fall” type, and that, therefore, no certificate of merit was required. The Superior Court disagreed, noting that the events involved all occurred during the course of medical treatment and also involved, at least to some extent, medical judgments. The court further disagreed with Plaintiff’s argument that no expert testimony would be required to prove her case and that this established that her claim was not one of medical negligence. The court stated that expert testimony would, in fact, be required to prove her claims, that her claims were for professional negligence, and that accordingly, a certificate of merit was required.

The Superior Court also disagreed with Plaintiff’s arguments that Defendant was required to raise, by way of preliminary objections, the issue of whether the complaint asserted a professional claim, and that the amended complaint served to withdraw the original complaint

and to foreclose all challenges against that first complaint. Finally, the Superior Court held that equitable considerations did not require that the judgment of *non pros* be opened and that the trial court had not abused its discretion in refusing to do so.

The court noted that, while Womer v. Hilliker, 908 A.2d 269 (Pa. 2006) (holding that where a plaintiff fails to take any steps to comply with Rule 1042.3, even where the plaintiff serves an expert report on a defendant during discovery, the plaintiff cannot open a judgment of *non pros* entered owing to the failure to file a certificate of merit), contemplates that Rule 1042.3 is subject to equitable considerations, Rule 126 applied only where a plaintiff had substantially complied with Rule 1042.3, not where a plaintiff had failed entirely to file a certificate of merit. Therefore, in this case, Rule 126 did not apply. Moreover, when the case was evaluated under Rule 3051, Plaintiff's argument failed because the reasons she offered for not having filed the certificate did not constitute a reasonable excuse. Consequently, the decision of the trial court was affirmed.

The Pennsylvania Supreme Court had granted appeal limited to the issues of: (1) whether a certificate of merit must be filed within 60 days of the filing of the original complaint, notwithstanding the filing of preliminary objections and/or an amended complaint; and (2) whether the complaint and amended complaint raise a professional negligence claim which requires the filing of a certificate of merit. As indicated above, the Supreme Court affirmed the Superior Court, doing so by per curiam order, over the dissent of one Justice.

In Weaver v. University of Pittsburgh Medical Center, 2008 U.S. Dist. LEXIS 57988 (W.D. Pa. July 30, 2008), the federal district court examined whether Plaintiff substantially complied with the certificate of merit requirement. Defendant filed a Motion to Dismiss, arguing Plaintiff's corporate negligence claim should be dismissed because Plaintiff's certificate of merit only supported a claim of vicarious liability against the hospital and not a direct claim of corporate negligence. Plaintiff conceded the certificate of merit only contained language supporting a claim of vicarious liability, but claimed she simply checked the wrong box when completing the certificate of merit.

Plaintiff made several arguments why the court should not dismiss Plaintiff's corporate negligence claim. Plaintiff argued in light of the language of the Complaint that only set forth a claim of corporate negligence (and not vicarious liability), Plaintiff's incorrect certificate of merit was simply a procedural mistake. Plaintiff also produced the opinion of an expert that was dated prior to the filing of the certificate of merit, which supported Plaintiff's direct claim of corporate negligence and did not support a claim of vicarious liability. Finally, Plaintiff argued that, since the statute of limitations had not run, the Complaint could simply be re-filed and that the re-filing of the Complaint would cause unnecessary paper shuffling.

Plaintiff relied heavily on the recent opinion in Stroud v. Abington Memorial Hospital, 546 F. Supp. 2d 238 (E.D. Pa. 2008), where counsel for Plaintiff checked the vicarious liability box on the certificate of merit, not the box for corporate liability. The court distinguished Stroud, noting the plaintiff in Stroud could not re-file the Complaint with a proper certificate of merit because the statute of limitations had run, but that, in the present case, Plaintiff was able to re-file a new Complaint with a proper certificate of merit. The court also explained that, in Stroud,

Plaintiff failed to check *both applicable boxes* on the certificate of merit (only checking box for vicarious liability); however, in the present case, Plaintiff checked the *wrong box*, which is clearly supported by Plaintiff's Complaint and expert report.

The court noted that, “[w]hile the [certificate of merit] filed by Plaintiff’s counsel may reflect an egregious lack of attention to detail or knowledge of Pennsylvania law, we conclude Plaintiff has substantially complied with *Rule 1042*.” Weaver, 2008 U.S. Dist. LEXIS 57988 at \*24. Thus, the court held the filing of an improper certificate of merit was excusable when counsel simply checked the wrong box (not the wrong number of boxes), which was supported by Plaintiff’s Complaint and expert report, especially in light of the fact that the statute of limitations had not yet expired.

In Gudalefsky v. Nipple, 122 A.3d 1134 (Pa. Super. Ct. 2015), appeal denied, 130 A.3d 1280 (Pa. 2015), the Pennsylvania Superior Court addressed whether a plaintiff can file a sufficient substitute to a certificate of merit. There, Plaintiff, a *pro se* litigant, filed a Complaint against Defendant physician, alleging medical malpractice resulting in the death of her mother. Plaintiff, however, did not file a certificate of merit with the Complaint. Defendant therefore filed a Notice of Intention to Enter a Judgment of Non Pros. In response, Plaintiff filed a document entitled, “Certificate of Qualified Expert,” which purported to be a summary of a report authored by another physician and suggested that Defendant breached the applicable standard of care during the course of his treatment of Plaintiff’s mother.

Defendant subsequently filed a Praeceptum for Entry of Judgment of *Non Pros*, on the basis that Plaintiff had not filed a proper certificate of merit. The Prothonotary agreed and entered judgment in favor of Defendant. Plaintiff then filed a Petition to Open Judgment of *Non Pros*, arguing that she filed a suitable substitute for a certificate of merit. The trial court disagreed and denied the Petition.

On appeal, the Pennsylvania Superior Court affirmed. The Superior Court explained that the requirement to file a certificate of merit is “clear and unambiguous.” Id. at \*2 (citation and quotation marks omitted). The Superior Court observed that, absent a proper certificate of merit, the prothonotary is empowered to enter judgment of *non pros* against the plaintiff, following proper notice and upon the praecipe of the defendant. Id. The Superior Court concluded that Plaintiff did not file a certificate of merit that “conforms substantially to the sample provided in Rule 1042.10.” Id. at 3. The Court added that Plaintiff did not offer an excuse for this failure. Id. Therefore, and believing that that case was “directly on point” with the Pennsylvania Supreme Court’s decision in Womer, the Superior Court held that the trial court did not abuse its discretion in denying the Petition. Id.

In Scales v. Witherite, No. 3:10-CV-0333, 2011 WL 5239142 (M.D. Pa. Nov. 1, 2011), the court addressed the propriety of a certificate of merit that asserts that expert testimony is not necessary in a medical negligence claim. In Scales, Plaintiff filed a document, entitled “certificate of merit,” asserting that expert testimony would not be necessary in his medical negligence claim. The magistrate judge recommended the matter be dismissed for Plaintiff’s failure to file a certificate of merit. However, the federal district court disagreed, holding that, while the magistrate judge is likely correct that medical testimony is necessary to establish

Defendants' negligence, a filing that a litigant intends to proceed without an expert, even in a case where the court believes an expert will be necessary, does satisfy Pennsylvania's certificate of merit requirement. Id. at \*2 (citing Liggon-Redding v. Estate of Sugarman, 659 F.3d 258 (3d Cir. Oct 4. 2011)); see also Harris v. Moser, 2011 Pa. Dist. & Cnty. Dec. LEXIS 320, at 5 (Allegheny Cnty. Ct. Com Pl. Aug. 19, 2011) (the filing of the incorrect Certificate of Merit could have been considered to be in substantial compliance with the rule requiring that a Certificate of Merit be filed).

### **Applicability of the Rule**

#### **Certificates of Merits in Federal Court for State and Federal Law Claims**

In Liggon-Redding v. Estate of Robert Sugarman, 659 F. 3d 258 (3d Cir. 2011), the Third Circuit held that Pennsylvania Rule of Civil Procedure 1042.3, mandating a certificate of merit in professional negligence cases, is substantive law and must be applied by federal courts. Id. at 265; see also Cuevas v. United States, 580 Fed. Appx. 71, 73(3d Cir. Pa. 2014) (where plaintiff filed a certificate of merit indicating that no expert testimony was required, when in fact such testimony was necessary, plaintiff was precluded from presenting expert testimony); Crawford v. McMillan, 2016, U.S. App. Lexis 18970, (3d Cir. 2016) (holding Pa. R. Civ. P. 1042.3 is a substantive law that must be applied to federal courts).

In Everett v. Donate, 2010 WL 1052944 (M.D. Pa. Mar. 22, 2010), aff'd, 397 Fed. Appx. 744 (3d Cir. 2010), the court addressed whether it was required to apply Rule 1042.3 when it was not sitting in diversity and was instead addressing pendent state claims of negligence. The court cited to Abdulhay v. Bethlehem Medical Arts, 2005 WL 2416012 (E.D. Pa. Sept. 28, 2005), and held that, under the *Erie* doctrine, "federal courts must apply [Rule 1042.3] to state law claims arising under pendent jurisdiction." Id. at \*3. The court also noted that Plaintiff's incarceration or *pro se* status is not a viable excuse for plaintiff's failure to comply with Rule 1042.3. Id. at \*4. The court further noted that Rule 1042.3 does not require that the moving party allege it suffered prejudice by plaintiff's failure to file a certificate of merit. Id.

Iwanejko v. Cohen & Grigsby, P.C., 249 Fed. Appx. 938 (3d Cir. 2007), involved an attorney, who had a psychotic breakdown at work. He was involuntarily committed to a mental health center. After a brief stay, Plaintiff attorney returned to work subject to a work agreement, but was subsequently terminated for violating the agreement. Plaintiff filed suit against multiple Defendants, including the mental health center. Defendant filed a motion to dismiss based upon Plaintiff's failure to file a certificate of merit, and the trial court dismissed Plaintiff's claims against the mental health center. On appeal, Plaintiff argued that his claim did not invoke Rule 1042.3. Plaintiff additionally maintained that Defendant waived the certificate of merit defense, by failing to raise it in a previous Rule 12(b)(6) motion.

The Third Circuit affirmed the district court's decision and held that the district court had correctly applied Rule 1042.3 as substantive law. The Third Circuit further held that the decision to involuntarily commit an individual is a question of medical judgment and Defendant's conduct in admitting Plaintiff constitutes "an integral part of the process of rendering medical treatment." As a result, Rule 1042.3 was applicable. The Court further noted that at the time Defendant filed its Rule 12(b)(6) motions, the 60-day window for filing a certificate of merit had not yet closed.

Therefore, even if the Rule 1042.3 defense were required to be raised in a Rule 12(b)(6) motion, Defendant did not waive it. The defense was not “then available” to Defendant under Rule 12(g). Accordingly, Defendant was entitled to raise it in a separate motion. Thus, Rule 1042.3 applied and Plaintiff was required to file a certificate of merit. See also Lopez v. Brady, No. 4:CV-07-1126, 2008 U.S. Dist. LEXIS 73759 (M.D. Pa. Sept. 25, 2008); Peraza v. Helton, 2016 U.S. Dist. LEXIS 150970 (M.D. Pa. November 1, 2016). (holding that claims brought under the Federal Tort Claims Act for failure to receive proper medical attention in prison triggered the certificate of merit requirement).

In D.V. v. Westmoreland County Children’s Bureau, No. 07-829, 2008 U.S. Dist. LEXIS 15951 (W.D. Pa. Mar. 3, 2008), the court examined whether a certificate of merit is required to assert a claim under federal law pursuant to 42 U.S.C. § 1983, alleging violations of the First and Fourteenth Amendments. Plaintiff’s claims arose out of a report issued by a psychologist, who was hired by Westmoreland County Children’s Bureau and resulted in the suspension of Plaintiff’s custodial rights of his children. The court stated the standard for determining whether a right conferred under the United States Constitution was violated is different than the standard for determining whether there was a violation of state tort law. The court explained that the Due Process Clause is not implicated by a negligent act. The court further determined that, when a §1983 claim is asserted, the court must look at the underlying substantive right that was violated, which Plaintiff asserted was a violation of his United States Constitutional Rights.

The court followed the three step analysis required by §1988, for determining whether Rule 1042.3 is indispensable to the federal scheme of justice. The court stopped their analysis at step one, finding step one was met because “this state rule is not vital to the adjudication of federal issues because the federal laws address the same concern through F.R.C.P. Rule 11(b), and F.R.C.P. Rule 26(a)(2).” The court reasoned that, since Rule 11(b) (which provides representations to the court are made for proper purpose) and 26(a)(2) (which governs disclosure of expert testimony) address the concern of weeding out “clearly non-meritorious lawsuits early in the litigation process,” Rule 1042.3 does not need to be imported into the federal judicial system. See also Guynup v. Lancaster County Prison, No. 06-4315, 2007 U.S. Dist. LEXIS 63412 (E.D. Pa. Aug. 17, 2007 (holding that where jurisdiction lies solely in federal question, Rule 1042.3 is inapplicable and a certificate of merit is not required).

In Ward v. Knox, McLaughlin, Gornall & Sennett, No. 08-43 Erie, 2009 U.S. Dist. LEXIS 20302 (W.D. Pa. Mar. 13, 2009), the United States District Court for the Western District of Pennsylvania has held that Rule 1042.7 is procedural in nature and thus inapplicable to federal practice. Because the Federal Rules of Civil Procedure do not provide for a judgment of *non pros*, the proper procedure in federal court is to treat a motion to dismiss a professional negligence action for failure to comply with Rule 1042.3 as a motion to dismiss, without prejudice. But see Liggon-Redding v. Estate of Sugarman, 659 F. 3d 258 (3rd Cir. 2011).

### **Certificates of Merits and Expert Testimony**

In Quinn Construction, Inc. v. Skanska USA Building Inc., No. 07-406, 2009 U.S. Dist. LEXIS 45247 (E.D. Pa. May 27, 2009), the court addressed a defense motion for the preclusion of expert testimony, on the basis that the trial court ruled at an earlier stage that Plaintiff was not asserting a claim for professional liability. Plaintiff was a subcontractor who brought claims

against the general contractor and architect alleging negligent misrepresentation and breach of contract. The defense argued that, based upon the comment to Rule 1042.3, Plaintiff cannot present expert testimony at the time of trial.

The court explained that the comment to Rule 1042.3 only addresses the situation where a plaintiff certifies that he/she is bringing a claim for professional liability, but that expert testimony is not required where the court finds that Plaintiff is bringing a claim for ordinary negligence. Plaintiff had not yet produced any expert reports, so the court abstained from making any ruling on what expert testimony would be permitted at the time of trial, noting that Fed. R. Evid. 702 would govern the admission of such testimony. See also McCool v. Dep't of Corr., 984 A.2d 565 (Pa. Commw. Ct. 2009), appeal denied, 742 A.2d 678 (Pa. 2009) (dismissing the Complaint when certificate of merit stated that expert testimony was not required and noting that the damages of mastocytosis and esophageal dysphagia are complex and little known diseases requiring expert testimony).

In Mertzig v. Booth, No. 11-1462, 2012 US Dist. LEXIS 57857 (E.D. Pa. Apr. 25, 2012), the federal district court, interpreting Pennsylvania law, held that a plaintiff who certifies in his/her certificate of merit that expert testimony is unnecessary for the prosecution of his claim may not, absent exceptional circumstances, be allowed to present expert testimony later on in the litigation. The court held that a plaintiff realizing he requires expert testimony to make out his claim does not qualify as an exceptional circumstance. See also Illes v. Beaven, Civil No. 1:12-CV-0395, 2012 WL 2836581, at \*4 (M.D. Pa. July 10, 2012) (granting summary judgment where an inmate brought a medical malpractice claim against the prison doctor and filed a certificate of merit stating that he did not need expert testimony for his claim, but the court found expert testimony was necessary and precluded the inmate from presenting the necessary testimony)

### **Certificates of Merit for Dragonetti Act Claims**

In Sabella v. Milides, 992 A.2d 180 (Pa. Super. Ct. 2010), appeal denied 9 A.3d. 631 (Pa. 2010), the court addressed whether a Dragonetti claim against an attorney required the filing of a certificate of merit. The Superior Court explained that the uncontested facts were that: (1) Defendant's actions were conducted as an attorney at law; (2) Plaintiff was never a client of Defendant; and (3) Plaintiff did not meet the narrow exception to the general rule of privity. Id. at 189. The Superior Court determined that, based upon the uncontroverted facts, "Pennsylvania law makes clear that [plaintiff] could not sue [defendant] for legal malpractice." Id. The Superior Court reversed the trial court's order, finding that "[t]he gist of the allegations involves actions [Defendant] took as opposing counsel, not [Plaintiff's] counsel." Id.

The Superior Court noted that, "[a]lthough [Plaintiff's] complaint might raise questions of professional judgment beyond the realm of common knowledge and experience, his cause of action did not arise from within the course of a professional relationship with [defendant]." Id. The Superior Court held that, despite the fact that issues may arise regarding defendant's professional judgment, plaintiff's complaint was not a cause of action for professional liability and thus did not require a certificate of merit. Id. at 189-90.

In Chizmar v. Borough of Trafford, 2009 WL 1743687 (W.D. Pa. June 18, 2009), the federal district court addressed whether a certificate of merit was required in the context of a claim under the Dragonetti Act (wrongful use of civil proceedings). The court noted that they were unable to find any authority on the issue whether a Dragonetti claim sounding in professional liability requires a certificate of merit. The court stated that expert testimony is often needed with Dragonetti claims, but that the Act itself does not explicitly require expert testimony. The court explained that the rules governing certificates of merit are sufficiently broad to warrant a reading that Dragonetti claims are included. The court held that a certificate of merit is required in the context of a Dragonetti claim when it is alleged that a lawyer deviated from the acceptable professional standard.

### **The Fair Share Act – Changes to 42 Pa. C.S.A §7102**

The Fair Share Act amends Title 42 of the Pennsylvania Consolidated Statutes section 7102, and abolishes most forms of joint and several liability, which had been the law in Pennsylvania civil cases prior to the Act's passage. Under the Fair Share Act, most liability is several, but not joint. This means that an individual defendant will only be responsible for damages proportionate to his share of the judgment, as determined by the jury. However, if a defendant is determined to be liable for 60% or more of the total liability of all the defendants, this defendant could be jointly liable for all of the damages owed to the injured party.

The Fair Share Act has four exemptions:

- 1) a suit including an intentional misrepresentation;
- 2) a case of intentional tort;
- 3) a suit concerning the release or threatened release of a hazardous substance under the Hazardous Sites Cleanup Act; and
- 4) a civil action in which a defendant has violated section 487 of the Liquor Code.

The Act also states that the fact that a plaintiff is found to be contributorily negligent will not bar the plaintiff's recovery where the plaintiff's negligence is not greater than the negligence of the defendant(s). However, damages awarded to the plaintiff will be diminished by the amount of negligence attributed to the plaintiff.

Finally, the Act states that for purposes of apportioning liability only, upon appropriate requests and proof, the jury will decide the question of the liability of a defendant or third party who entered into a release with the plaintiff. The defendant requesting the apportioning of that settling defendant or third party's liability must, however, prove the liability. An exception is an employer protected with immunity pursuant to the Worker's Compensation Act.

### **Preemption of Vaccine Design Defect Claims by National Childhood Vaccine Injury Act**

In Bruesewitz v. Wyeth, LLC, 562 U.S. 223 (2011), the United States Supreme Court held that "the National Childhood Vaccine Injury Act preempts all design-defect claims against

vaccine manufacturers brought by Plaintiffs who seek compensation for injury or death caused by vaccine side effects.” Id. at 243. The particular language of the Act at issue provides:

No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.

42 U.S.C. § 300(aa)-22(b)(1).

In light of the United States Supreme Court’s decision in Bruesewitz, the Pennsylvania Supreme Court vacated the order of the Superior Court in Wright v. Aventis, 33 A.3d 1262 (Pa. 2011), with instructions on remand for proceedings consistent with the United States Supreme Court’s decision in Bruesewitz. In Wright, 14 A.3d 850 (Pa. Super. Ct. 2011), the Superior Court had held that 42 U.S.C. § 300aa-22(b)(1) “does not serve as an outright bar to any design defect claim. Rather, § 300aa-22(b)(1) requires courts to conduct a case-by-case inquiry in order to determine whether a particular vaccine’s side effects are unavoidable.” Wright, 14 A.3d at 880. The Superior Court had further held that, “Before ruling that § 300aa-22(b)(1) preempts Appellants’ design defect claim, the trial court must first conduct an inquiry to determine whether the injury-causing side effects were unavoidable.” Id. This position is not compatible with the United States Supreme Court’s decision in Bruesewitz, readily explaining the decision of the Pennsylvania Supreme Court to vacate the Superior Court’s decision in Wright.

## **MISCELLANEOUS ISSUES**

### **Discovery of Private Social Media Content in Personal Injury Actions**

The body of law surrounding the discovery of so-called “private” social media content continues to develop, with significant implications for medical malpractice actions. For example, in medical malpractice cases, plaintiffs often claim severe and debilitating injuries, but may post content on-line that suggests otherwise. One question involves whether and when a party may access “private” content through discovery, in the hopes of reducing or eliminating plaintiffs’ claimed damages.

In McMillen v. Hummingbird Speedway Inc., No. 113-2010 CD, 2010 Pa. D. & C. Dec. LEXIS 270 (Pa. C.P. Sept. 9, 2010), the court held that social media login information was discoverable where the public profile showed that relevant information might be contained in the private profile, demonstrating that the plaintiff’s injuries were exaggerated. Id. at \*11. Additionally, the court noted that there exists no privilege between friends on social media accounts. If such a privilege did exist, it was waived by posting on the account. Id. at \*5–12.

In Largent v. Reed, No. 2009-1823, 2011 Pa. D. & C. Dec. LEXIS 612 (Pa. C.P. Nov. 8, 2011), the court held that because non-public information on a Facebook account is shared with others, there exists no reasonable privacy expectation in that information. Id. at \*12. The purpose of a Facebook account is to share information with others, nullifying any claim of privilege. Id.

at \*13. The court confined this holding to cases where the party seeking discovery can articulate in good faith that further discovery will lead to relevant information. Id. at \*6–7.

In Zimmerman v. Weis Markets, Inc., No. CV-09-1535, 2011 Pa. D. & C. Dec. LEXIS 187 (Pa. C.P. May 19, 2011), the court decided that it was reasonable to infer the existence of relevant content within plaintiff’s private profile based on publicly-available information. Id. at \*7. While plaintiff argued that he had a reasonable expectation of privacy, he consented to share the information when he created the account and voluntarily posted the information. Id. at \*10. Thus, the court ordered the plaintiff to comply with the discovery request. Id.

In Arcq v. Fields, No. 2008-2430 (Pa. C.P. Dec. 7, 2011) (Herman, J.), the court held that social media discovery is predicated on a showing that the public portions of the subject profile contain relevant information, establishing a gateway to the private profile. There must be some reasonable, good-faith basis for thinking that the private profile contains relevant information.

In Hoy v. Holmes, 28 Pa. D. & C.5th 9 (Pa. C.P. 2013), the defendant argued that he was entitled to view plaintiffs’ social media accounts for information related to damages. Id. at \*2. The court cited Trail v. Lesko, No. GD-10-017249, 2012 Pa. D. & C. Dec. LEXIS 194 (Pa. C.P. July 5, 2012), which held that a threshold showing of relevance is necessary prior to permitting discovery into non-public portions of social media accounts. Id. at \*3. “To this end, the courts have relied on information contained in the publicly available portions of a user’s profile to form a basis for further discovery.” Id. at \*4 (quoting Trail, 2012 Pa. D. & C. Dec. LEXIS 194, at \*19). The Hoy court agreed, and noted that there exists no constitutional privacy right or privilege applicable to the type of discovery the defendant sought. Id. at \*8. However, that a lawsuit has been filed, alone, does not identify or establish a factual predicate. Id. at \*8–9. Accordingly, the court denied the defendant’s motion to compel without prejudice for the defendant to seek relief if he could establish a factual predicate as to the requested discovery. Id. at \*9.

In Brogan v. Rosenn, Jenkins & Greenwald, LLP, 28 Pa. D. & C.5th 533 (Pa. C.P. 2013), plaintiffs sought to compel a deponent to produce her Facebook username and password. Id. at \*1. Partly at issue in the case was whether a title insurer disclosed a recorded easement to the plaintiffs before closing on a property. See id. The title insurer’s former director testified that he communicated through private messages on Facebook with the deponent about the issue. Id. at \*6-8. The title insurer produced the former director’s communications, but declined to produce the deponent’s Facebook username and password. Id. The court held that the moving party must demonstrate that the information sought is relevant, for example, by demonstrating that publicly accessible information arguably controverts the account holders’ claims or defenses, but the moving party failed to do so. Id. at \*1-2.

In Perrone v. Rose City HMA, LLC, No. CI-11-14933, 2013 WL 4011622 (Pa. C.P. May 3, 2013), the court ordered plaintiffs to provide a neutral forensic expert with Facebook login information for purposes of identifying any information relevant to the plaintiff’s alleged injury. Id. at ¶¶ 1-3. Plaintiff claimed that a fall left her with debilitating injuries, but the defendant produced photographs from the public portion of Plaintiff’s Facebook account suggesting

otherwise. The court found that the defendant made the requisite showing of relevance, entitling the defendant to have access to the plaintiff's private social media postings.

In Hunter v. PRRC, Inc., No. 2010-SU-3400-71, 2013 WL 9917150 (Pa. C.P. Nov. 4, 2013), the court denied a defendant's motion to compel all photographs and postings on the plaintiff's social media accounts. A hypothetical possibility that relevant information is contained in a party's private social media posting is not sufficient. Id. at \*4. The court rejected the standard of "reasonably likely to lead to the discovery of admissible information" because the requesting party does not know what is contained in the private pages of another's account, and cannot reasonably calculate whether such information will lead to relevant evidence. Id. Instead, the court looked to whether publicly available information establishes a "reasonable probability that relevant information will be found on the private account." Id.

In three recent cases, defendants sought to withhold social media-related findings until after plaintiffs were deposed for impeachment purposes. See Appleby v. Erie Insurance Exchange, No. 2016 CV 2431 (Pa. C.P. Sept. 8, 2016); Vogelson v. Cruz-Ramirez, No. 2015 CV 234 CV (Pa. C.P. Jul. 29, 2016); Vinson v. Jackson, No. 2015 CV 05150 CV (Pa. C.P. Aug. 23, 2016). The Court of Common Pleas denied the requests, finding that no privilege applied to withhold the information until after plaintiffs were deposed. See Appleby, Vogelson, and Vinson, *supra*.

More recently in Nicolaou v. Martin, 153 A.3d 383 (Pa. Super. Ct. 2016), the court affirmed the trial court's granting of summary judgment in favor of defendants for failure to file suit related to misdiagnosis of Lyme disease within the two-year statute of limitations. Plaintiff's Facebook post and subsequent comments were offered as evidence that plaintiff was on notice when plaintiff posted "I had been telling everyone for years I thought it was Lyme ..." to which her friend posted "You DID say you had Lyme so many times!". Id. at 387. Plaintiff argued that the statute of limitations did not start until she received the test results, but the court determined that the post, among other testimony, indicated that plaintiff was aware of the possibility that she was suffering from Lyme disease prior to her 2010 diagnosis, and therefore, the lawsuit was after the expiration of the statute of limitations. Id. at 394-95. **The Superior Court affirmed the trial court's holding, and the matter is currently on appeal to the Pennsylvania Supreme Court. Nicolaou v. Martin, 2017 Pa. LEXIS 1920 (Pa. 2017).**

### **Arbitration Clauses in Malpractice/Nursing Home Actions**

Another area in which practitioners should keep themselves informed is the effect of mandatory arbitration clauses in nursing home actions.

In Pisano v. Extendicare Homes, Inc., 77 A.3d 651 (Pa. Super. Ct. 2013), app. denied, 86 A.3d 233 (Pa. 2014), cert. denied, 134 S. Ct. 2890 (2014), the plaintiff's daughter signed an agreement with an arbitration clause on plaintiff's behalf upon his admission to the defendant facility. Id. at 653. After his death, the plaintiff's children, with the exception of the daughter who signed the agreement, brought a wrongful death claim against the facility. Id. The facility moved to dismiss the action pursuant to the arbitration agreement. Id. The court found that the arbitration agreement was not binding on the decedent's children. Id. at 663.

The court explained that wrongful death actions are derivative of the decedent's injuries, but are not derivative of the decedent's rights. Id. at 660. Relying on the principle that one who is not a party to a contract cannot be bound by it, the court held that the non-signatory wrongful death claimants were not bound by the decedent's contract. Id. at 663. The court noted that Pennsylvania's wrongful death statute does not characterize wrongful death claimants as third-party beneficiaries; a finding to the contrary might have compelled arbitration of their claims. Id. at 661. The court further stated that the claimants' constitutional right to a jury trial would be infringed if they were compelled to arbitrate their claims under the circumstances. Id. at 661-62.

In Tyler v. Kindred Healthcare Operating, Inc., 34 Pa. D. & C.5th 324 (Pa. C.P. 2013), the decedent was transferred to defendant Kindred Hospital South Philadelphia from another hospital after fracturing her leg. Id. at 325. Thereafter, she was transferred to defendant St. Francis Country House, where she remained until her death. Id. Both defendants sought to arbitrate the wrongful death and survivor claims the decedent's daughter brought pursuant to respective arbitration agreements.

The court held that there was no binding arbitration agreement between the decedent and Kindred Hospital, as the decedent signed the agreement at a time when hospital records noted that she was disoriented and incapacitated. Id. at 326-29. With respect to St. Francis Country House, the decedent's daughter allegedly signed the arbitration agreement on decedent's behalf, but, there was no evidence that the decedent gave her daughter power of attorney or authorized her to make legal decisions on her behalf. Id. at 329-30. A familial relationship alone was insufficient to create an agency relationship. Id. at 330-31. Therefore, the court refused to compel arbitration. Id.

In Lipshutz v. St. Monica Manor, No. 614, 2013 Phila. Ct. Com. Pl. LEXIS 396 (Pa. C.P. Nov. 12, 2013), aff'd, 120 A.3d 367 (Pa. Super. Ct. 2015), the decedent suffered a stroke that left her incapacitated. Id. at \*2. Upon admission to the defendant facility, the decedent's daughter signed an arbitration agreement pursuant to her authority under a power of attorney that was previously executed. Id. The daughter brought wrongful death and survivorship claims after the decedent passed away.

In accordance with Pisano, because the daughter signed the arbitration agreement in her representative capacity, the survival claims were subject to mandatory arbitration, but not the wrongful death claims, which were brought in her own right. Id. at \*10-13. The court further explained:

Although bifurcation of wrongful death claims from the survival claims runs afoul of the clear import and intent of Pa. R.C.P. 213(e), the main policy considerations underlying this Rule are to prevent the duplication of damages and thus promote judicial economy. However, compensation for loss of earnings is the only significant overlap in damages between the two statutes. Here, there could be virtually no significant claim for lost earnings. Therefore, this concern was insufficient to override shared state and federal policy promoting arbitration. Similarly, an interest in promoting judicial economy is insufficient, standing alone, to override a joint state and federal policy and Federal preemption. Thus,

the wrongful death claims must remain before this Court, and the survival claims were remanded to arbitration.

Id. at \*13-14.

In Washburn v. N. Health Facilities, Inc., 121 A.3d 1008 (Pa. Super. Ct. 2015), the decedent's wife signed admission paperwork containing an arbitration agreement upon arrival to the defendant nursing facility. Id. at 1010. When decedent's wife informed a staff person that she did not have power of attorney for her husband, the staff person insisted that all the paperwork had to be signed prior to his admission. Id. After decedent's death, his wife filed a survival suit against the facility. Id. at 1011. The facility sought to compel arbitration pursuant to the agreement. Id. The court held that while there was evidence that decedent's wife had previously acted on her husband's behalf, for example, in affixing his signature to tax returns, the record was devoid of evidence that he ever authorized her to do so, and such evidence did not establish that her husband authorized her to act as his agent in the present circumstances. Id. at 1014-15. Therefore, the arbitration agreement was not enforceable.

In Wert v. Manorcare of Carlisle PA, LLC, 124 A.3d 1248 (Pa. 2015), cert. denied, 136 S. Ct. 1201 (2016), the decedent's daughter filed suit against the defendant facility. The facility sought to enforce an arbitration agreement, which the daughter signed upon decedent's admission. Id. at 1251. The trial court found the agreement unenforceable, as it relied upon National Arbitration Forum ("NAF") Code procedures that were void at that time with respect to consumer arbitration disputes. Id. On appeal, the facility argued that the NAF provision was not integral to the agreement, so the arbitration clause should still be enforced. Id. The Superior Court affirmed the trial court's ruling, finding that the NAF provision was integral, despite the daughter's testimony that it had nothing to do with her decision to sign the agreement. Id. at 1252. The Pennsylvania Supreme Court affirmed the lower court's order not to compel arbitration. The parties agreed that any disputes would be resolved exclusively by binding arbitration to be conducted in accordance with the NAF Code of Procedure. Id. at 1263. Thus, the provision was integral and non-severable, so the arbitration clause was unenforceable. Id.

In MacPherson v. Magee Mem. Hosp. for Convalescence, 128 A.3d 1209 (Pa. Super. Ct. 2015), app. denied, 161 A.3d 789 (Pa. 2016), cert. denied, 198 L.Ed. 2d 756 (2017), the Superior Court reversed the trial court's order overruling preliminary objections seeking to enforce an arbitration agreement. Id. at 1212. The Superior Court found that the trial court failed to recognize Pennsylvania's policy favoring arbitration, and the trial court's conclusion that the decedent lacked capacity to enter the agreement was unsubstantiated by the record; the evidence indicated that the decedent suffered from physical, not mental, ailments. Id. at 1220-21. Moreover, there was no evidence that the agreement was unconscionable or entered into involuntarily. Id. at 1221-22. Finally, the court rejected the contention that the agreement's reference to the use of NAF rendered the agreement unenforceable pursuant to Wert. The court found that Wert was not binding authority because it was only a plurality decision. Id. at 1223. Moreover, unlike Wert, the agreement did not contain a reference to the exclusivity of the use of NAF. Id. Instead, the agreement provided that the NAF's availability was non-essential, so the use of NAF was not an

**integral to the contract. Therefore, the court remanded the case for referral to arbitration. Id. at 1227.**

In Hendricks v. Manor Care of W. Reading PA, LLC, No. 1375 MDA 2014, 2015 Pa. Super. Unpub. LEXIS 3482 (Pa. Super. Ct. Sept. 24, 2015), the court found that an arbitration agreement signed on behalf of the decedent upon admission to a nursing facility was unenforceable. The facility argued that the decedent's daughter had valid authority to sign the agreement in an agency capacity. Id. at \*11. However, there was no evidence that the daughter had express, implied, or apparent authority to sign on her mother's behalf. Id. at \*12-13. Specifically, the daughter only assigned the agreement after facility staff said she could fill out the papers. Id. There was no evidence that the daughter possessed any authority to act on her mother's behalf otherwise. Id. Therefore, the agreement was not enforceable. Id. at \*15.

In Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490 (Pa. 2016), the Pennsylvania Supreme Court found that the FAA, which provides for the enforceability of arbitration agreements, preempts the application of Pa. R.C.P. 213(e), which requires joinder of survival and wrongful death claims, when a representative of a nursing center executed an arbitration agreement with the decedent. If the contract was valid, arbitration of the survival claim would be required pursuant to the agreement. Id. at 512-13. However, pursuant to Pisano, the wrongful death claim was not subject to arbitration. Id. at 498. "[W]here a plaintiff has multiple disputes... arising from the same incident, and only one of those claims is subject to an arbitration agreement, the [Supreme] Court requires, as a matter of law, adjudication in separate forums." Id. at 507.

The Pennsylvania Supreme Court recently vacated five lower court rulings in nursing home cases consistent with Taylor. See Collins v. Manor Care of Lancaster, PA, LLC, 160 A.3d 796 (Pa. 2016); Cosgrove v. Manor Care of Lancaster, PA, LLC, 160 A.3d 797 (Pa. 2016); Hetrick v. Manorcare of Carlisle PA, LLC, 160 A.3d 797 (Pa. 2016); Davis v. HCR Manorcare, LLC, 160 A.3d 798 (Pa. 2016); Tuomi v. Extendicare, Inc., 161 A.3d 784 (Pa. 2016). The Superior Court reversed multiple rulings in accordance with Taylor. See e.g., Brosius v. HCR ManorCare, LLC, No. 789 MDA 2015, 2016 Pa. Super. Unpub. LEXIS 4421 (Pa. Super. Ct. Dec. 5, 2016); Minich v. Golden Gate Nat'l Senior Care, LLC, No. 314 MDA 2015, 2016 Pa. Super. Unpub. LEXIS 4645 (Pa. Super. Ct. Dec. 21, 2016); **Martz v. Golden Fate Nat'l Senior Care, No. 855 WDA 2015, 2017 Pa. Super. Unpub. LEXIS 145 (Jan. 12, 2017); Foster v. Golden Gate Nat'l Senior Care LLC, No. 1147 WDA 2015 (2017 Pa. Super. Unpub. LEXIS 230 (Pa. Super. Ct. Jan. 20, 2017); Stubits v. Golden Gate Nat'l Senior Care, No. 1160 WDA2015, 2017 Pa. Super. Unpub. LEXIS 233 (Pa. Super. Ct. Jan. 20, 2017).**

In Bauer v. Golden Gate Nat'l Senior Care, LLC, No. 1252 WDA 2015, 2016 Pa. Super. Unpub. LEXIS 4044 (Pa. Super. Ct. Nov. 7, 2016), the executrix of the decedent's estate brought a wrongful death and survival action against the defendant facility. Id. at \*1-2. The facility sought to compel arbitration pursuant to an admission agreement. Id. at \*2. The court overruled the lower court's determination that the claims must be consolidated pursuant to Pa. R.C.P. 213(e). Id. at \*3. Instead, the court relied on the recent decision in Taylor, finding that the FAA preempts Pa. R.C.P. 213(e). Id. at \*3-4. Therefore, the court remanded the matter to the lower court to determine the enforceability of the ADR agreement. Id. at \*7.

Similar cases have followed the line of reasoning set forth in Taylor, reiterating the holding that the FAA requires bifurcation of wrongful death and survival actions, and the existence of a wrongful death claim no longer provides the basis for requiring trial in a court of law as to an entire action. See, e.g., Cardinal v. Kindred Healthcare, Inc., 155 A.3d 46 (Pa. Super. Ct. 2017).

### Discovery of Experts

#### Discovery – Work Product Protection Expanded to Include Expert Witness Drafts and Communication with Counsel – Duty to Disclose; General Provisions Governing Discovery

Effective December 1, 2010, Rule 26 was amended to expand work-product protection to include both drafts of expert witness reports and expert-retained counsel communications, except communication regarding: (1) the expert’s compensation; (2) facts or data provided by the attorney that the expert considered in forming decisions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

This rule was amended to promote the expert’s proficiency and candor during the trial preparation period. Also, the protection afforded will allow the judicial process to flow more freely and to remove the focus from the attorneys’ actions to the issues of dispute.

The practical effect of the amended rule is that: (1) experts will no longer be fearful of preparing draft reports for counsel to review; (2) expert-retained counsel communications will no longer be cloak and dagger, thereby risking accuracy and efficiency; and (3) the judicial process will be more efficient in that attorneys will be able to focus more on issues specific to the facts supporting the claim opposed to the possibility of influences or antics of the opposing counsel.

In In Re: Asbestos Prods. Liab. Litig., MDL 875, 2011 U.S. Dist. LEXIS 143009 (E.D. Pa. Dec. 13, 2011), the District Court held that a party could not get around the “facts or data” exception to Rule 26(b)(4) by including facts or data in a “transmittal letter” to its experts. Id. at \*21-25. Additionally, the court cautioned against protecting facts or data from discovery by placing them in draft expert reports. Id.

In 2014 the Pennsylvania Supreme Court amended Rule 4003.5 of the Pennsylvania Rules of Civil Procedure to **generally** protect communications between a party’s attorney and any expert, whether that expert is anticipated to testify at trial (Pa. R.C.P. 4003.5(a)(1)), or is merely a consulting expert (Pa. R.C.P. 4003.5(a)(3)). See Pa. R.C.P. 4003.5(a)(4). Pa. R.C.P. 4003.5 now provides in its entirety, as follows:

#### **Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material**

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

(A) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

(B) subject to the provisions of subdivision (a)(4), the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

(2) Upon cause shown, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

(A) such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate, and

(B) the provisions of subdivision (a)(4) of this rule.

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

*Note:* For additional provisions governing the production of expert reports in medical professional liability actions, see Rule 1042.26 et seq. Nothing in Rule 1042.26 et seq. precludes the entry of a court order under this rule.

(4) A party may not discover the communications between another party's attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) or from whom discovery is permitted under subdivision (a)(3) regardless of the form of the communications, except in circumstances

that would warrant the disclosure of privileged communications under Pennsylvania law. This provision protects from discovery draft expert reports and any communications between another party's attorney and experts relating to such drafts.

(b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

(c) To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

Pa. R.C.P. 4003.5 (emphasis added). Note that there is not complete congruence between the Federal Rules of Civil Procedure and the Pennsylvania Rules of Civil Procedure on the issue of expert witnesses. As observed in the Explanatory Comment to the amended Pa. R.C.P. 4003.5, which merits noting in its entirety:

The Supreme Court has amended Rule 4003.5 governing the discovery of expert testimony. Recent amendments to the Federal Rules of Civil Procedure have prohibited the discovery of communications between an attorney and his or her expert witness unless those communications (1) relate to compensation for the expert's study or testimony, (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or (3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. See Fed. R. Civ. P. 26(b)(4)(C), effective December 31, 2010.

Under current practice in Pennsylvania, few attorneys have been seeking discovery of the communications between an opposing attorney and his or her expert. The proposed amendment to Rule 4003.5 follows the federal rule in explicitly prohibiting the discovery of such communications. However, it does not include the exceptions in the federal rule to those communications because of the differences between the federal rules and the Pennsylvania rules governing the scope of discovery of expert testimony.

The federal rules of civil procedure permit an expert to be deposed after the expert report has been filed. The exceptions enumerated above simply describe some of

the matters that may be covered in a deposition. However, in the absence of cause shown, the Pennsylvania rules of civil procedure do not permit an expert to be deposed. Thus, the exceptions within the federal rule are inconsistent with the restrictions of the Pennsylvania rules of civil procedure governing discovery of expert witnesses.

In Pennsylvania, questions regarding the compensation of the expert have traditionally been addressed at trial; there is no indication that this procedure is not working well.

In addition, the facts or data provided by the attorney that the expert considered, as well as the assumptions provided by the attorney that the expert relied on in forming his or her opinion, are covered by Rule 4003.5(a)(1)(B), which requires the expert to "state the substance of the facts and opinions to which the expert is expected to testify and summary of the ground for each opinion." If facts or data which the expert considered were provided by counsel or if the expert relied on assumptions provided by counsel, they must be included in the expert report. See Rule 4003.5(c) which provides that the expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of his or her testimony set forth in the report. If the expert report is unclear as to the facts upon which the expert relied, upon motion of a party, the trial court should order the filing of a supplemental report that complies with Rule 4005.3(a)(1).

Pa. R.C.P. 4003.5 explanatory cmt. (emphasis added).

On October 27, 2015, the Supreme Court decided Polett v. Public Communs., Inc., 126 A.3d 895 (Pa. 2015), which interpreted Pa. R.C.P. 4003.5. The court held that the trial court did not err in permitting the appellant's treating orthopedic surgeon to provide trial testimony under Pa. R.C.P. 4003.5, even though he did not provide an expert report. Because it was undisputed that the surgeon was not retained to render an expert report, the issue was whether his causation opinion was "acquired or developed in anticipation of litigation for trial." Id. at 924 (quoting Pa. R.C.P. 4003.5). Accordingly, the point at which the surgeon came to his causation conclusion was dispositive. Id.

The court found that the trial court reasonably determined that the surgeon developed his opinion during treatment, and not solely in anticipation of litigation. Id. at 925. Consequently, the appellees' contention that they were prejudiced by a lack of a formal report or by the introduction of the surgeon's testimony at trial was meritless. Id. at 926-27. The purpose of Rule 4003.5 is to prevent surprise, but there was no surprise as to the surgeon's opinion, as all the treatment records and notes were available during the course of discovery before trial. Id. at 927. Therefore, the court affirmed the trial court's finding in allowing the treating physician to give testimony on causation where he reached his opinion during the course of treating appellant, and before the anticipation of litigation. Id. at 927-28.

In Mina v. Hua Mei, Inc., No. 2012 – Civ – 7781 (Pa. C.P. Jan. 19, 2016) (Mazzoni, J.), the treating physician rendered a report before the start of litigation, and defendant sought discovery through interrogatories regarding his opinion. The court found that the physician likely

rendered his report “with an eye towards litigation,” as he used language like “with a reasonable degree of medical certainty,” and plaintiff’s counsel originally requested the report. Id. at ¶¶ 7-9. Therefore, the court ordered plaintiffs to respond to expert interrogatories directed towards the treating physician’s expert opinion. Id. at 6.

In Karim v. Reedy, No. 11 CV 4598, 2016 Pa. D. & C. Dec. LEXIS 1159 (Pa. C.P. Jan. 11, 2016), the court found that the plaintiffs could discover the expert opinions of the defendant doctor and defendant nurse, even though defendants stipulated that they would not offer opinion testimony at trial. Id. at \*44-45. The court compelled defendant doctor and nurse to answer standard of care questions, as well as questions concerning standards, protocol, and medical issues, even though defendant stipulated that they would not offer opinion testimony at trial. Id.

In Walker v. Lancaster General, 141 A.3d 585 (Pa. Super. Ct. 2016), the court affirmed a trial court’s ruling to limit a physician’s testimony to opinions he held solely in his capacity as a treating provider. Id. at \*11. To the extent that counsel failed to identify the physician as an expert witness who would opine outside his capacity as a treating physician, the appellant violated Rule 4003.5. Id.

In Cosklo v. Moses Taylor Hosp., No. 07 CV 5484 (Pa. C.P. Sept. 23, 2016) (Nealon, J.), the court held that absent a statement in the defendant’s expert report regarding a “considerable number of recognized and reputable [physicians] who support the course of treatment” provided to the plaintiff, the plaintiff would be unfairly surprised by trial testimony to that effect, and therefore, any two schools of thought testimony would be subject to preclusion under Rule 4003.5(c).

In Schwalm v. Modi, 2016 Pa. Super. Unpub. LEXIS 4659 (Pa. Super. Ct. Dec. 22, 2016), app. denied, 2017 Pa. LEXIS 1560 (Pa. July 6, 2017), the court held that the trial court did err in permitting a physician, who performed an IME on the plaintiff, to also provide a liability opinion after he prepared an expert report pursuant to Rule 4003.5. The court noted that although an IME is meant to assess damages, there was no legal authority to support that an IME expert must be precluded from also testifying as to liability. Id. at \*21-22.

In Crespo v. Hughes, 167 A.3d 168 (Pa. Super. Ct. 2017), the court held that the trial court did not err in permitting a treating physician fact witness to offer expert opinions at trial. The trial court allowed the doctor to testify as to the cause of the plaintiff’s injury, as that was his diagnosis at the time of treatment, and it helped the doctor determine a further plan of action. Id. at 182. It was permissible to clarify his own notes made at the time of treatment, as these notes were not made in anticipation of litigation for trial. Id.

In Casper v. Halstead, 2017 Pa. Super. Unpub. LEXIS 833 (Pa. Super. Ct. Mar. 3, 2017), the court explained that a doctor may serve as either a treating physician, an expert witness, or both. Where opinions are not “developed with an eye toward litigation, Pa.R.C.P. 4003.5 is inapplicable.” Id. at \*6. Because a treating physician in the case did not consult with the patient until after the discovery deadline closed, and he prepared an expert report as to causation using the language: “with a reasonable degree of medical certainty,”

the court found that the physician was properly considered an expert retained for the purpose of litigation, who was therefore subject to the disclosure requirements of Rule 4003.5. Id. at \*6-7. As a result, the court held that the lower court did not err in precluding the physician's testimony where the defendant suffered prejudice by failure to disclose the physician's expert opinion in accordance with the case management order. Id. at \*7. See also Estate of Terry, Jr. v. Cathedral Village, No. 140300820 (Pa. C.P. Nov. 17, 2017) (Butchart, J.).

In Shiflett v. Lehigh Valley Health Network, Inc., 2017 PA Super LEXIS 900 (Pa. Super. Ct. Nov. 9, 2017), the court addressed an argument related to whether a medical expert's testimony was outside the scope of his report, as contemplated by Rule 4003.5(c):

In deciding whether an expert's trial testimony is within the fair scope of his report, the accent is on the word "fair." The question to be answered is whether, under the circumstances of the case, the discrepancy between the expert's pre-trial report and his trial testimony is of a nature which would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response.

Id. at \*59-60 (quoting Callahan v. Nat'l R.R. Passenger Corp., 979 A.2d 866 (Pa. Super. Ct. 2009), app. denied, 12 A.3d 750 (Pa. 2010)). The court ultimately held that the physician's testimony was consistent with the "fair" scope of his report because he simply testified further regarding the medical records he noted he relied upon in his report, and he did not present a new theory at trial. Id. at \*60. Therefore, the trial court did not abuse its discretion in allowing him to give expanded testimony, which was not inconsistent with his report. Id. See also Grizzanti v. Chiavacci, No. 11 CV 5649 (Pa. C.P. Jan. 3, 2017) (Nealon, J.) (opinions and knowledge acquired before litigation is commenced are not developed in anticipation of litigation and therefore fall outside the scope of Rule 4003.5).

#### **Interfering with Your Adversary's Expert**

In Sutch v. Roxborough Mem. Hosp., No. 901, 2015 Phila. Ct. Com. Pl. LEXIS 311 (Pa. C.P. Oct. 23, 2015) a defense attorney contacted plaintiff's expert's hospital employer to explain that the expert offered an "untenable opinion," which could expose the hospital to liability. Id. at \*2. Thereafter, the plaintiff filed a motion for sanctions. Id. at \*3. The trial court granted the motion in part, ordering counsel to refrain from contact with plaintiff's experts, but stayed consideration of additional sanctions until post-trial. Id. After trial, the court issued the second order, disqualifying counsel from further representing her clients in the case. Id.

The Court of Common Pleas found that counsel's conduct was willful and unconscionable, and could have amounted to witness intimidation and obstruction of a party's access to evidence. Id. at \*10. Counsel's improper conduct could have had far-reaching consequences, threatening the integrity of the bar. Id. at \*10-11. The totality of counsel's improper conduct, and the absence of any legally cognizable explanation for such conduct warranted sanctions and disqualification to ensure the parties received a fair trial. Id. at \*11. **This decision and the lower court's award of monetary sanctions were upheld by the appellate**

courts. See Sutch, 151 A.3d 241 (Pa. Super. Ct. 2016), rehearing denied, 2017 Pa. Super. LEXIS 15 (Pa. Super. Ct. Jan. 12, 2017), app. denied, 2017 Pa. LEXIS 1745 (Pa. July 25, 2017).

**Pa. R.C.P. 1036.1 – Reinstatement of a Party to a Negligence Action – A  
Judicial Mechanism Created to Reinstatement a Party Who Was  
Dismissed Upon Filing an Affidavit of Non-Involvement Premised on  
False Inaccurate Facts – Reinstatement of Claim Dismissed Upon  
Affidavit of Noninvolvement**

Effective March 1, 2009, this newly created rule provides a procedure to reinstate a claim previously dismissed by an affidavit of noninvolvement. Pursuant to Pa. R.C.P. 1036.1, subsequent to the dismissal, any other party to the suit may file a motion for the reinstatement of the dismissed party. The motion must set forth facts showing false or inaccurate statements were included in the affidavit of noninvolvement. Any party to the suit may respond to this motion to reinstate.

The court will hear argument limited to whether the moving party presented evidence, which when considered in a light most favorable to that party, would require the issue of the dismissal of the party to be presented to a jury. The court reviews the motion to determine if a *prima facie* case of involvement of the dismissed party exists. If the court finds there is a *prima facie* case, it will allow any party to: (1) conduct limited discovery specific to the involvement of the dismissed party and (2) file any affidavits, depositions or other evidentiary materials that would permit a jury to find that the dismissed party was involved.

**Civil Procedure Case Law**

**Discovery of Experts**

**Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity**

In Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 32 A.3d 800 (Pa. Super. Ct. 2011), the court reversed its earlier decision regarding whether attorney-expert correspondence was discoverable. In the withdrawn decision, the court found that the discovery of the basis of expert's opinion under Rule 4003.5(a) trumped Rule 4003.3's attorney work product protection. See Barrick, 5 A.3d 404 (Pa. Super. Ct. 2010). Because the decision contradicted the newly revised Fed. R. Civ. P. 26(b)(3), the court withdrew its opinion and granted reargument. Barrick, 2010 Pa. Super. LEXIS 3833 (Pa. Super. Ct. Nov. 19, 2010). On reargument, the Superior Court held:

[B]ased upon our interpretation of the Pennsylvania Rules of Civil Procedure..., we conclude that the trial court committed an error of law in granting Sodexho's motion to enforce. As our Supreme Court has previously determined, other than the interrogatories described in Pa. R.C.P. 4003.5(a)(1), the Rules of Civil Procedure require that a party show cause to obtain further discovery from an expert witness. Sodexho in this case failed to make any such showing. Thus, we hold that Sodexho's subpoena seeking documents from Appellants' expert witness

was beyond the scope of Pa. R.C.P. 4003.5, without first showing cause as to why such a discovery request was needed. Furthermore, the written communication between counsel and an expert witness retained by counsel is not discoverable under the Pennsylvania Rules of Civil Procedure to the extent that such communication is protected by the work-product doctrine, unless the proponent of the discovery request shows pursuant to Pa. R.C.P. 4003.5(a)(2) specifically why the communication itself is relevant. As such, we also hold that Pa. R.C.P. 4003.3 immunizes from discovery any work product contained within the correspondence between Appellants' counsel and Dr. Green.

Barrick, 32 A.3d 800 (Pa. Super. Ct. 2011) (internal citations omitted). In 2014, the Supreme Court evenly split in deciding whether Barrick should be affirmed – resulting in the affirmance of the opinion. Barrick, 91 A.3d 680 (Pa. 2014). In support of affirmance, Justice Baer wrote:

While some documents might solely contain an attorney's mental impressions and legal theories, most correspondence between counsel and an expert witness will necessarily entail substantial overlap and intermingling of core attorney work product with facts which triggered the attorney's work product, including the attorney's opinions, summaries, legal research, and legal theories....[W]e conclude that attempting to extricate the work product from the related facts will add unnecessary difficulty and delay into the discovery process.

...

We additionally recognize that the Procedural Rules Committee has proposed an amendment to Rule 4003.5 which would embrace unambiguously the bright-line rule denying discovery of all attorney-expert communications: “[a] party may not discover the communications between another party's attorney and any expert who is [expected to testify at trial] regardless of the form of communications.” Without further comment, we acknowledge that the explanatory comment to the proposal indicates that the “[c]urrent practice in Pennsylvania has not been to seek discovery of communications between the attorney and his or her expert.” ...[I]t would appear that the Rules Committee believes that adoption of a bright-line test for denying discovery of communications between counsel and expert witnesses would not result in a change of practice in Pennsylvania. Our consideration of the proposed amendment to the rule is entirely separate, however, from the determination of the case before us, which, as initially noted, is governed by the current rule.

Id. at 687 (internal citations omitted).

In St. Luke's Hosp. of Bethlehem v. Vivian, 99 A.3d 534 (Pa. Super. Ct. 2014), the court considered whether the trial court properly directed discovery of the plaintiff's attorneys' fees in a Dragonetti action in which the plaintiff sought fees incurred in the course of underlying litigations. The court quoted Barrick in distinguishing its conclusion:

Although the work-product doctrine is not absolute, we noted above that the privilege only surrenders to the need for discovery when the attorney's work product itself becomes relevant to the action. Here, unlike the examples in the explanatory comment accompanying Pa. R.C.P. 4003.3, the correspondence is only relevant because of the subject matter discussed between Appellants' counsel and Dr. Green. The correspondence itself is not relevant to this action. In stark contrast to the examples in the explanatory comment, Appellants' action relies upon the opinions and analyses of the expert witness, not those of their attorneys.

Id. at 551-52 (quoting Barrick, 32 A.3d at 813) (internal citations omitted). Unlike Barrick, the St. Luke's court concluded that the invoices were discoverable, as they had been placed in issue by the very nature of the appellant's Dragonetti claims.

### **Release**

#### **Maloney v. Valley Med. Facilities, Inc., 984 A.2d 478 (Pa. 2009)**

This important case held that release of a principal, who was only liable under vicarious liability, did not release the agent. In an earlier case, Mamalis v. Atlas Van Lines, 560 A.2d 1380 (Pa. 1989), the court held that release of the agent operated to release the principal who was vicariously liable; the release of the active tortfeasor released the passive tortfeasor. Later, in Pallante v. Harcourt Brace Jovanovich, 629 A.2d 146 (Pa. 1993), the court held that the opposite was also true.

In Maloney, the plaintiff settled with the vicariously liable principal, and the release attempted to carve out the agent. 984 A.2d at 492. The Superior Court affirmed the trial court's grant of summary judgment in favor of the agent, reasoning that there was a single act that caused the damage. Id. at 481-822. The Supreme Court reversed, essentially reversing Pallante also, and held that where the plaintiff releases a principal for vicarious liability only, and preserves its claim against the agent, the claims against the agent are not released. Id. at 496.

#### **Tindall v. Friedman, 970 A.2d 1159 (Pa. Super. Ct. 2009)**

In Tindall, the court addressed the issue of whether a release that explicitly reserved the right of the plaintiff to pursue excess insurance policy coverage applies to the MCARE Fund. The plaintiff agreed to a partial release of one doctor among multiple defendants. Id. at 1163-64. The release expressly stated that the plaintiff reserved the right to pursue the remaining defendants to collect primary and excess insurance policies. Id. at 1165.

The court found that the agreement released the doctor personally, but since he continued to possess MCARE coverage that remained subject to liability, the plaintiff did not abandon the claim against the doctor. Id. at 1165-66. Thus, the hospital was not released from its vicarious liability. Id. at 1166. The court distinguished Mamalis on the grounds that the agreement did not fully release the physician, but instead was as a partial release of a portion of the defendant's liability exposure. Id. at 1167.

#### **Zaleppa v. Seiwell, 9 A.3d 632 (Pa. Super. Ct. 2010)**

In Zaleppa, a defendant claimed that the Medicare Secondary Payer Act (“MSPA”) required all parties to protect Medicare’s interests when resolving claims involving conditional payments made by Medicare. The defendant requested that she be allowed to include Medicare as a payee on the check, or “[p]ay the verdict into [the trial court] pending notification from Medicare to the [trial court] that the Medicare lien is satisfied.” Id. at 633-34. The trial court’s decision to deny the motion was affirmed by the Superior Court, which found that the MSPA only authorizes the United States government to bring an action for reimbursement. Id. at 638-39. By extension, private parties are prohibited from asserting the government’s interests. Id. The defendant could not satisfy the judgment if she added Medicare as a payee because in doing so, she would fail to discharge all her obligations pursuant to the judgment. Id. at 640. Because the government was not a party to the action, the obligations either party owed to Medicare were irrelevant in satisfying the judgment. Id.

### **No Tort for Negligent Spoliation of Evidence**

In Pyeritz v. Commonwealth, 32 A.3d 687 (Pa. 2011), the Supreme Court decided an issue with potentially frequent and far-reaching implications – whether a tort exists for negligent spoliation of evidence. The suit was based on a third party’s destruction of personal property, which was allegedly crucial evidence to a separate action. Id. at 689. The Commonwealth Court affirmed the trial court’s grant of summary judgment, holding that no cause of action exists against a third party for negligent spoliation of evidence. Id. at 689.

The Pennsylvania Supreme Court affirmed and set forth five relevant factors: (1) the relationship between the parties, (2) the utility of the defendant’s conduct, (3) the nature and foreseeability of the given risk, (4) the consequences of imposing the duty, and (5) the overall public interest in imposing a given duty. Id. at 69-95. The court distinguished Elias v. Lancaster Gen. Hosp., 710 A.2d 65 (Pa. Super. Ct. 1998), noting that not even a special relationship can give rise to a cause of action for negligent spoliation. Id. at 694-95; see also Payne v. Whalen, 122 A.3d 509 (Pa. Commw. 2015) (citing Pyeritz for the proposition that a cause of action for negligent spoliation of evidence does not exist under Pennsylvania law).

### **Pringle Under Review**

In Pringle v. Rapaport, 980 A.2d 159 (Pa. Super. Ct. 2009), the court determined that the “error in judgment” instruction given in a medical malpractice case was improper, as it failed to inform jurors of the applicable standard of care, and the type of instruction, in general, was not appropriate for medical malpractice cases.

In Passarello v. Grumbine, 29 A.3d 1158 (Pa. Super. Ct. 2011), the court ordered a new trial pursuant to Pringle. On appeal, the Pennsylvania Supreme Court considered whether the trial court gave a proper error in judgment jury instruction, *i.e.*, an instruction that physicians are not liable for “errors in judgment” when making medical decisions. Passarello, 87 A.3d 285, 287 (Pa. 2014). The court did not disturb Pringle in holding that error in judgment instructions should not be used in medical malpractice cases. Id. at 304-05. The court found that the charges are not necessary and may confuse juries with respect to the standard of care. Id. Additionally, although Pringle created a new rule of law, the lower court properly exercised its discretion to apply the holding retroactively because: (1) retroactive effect furthered the purpose of the new rule; (2) the

parties were not unfairly prejudiced by retroactive application; and (3) giving the new rule retroactive effect was not detrimental to the administration of justice. *Id.* at 308.

### **Wrongful Birth**

Pennsylvania law codifies that there is no cause of action for wrongful birth at 42 Pa. C.S. § 8305(a):

There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion....

In *Sernovitz v. Dershaw*, 127 A.3d 783 (Pa. 2015), the plaintiffs brought a wrongful birth claim, which is barred by 42 Pa. C.S. § 8305. However, plaintiffs argued that their suit was proper, as Act 47, which encompassed 42 Pa. C.S. § 8305, was unconstitutional for failure to comply with the single-subject rule requiring that all aspects of the Act involve a unifying topic. *Id.* at 785. Nevertheless, the court found that the legislation was immune from challenge given the length of time—22 years—that had passed since enactment. *Id.* at 794. Accordingly, 42 Pa. C.S. § 8305 was still applicable. *See id.*

### **Damage Cap Under 42 Pa. C.S. § 8553**

42 Pa. C.S. § 8542 contains exceptions to governmental immunity. To fit within an exception, a party must demonstrate that: (1) “damages would be recoverable under common law or a statute if the injury were caused by a person not having available a defense under [§] 8541 (relating to governmental immunity) or [42 Pa. C.S. §] 8546 (relating to official immunity),” and (2) the “injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the [following categories]”: liability related to vehicles, personal property, real property, trees, traffic control and street lighting, utility service facilitates, streets, sidewalks, and the care, custody, and control of animals. § 8542(a). Even where governmental immunity is subject to attack, § 8553 provides for a cap on recovery of \$500,000, limited to specific items of damage for past and future lost earnings, death and specific bodily harm, medical and dental expenses, loss of consortium, loss of support, and property losses.

In *Zauflik v. Pennsburg Sch. Dist.*, 104 A.3d 1096 (Pa. 2014), the Pennsylvania Supreme Court upheld the \$500,000 damages cap under § 8553 against a challenge that it was unconstitutional.

### **Trial Issues**

On the issue of jury selection, *Cordes v. Assoc. of Internal Med.*, 87 A.3d 829 (Pa. Super. Ct. 2014), appeal denied, 102 A.3d 986 (Pa. 2014), is notable. In *Cordes*, the appellant argued that the trial court abused its discretion by denying challenges for cause asserted against three

potential jurors. *Id.* at 831. The jury included a husband and a daughter of a patient of the defendant doctor, and an employee of the defendant doctor's employer's parent company. *Id.* at 832-33. In a divided opinion, the appellate court reversed, noting that the goal of jury selection was to obtain a jury with "a clean slate and open mind." *Id.* at 836. Although a potential juror's relationship with a person involved in the case need not be direct to warrant disqualification, "the close situational, familial, and financial relationships presented...stripped the trial court of its discretion to rely upon the challenged jurors' assurances of impartiality. *Id.* at 847. Therefore, exclusion was required *per se*. *Id.* This holding was meant to avoid the appearance of impartiality, and "reinforce the importance of erring on the side of caution...and, in so doing, to protect the reputation of Pennsylvania courts for the fair and impartial administration of justice." *Id.* at 835. The concurring opinion noted that when the details of a relationship indicate a presumption of prejudice, the court must strike the juror for cause, regardless of whether there is a direct relationship or the juror believes he can be impartial. *Id.* at 866.

In *DeFrancesco v. Lehigh Valley Health Network*, No. 742 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 1481 (Pa. Super. Ct. May 26, 2015), *app. denied*, 129 A.3d 1243 (Pa. 2015), the court did not recognize *Cordes* as binding authority because there was no majority opinion. Instead, the court recognized that the trial judge is entitled to discretion, holding that the fact that the defense attorney's partner in another office represented the juror in an unrelated matter, did not constitute grounds for striking the juror for cause. *Id.* at \*12-13.

**In *Shinal v. Toms*, 162 A.3d 429 (Pa. June 20, 2017), the Supreme Court considered whether the plaintiffs were entitled to strike jurors for cause where they had some relationship with the defendant's employer and the tortious conduct occurred during the course of employment. The Court held that the decision depends on whether the relationship is sufficiently close to presume the likelihood of prejudice, or whether the juror reveals a likelihood of prejudice through conduct and answers to questions. *Id.* at 441. In the first scenario, prejudice is presumed, and the appellate court must review the trial court's determination for error of law. *Id.* In the second scenario, "much depends upon the answers and demeanor of the potential juror as observed by the trial judge, and therefore, reversal is appropriate only in the case of palpable error." *Id.* (citing *McHugh v. Proctor & Gamble Paper Products Co.*, 776 A.2d 266, 270 (Pa. Super. Ct. 2011)). In the case at hand, the Court held that relationships with the third party employer were too attenuated to presume prejudice. *Id.* 448. Therefore, where prejudice was only suggested based on juror questioning, the Court deferred to the lower court judge who has the opportunity to see and hear what the juror says. *Id.* at 441-42, 450.**

In *Deeds v. Univ. of Pa. Med. Ctr.*, 110 A.3d 1009 (Pa. Super. Ct. 2015), *app. dismissed*, 128 A.3d 764 (Pa. 2015), the Superior Court reversed a jury verdict in favor of defendants. The case only proceeded against the defendant hospital because the parties stipulated that all persons who provided treatment to plaintiff were agents of the defendant hospital. *Id.* at 1011. However, the trial court denied a motion to dismiss the individual defendants, even though only the hospital was listed on the verdict sheet. *Id.* As a result, the trial court permitted the individual defendants to be represented by separate counsel. *Id.*

After a defense verdict, the trial court denied plaintiff's post-trial motions seeking JNOV or a new trial. *Id.* On appeal, the Superior Court considered: (1) whether plaintiff was entitled to

a new trial where defendants' counsel informed the jury that the plaintiff's injuries were cared for pursuant to government benefits; (2) whether the trial court erred in allowing separate attorneys to represent the defendants; and (3) whether the trial court erred in permitting a defendant doctor to testify as an expert witness beyond the scope of his treatment. Id. at 1012.

With respect to the first issue, the court held that a new trial was warranted, as defendants' counsel's comments suggested that plaintiff's costs were being covered, and that she did not require additional compensation, in violation of the collateral source rule. Id. at 1013. With respect to the second issue, the court relied in part on Pa. R.C.P. 223(2)—which permits trial courts to limit the number of attorneys representing the same group of parties who can actively participate in trial—holding that the trial court abused its discretion in allowing separate attorneys to represent the defendants. Id. at 1016-17. The court found persuasive that the defendants faced identical claims, had no cross-claims between them, shared expert witnesses, and belonged to the same group of parties. Id. As to the final issue, the court noted that the dividing line between fact and opinion testimony can be difficult to discern, but that the physician's testimony was based on his treatment and observation of the plaintiff's mother. Id. at 1019. Accordingly, because he did not render any opinion as to standard of care, the trial court did not err in admitting the doctor's testimony as a fact witness. Id.

**Polett v. Public Communs., Inc., and Crespo v. Hughes, supra, also discuss the expert issue presented in Deeds. On the other hand, Drusko v. UPMC Northwest, No. 1144 WDA 2015, 2017 Pa. Super. Unpub. LEXIS 799 (Pa. Super. Ct. Mar. 1, 2017), distinguished Deeds, finding the case immaterial to its affirmance of the decision to include a settling defendant on the verdict sheet where even if the decision was improper, there existed no resulting prejudice because there was nothing to suggest that it affected the jury's verdict on lack of causation. Id. at \*27. Since inclusion of the settling defendant on the verdict slip did not result in any apportionment or reduction in the verdict, there was no prejudice sufficient to warrant a new trial. Id.**

## **LEGAL MALPRACTICE**

### **Elements of a Cause of Action for Legal Malpractice – Negligence**

In Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998), the Pennsylvania Supreme Court reiterated the elements for a negligence-based legal malpractice cause of action as follows: (1) employment of the attorney or other basis for a duty; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) negligence was the proximate cause of the damage to plaintiff. Id. at 1029. Furthermore, plaintiffs must prove that they have a viable cause of action against the party they wish to sue in the underlying action, and that their attorney is negligent in prosecuting or defending that case. Id. at 1030. Thus, plaintiffs must prove “a case within a case,” as they must initially establish by a preponderance of the evidence that they would have recovered a judgment in the underlying action before seeking to establish the legal malpractice claim. Id.; see also Still v. Saul Ewing, L.L.P., No. 3737, 2009 Phila. Ct. Com. Pl. LEXIS 190 (Pa. C.P. Sept. 10, 2009) (granting summary judgment when plaintiff did not have a viable cause of action); CBC Innovis, INC. v. Federman & Phelan, LLP, No. 4147, 2009 Phila. Ct. Com. Pl. LEXIS 50 (Pa. C.P. Feb. 18, 2009), aff'd, 11 A.3d 1022 (Pa. Super. Ct. 2010) (attorney did not owe a duty to confirm payoff data provided by plaintiff in connection with a foreclosure action);

Windward Agency, Inc. v. Russell, No. 3333, 2009 Phila. Ct. Com. Pl. LEXIS 196 (Pa. C.P. Oct. 1, 2009), aff'd, 11 A.3d 1035 (Pa. Super. Ct. 2010) (foregoing and losing the right to name a neutral arbitrator is below the professional standard of care).

In Stacey v. City of Hermitage, 2:02-cv-1911, 2008 U.S. Dist. LEXIS 29359 (W.D. Pa. Apr. 7, 2008), in discussing whether allegations were sufficient to establish legal malpractice, the court stated there must be “proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm.” Id. at \*9 (quoting Kituskie, 714 A.2d at 1030). Because the only reference to legal malpractice in the complaint was that defendants injured the plaintiffs “[b]ecause [of] the[ir] actions and omissions,” the court found plaintiff’s allegations bare and conclusory, and insufficient to establish causation or failure to exercise ordinary professional skill and knowledge. Id. at \*16-18. Failure to file a complaint, without more “may be ‘consistent with’ wrongful conduct, but it [was] not ‘suggestive’ of misconduct,” especially in light of the obligation to undertake a reasonable investigation before filing. Id. at \*18 (quoting Bell Atlantic Corp v. Twombly, 550 U.S. 554 (2007)).

In Barcola v. Hourigan, Kluger & Quinn, 82 Pa. D. & C.4th 394 (Pa. C.P. 2006), the court discussed plaintiff’s burden to prove a “case within a case.” Plaintiffs alleged that their lawyers let the statute of limitations lapse on a products liability claim while working on a medical malpractice action. Id. at 395. Through discovery requests, the plaintiffs asked the lawyers to admit the extent of plaintiffs’ injuries and resulting damages, based on the assertions made in the medical malpractice case filings. Id. Plaintiffs moved to compel the lawyers to make the admissions without qualifications. Id. at 402. The lawyers asserted they were able to argue a different position in the legal malpractice case than they had on plaintiffs’ behalf in the medical malpractice case, as both positions were supported by evidence. Id. at 403. Furthermore, plaintiffs were required to prove that they would have prevailed in the products liability suit—the “case within the case.” Id. In denying plaintiffs’ motion, the court found that plaintiffs’ burden could not be fulfilled by submissions made in the medical malpractice case. Id. at 407-14. Citing the duty of zealous advocacy, the court explained:

If statements and arguments made by counsel in furtherance of a client’s claim were routinely deemed to constitute binding admissions against a lawyer in a subsequent legal malpractice action, it could conceivably have a chilling impact upon the vigor and resulting effectiveness of counsel’s advocacy.

Id. at 411. Also, in proving the “case within the case,” plaintiffs were limited to introducing evidence that the lawyers could have offered in the products liability action, and were required to present expert testimony establishing causation, which they could not do. Id. at 412-13.

The requirement that a plaintiff must prove its “case within the case” often serves as the basis to dismiss legal malpractice claims. See, e.g., Jin Fu Zhong v. Tsiwen Law Esq., No. 2504 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 1898 (Pa. Super. Ct. May 27, 2016), app. denied, 165 A.3d 870 (Pa. 2016); Plac, Inc. v. Lamb, No. 2122 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 2987 (Pa. Super. Ct. Aug. 17, 2016); **Skonieczny v. Cooper, No. 1166 WDA 2016, 2017 Pa. Super. Unpub. LEXIS 1644 (Pa. Super. Ct. Apr. 28, 2017); Servin v. Duane Morris LLP, No. 02825, 2017 Phila. Ct. Com. Pl. LEXIS 247 (Pa. C.P. Aug. 23, 2017).**

As is the case in other negligence actions, a causal connection between a plaintiff's claims and the alleged harm is necessary to support a legal malpractice action. See 412 N. Front St. Assocs. v. Specter Gadon & Rosen, P.C., 151 A.3d 646 (Pa. Super. Ct. 2016); Fandray v. Baum, No. 199 WDA 2016, No. 200 WDA 2016, 2016 Pa. Super. Unpub. LEXIS 4203 (Pa. Super. Ct. Nov. 17, 2016). Pennsylvania courts have also held that absent expert testimony, plaintiffs may not be able to establish the merits of their legal malpractice claims. See Hemphill v. Siegel, No. 866 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 171 (Pa. Super. Ct. Jan. 21, 2016); Cruikshank-Wallace v. CNA Fin. Corp., No. 2403 EDA 2016, No 2621 EDA 2016, 2017 Pa. Super. Unpub. LEXIS 3562 (Pa. Super. Ct. Sept. 25, 2017).

On a procedural note, in Zarenkiewicz v. Lefkowitz, No. 1387, 2014 Phila. Ct. Com. Pl. LEXIS 255 (Pa. C.P. July 17, 2014), venue was improper in a legal malpractice case against an attorney as either an individual or a business association in Philadelphia. The action in which defendant previously represented plaintiff was brought in Bucks County, and no transactions or occurrences transpired in Philadelphia. Id. at \*4-6 (citing Pa. R.C.P. 1006(a)). Furthermore, the defendant did not regularly conduct business in Philadelphia, aside from occasional client meetings that were not essential to his business. Id. Additionally, the occasional meetings were not continuous and sufficient enough to be considered general and habitual so as to satisfy the quality of acts portion of the quality/quantity test. Id. See also Ferguson v. Stengle, 2017 Phila. Ct. Com. Pl. LEXIS 139 (Pa. C.P. Mar. 21, 2017) (preliminary objections sustained for lack of venue).

### **Elements of a Cause of Action for Legal Malpractice – Breach of Contract**

In Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. Ct. 1997), the court found that a claim of legal malpractice can be based on a breach of contract theory. In such an action, the attorney's liability must be assessed under the terms of the contract with the client. Id. at 213. A legal malpractice action can be based on a breach of contract theory if "the attorney agrees to provide his or her best efforts and fails to do so." Id.; see also Sherman Indus., Inc. v. Goldhammer, 683 F. Supp. 502 (E.D. Pa. 1988) (legal malpractice action can be based on breach of contract if attorney breached specific contractual term, specific promise upon which client reasonably relied to their detriment, or failed to follow specific instructions from client); Red Bell Brewing Co. v. Buchanan Ingersoll, P.C., 51 Pa. D. & C.4th 129 (Pa. C.P. 2001) (breach of contract theory allowed to proceed where complaint alleged facts that would establish breach of contractual promises to "deliver to [plaintiff] quality legal services" and to handle plaintiff's account "with the utmost of professionalism and proficiency at all times"); Jackson v. Ferrera, No. 01-5365, 2002 U.S. Dist. LEXIS 12731 (E.D. Pa. Apr. 16, 2002) (while both contract and tort theories provide an appropriate framework for legal malpractice claims, plaintiff may combine them in one complaint by asserting that defendants breached specific contractual terms and the attorney's general duty of care); Burns v. Drier, 12 Pa. D. & C.5th 479 (Pa. C.P. 2010) (court dismissed preliminary objections that plaintiff did not allege violation of a specific provision noting that "averments that the attorney violated specific instructions are not necessary in a breach of contract action for legal malpractice.").

In Dougherty v. Pepper Hamilton LLP, 133 A.3d 792 (Pa. Super. Ct. 2016), the court recently reiterated that the elements of a legal malpractice claim based on breach of contract are:

(1) the existence of a contract; (2) a breach of duty imposed by the contract; and (3) damages. Based on those elements, in Northwest Sav. Bank v. Babst, 134 A.3d 498 (Pa. Super. Ct. 2015), the court found that plaintiff's breach of contract claim was properly dismissed where no contract existed to create an attorney-client relationship between the parties with respect to the matter at issue. Conversely, in Liberatore v. Winterhalter, No. 1887, 2016 Phila. Ct. Com. Pl. LEXIS 237 (Pa. C.P. Aug. 9, 2016), the court held that the attorney-client engagement letter provided a basis for damages based on alleged breaches of express and implied terms.

**In Estate of Agnew v. Ross, 152 A.3d 247 (Pa. 2017), the Pennsylvania Supreme Court recently overruled a decision to deny attorneys summary judgment in a breach of contract action brought by named beneficiaries in an unexecuted trust because an executed testamentary document naming the parties was a prerequisite to their ability to enforce the contract between the testator and the attorney hired to draft that particular document.**

In Wachovia Bank, N.A. v. Ferretti, No. 2005-C-2457, 2006 Pa. D. & C. Dec. LEXIS 653 (Pa. C.P. July 14, 2006), the court noted that the statute of limitations for a claim involving breach of an attorney-client contractual agreement is four years. See 42 Pa. C.S.A. § 5525.

In Heldring v. Lundy, Deldecos & Milby, P.C., 151 A.3d 634 (Pa. Super. Ct. 2016), the court discussed a non-contractual basis for legal malpractice in providing that failure to sue the correct party may also support this type of cause of action.

### **The “Increased Risk of Harm” Standard Does Not Apply To Legal Malpractice Actions**

In Myers v. Seigle, 751 A.2d 1182 (Pa. Super. Ct. 2000), the court addressed whether the “increased risk of harm” standard applies to legal malpractice actions. Plaintiff alleged that her lawyers were negligent in failing to conduct an adequate investigation of her car accident, and in failing to have her car inspected for design and manufacturing defects in the underlying products liability matter. Id. at 1183-84. Plaintiff claimed that her lawyers’ negligence precluded her from prevailing in the action. Id. The court held that the increased risk of harm standard, defined by RESTATEMENT (SECOND) OF TORTS § 323, was inapplicable to legal malpractice actions. Id. at 1185. Rather, proof of actual loss is required. Id. To prove such, plaintiff “must demonstrate that she would have prevailed in the underlying action in the absence of [her lawyers’] alleged negligence.” Id. The court found that plaintiff could not prevail on the underlying action due to a lack of evidence regarding causation. Id. at 1186. Accordingly, finding that she had suffered no actual injury from the alleged negligent conduct, the court affirmed the grant of summary judgment in counsels’ favor. Id.

Courts consistently apply the holding in Myers to support that no “increased risk of harm” standard applies in legal malpractice actions. See, e.g., Kachmar v. Litvin, No. 13-06092, 2015 Pa. D. & C. Dec. LEXIS 9131 (Pa. C.P. Oct. 22, 2015).

### **Settlement**

In Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346 (Pa. 1991), the Pennsylvania Supreme Court decided “we will not permit a suit to be filed by a

dissatisfied Plaintiff against his attorney following a settlement to which that Plaintiff agreed, unless that Plaintiff can show he was fraudulently induced to settle the original action.”

In Wassall v. DeCaro, 91 F.3d 443 (3d Cir. 1996), the Third Circuit allowed plaintiffs to maintain their legal malpractice action against their former attorney, even though they agreed to dismissal, due to the attorney’s failure to prosecute the action. The court observed that the policies expressed in Muhammad would be served by allowing the action to go forward, as the attorney’s failure to settle the matter as the clients wished ran counter to the policy of encouraging settlements. Id. at 449. The court noted that where an attorney inordinately delays in prosecuting a claim “forc[ing] a client to accept a dismissal of the case, allowing a subsequent malpractice action serves as a systemic deterrent for this behavior and thus promotes the policies articulated in Muhammad.” Id. at 449.

In McMahon v. Shea, 688 A.2d 1179 (Pa. 1997), the Pennsylvania Supreme Court distinguished Muhammad in a legal malpractice action regarding a divorce settlement agreement. Defendant-attorneys advised the plaintiff to enter into an agreement incorporated—but not merged—into a final divorce decree. Id. at 1180. The agreement provided that half of plaintiff’s payments to his ex-wife were deemed alimony. Id. Because there was no alimony termination provision, plaintiff was required to continue paying alimony, even after his ex-wife remarried, because the parties’ agreement survived the divorce decree. Id. Plaintiff alleged that defendant-attorneys’ failure to merge the alimony agreement with the final divorce decree constituted a breach of the duty to exercise reasonable care. Id. The court held that Muhammad was not applicable to the facts of the case, as plaintiff was not attacking the settlement value, but alleged that counsel failed to advise him as to the possible consequences of entering into the settlement agreement. Id. at 1181-82. Accordingly, the preliminary objections to plaintiff’s complaint should have been dismissed. Id.

In Banks v. Jerome Taylor & Associates, 700 A.2d 1329 (Pa. Super. Ct. 1997), the court held that a negligence action may not be maintained against an attorney on the ground that the settlement amount was too small. The court reasoned that in cases where a dissatisfied litigant merely wishes to second guess his decision to settle in the hope that he may have been able to “get a better deal,” the Muhammad rule applies to bar that litigant from suing his counsel for negligence. Id. at 1332.

In Piluso v. Cohen, 764 A.2d 549 (Pa. Super. Ct. 2000), the court affirmed the trial court’s entry of summary judgment in favor of the attorney-defendant. In the underlying medical malpractice action, the attorney settled claims against some defendants, and proceeded to trial on a claim against one remaining doctor. Id. at 550. Plaintiff was aware of the settlement, although, it occurred outside her presence, and she did not repudiate it. Id. at 551. Thereafter, the jury returned a large verdict, but apportioned no liability to the non-settling doctor. Id. at 550. Plaintiff alleged that she did not consent to the settlement. Id. Citing Muhammad, the court held that plaintiff ratified her attorney’s actions by failing to promptly repudiate them, and she was foreclosed from filing suit against her attorney where there was no allegation of fraud. Id. at 551-52. Additionally, plaintiff’s claimed damages were purely speculative, as the outcome of the trial was likely to have been different if the settling defendants had been present and defended the claims against them. Id.

In Red Bell Brewing Co. v. Buchanan Ingersoll, P.C., 51 Pa. D. & C.4th 129 (Pa. C.P. 2001), the court held plaintiff's negligence action against his former attorneys was not barred where plaintiff alleged that defendant-attorneys failed to provide accurate facts upon which their decisions were made, and failed to adequately disclose a conflict of interest between plaintiff and one of the firm's other clients. The court reasoned that McMahon, not Muhammad, controlled based on the facts of the case. Id. at 139.

In Capital Care Corp. v. Hunt, 847 A.2d 75 (Pa. Super. Ct. 2004), the court applied Muhammad to its damage analysis to allow a corporation to prove that the attorney's fraudulent misrepresentation induced it to sell its corporate assets for less than fair market value, resulting in the corporation realizing a much lower amount than it would have in a future sale or upon liquidating its assets via Chapter 11 bankruptcy.

In Hauber v. Mudy, No. 5062, 2009 Phila. Ct. Com. Pl. LEXIS 183 (Pa. C.P. Sept. 1, 2009), citing Muhammad, the court dismissed plaintiff's complaint, holding that plaintiff, while being represented by defendants, had knowingly entered into a voluntary settlement and therefore could not maintain a legal malpractice claim against the defendants.

In Moon v. Ignelzi, No. WDA 2008, 2009 Pa. Super. LEXIS 7016 (Pa. Super. Ct. Dec. 11, 2009), the court rejected a legal malpractice claim predicated on the supposition that plaintiffs were improperly advised of the effect of a lien on their settlement. The court held that the plaintiffs' challenge was "at its core, a challenge to the attorney's judgment regarding an amount to be accepted in settlement." Id. at \*18. Therefore, the trial court properly rejected the claim on preliminary objections. Id. at \*15. In so holding, the court quoted Muhammad, determining that the case created a bright-line rule that "shield[s] attorneys from malpractice claims sounding in negligence or contract in cases concluded by settlement." Id.

In Palmer v. Kenney, No. 2512, 2012 Phila. Ct. Com. Pl. LEXIS 294 (Pa. C.P. Oct. 1, 2012), the court held that failure to advise plaintiff to pursue a survival action was not legal malpractice. This case arose after plaintiff settled an asbestos-related lawsuit, releasing defendants from future claims. Id. at \*2. The court held that the facts were more analogous to Muhammad than McMahon. Id. at \*11-12. The court opined that whether a survival action would have resulted in a recovery greater than the settlement amount was mere speculation, and therefore, there was no legal malpractice. Id. at \*12. Unlike McMahon, plaintiff could not point to a procedural or substantive error that resulted in harm. Id. Additionally, plaintiff did not allege that she was fraudulently induced into settling her claims, so the Muhammad exception did not apply. Id.

In Silvagni v. Shorr, No. 1386, 2014 Phila. Ct. Com. Pl. LEXIS 152 (Pa. C.P. May 1, 2014), aff'd, 113 A.3d 810 (Pa. Super. Ct. 2015), the court granted summary judgment in favor of attorney-defendants in a legal malpractice case where plaintiff alleged that he was fraudulently induced to settle a worker's compensation claim. The court found that there was no evidence plaintiff was misinformed about the legal consequences of the settlement, or that the agreement was improperly drafted. Id. at \*8. Citing Muhammad, the court further observed, "[w]ell established precedent in Pennsylvania holds that a litigant's dissatisfaction with the value

of a voluntary settlement cannot form the basis of a subsequent legal malpractice action against the attorney who represented that litigant for the purpose of settlement.” Id. at \*6.

**Similarly, in Edward Kapuscinski & TG Cooper & Co. v. Cavalier, No. 1098 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 2512 (Pa. Super. Ct. July 14, 2016), app. denied, 164 A.3d 489 (Pa. 2017), the court recently held that where plaintiffs’ complaint asserted no allegations of fraud against their former attorneys in connection with a settlement agreement, the claim for legal malpractice was not actionable pursuant to Muhammad.**

On the other hand, in Kilmer v. Sposito, 146 A.3d 1275 (Pa. Super. Ct. 2016), the court found Muhammad inapposite in a legal malpractice case where the plaintiff alleged the attorney failed to advise her correctly on the law pertaining to her interest in her husband’s estate. After the attorney’s flawed recommendation, the plaintiff hired new counsel who helped her reach a settlement regarding the percentage of her entitlement to the estate. Id. at 1277. The court found that the facts were more akin to McMahon, finding that Muhammad was not applicable where the alleged negligence stemmed from the attorney’s advice, rather than the settlement amount. Id. at 1279-80. Therefore, the trial court erred in dismissing the legal malpractice suit, as barring the plaintiff from holding the attorney accountable for allegedly flawed legal advice would not advance the interest of finality in settlements. Id. at 1280-81.

**Despite Muhammad’s longstanding precedent, the question of whether Muhammad—which bars legal malpractice suits following settlement of a lawsuit absent an allegation of fraud, even in instances where an attorney’s negligence led to a lesser settlement—should be overturned, is currently pending before the Pennsylvania Supreme Court. See McGuire v. Russo, 169 A.3d 567 (Pa. 2017).**

### **Damages**

The legal malpractice plaintiff must prove actual loss, and often will find this to be a difficult task. See Kituskie, *supra*. However, damages are considered speculative “only if the uncertainty concerns the *fact* of damages, rather than the amount.” Rizzo v. Haines, 555 A.2d 58, 68 (Pa. 1989) (quoting Pashak v. Barish, 450 A.2d 67, 68 (Pa. Super. Ct. 1982)).

In Ammon v. McCloskey, 655 A.2d 549 (Pa. Super. Ct. 1995), the court held that plaintiff in a legal malpractice action could prove economic harm simply by showing that judgment had been entered against him in the underlying case. Under Rizzo, a case in which the recovery was lost by the attorney’s acts or omissions, a successful legal malpractice plaintiff is entitled to receive as damages the difference between the actual recovery and what would have been recovered absent attorney negligence. Rizzo, 555 A.2d at 68-69.

In Carnegie Mellon University v. Schwartz, 105 F.3d 863 (3d Cir. 1997), the Third Circuit reiterated that under Pennsylvania law, an action for professional negligence requires proof of actual loss. The court concluded that “the mere breach of a professional duty, causing only nominal damages, speculative harm or threat of future harm, not yet realized, does not suffice to create a cause of action for negligence.” Id. at 867 (quoting Rizzo, 555 A.2d at 68).

In Kituskie, supra, the Pennsylvania Supreme Court reiterated that a legal malpractice plaintiff can only be compensated for his actual losses. Such losses “are measured by the judgment the Plaintiff lost in the underlying action.” Id. at 1030.

In Trauma Serv. Grp. P.C. v. Hunter, MacLean, Exley & Dunn, P.C., No. 99-CV-5979, 2000 U.S. Dist. LEXIS 3712 (E.D. Pa. Mar. 24, 2000), plaintiff hired defendant law firm to defend a medical malpractice action. The law firm prepared a summary judgment motion, which was granted, and all claims against the plaintiff were dismissed. Id. at \*3-4. A dispute arose about the firm’s bill. Id. at \*4-5. The firm obtained a judgment for its fees, but the plaintiff filed suit against the firm, alleging negligence, fraud, and breach of contract. Id. at \*5-6. The court held that the negligence claim was barred by the statute of limitations, and that the breach of contract claim was meritless. Id. at \*11-18. Furthermore, because plaintiff prevailed in the underlying action, the logical conclusion was that no malpractice occurred. Id. at \*10.

In Abood v. Gulf Grp. Lloyds, No. 3:2007-299, 2008 U.S. Dist. LEXIS 51406 (W.D. Pa. July 1, 2008), the court addressed whether an attorney’s declaratory judgment action against his insurer regarding malpractice insurance coverage exceeded the federal jurisdictional amount in controversy requirement. The court determined that there were three categories of damages presented that could be included in calculating the amount in controversy: (1) the amount plaintiff could have won in the underlying lawsuit, but for the negligence of the attorney; (2) the cost necessary to defend the malpractice action if a “necessary part of the amount in controversy”; and (3) the cost of other benefits provided by the professional liability insurance policy, which included a provision providing for payment of lost wages. Id. at \*8-14 (quoting Suber v. Chrysler Corp., 104 F.3d 578 (3d Cir. 1997)). The court held that through the aforementioned categories, “it cannot be shown to a legal certainty that the jurisdictional amount will not exceed \$75,000.” Id. at \*14. (citation omitted).

In Giesler v. 1531 Pine St. Ass’n, L.P., No. 4301, 2010 Phila. Ct. Com. Pl. LEXIS 152 (Pa. C.P. Feb. 2, 2010), the court held that attorneys could not be joined by their client-defendants for indemnification, contribution, or joint and several liability in an action, as the resolution of the matter would determine whether the client suffered an actual loss. Because no liability had yet been found, nor any damages assessed, joinder of the attorneys was premature. Id. at \*5-7. However, the client was not precluded from filing a separate legal malpractice claim at a later time. Id. at \*7.

In GNC v. Gardere Wynne Sewell, LLP., 727 F. Supp. 2d 377 (W.D. Pa. 2010), plaintiff alleged that it entered into a settlement agreement based on faulty advice of the defendant attorneys. The court granted summary judgment in defendants’ favor because a separate corporate entity paid the settlement on plaintiff’s behalf, and no reimbursement was required. Id. at 384. Because plaintiff was not required to reimburse the settlement funds, plaintiff did not suffer an “actual loss.” Id.

In Bayview Loan Servicing, LLC v. Law Firm of Richard M. Squire & Assoc., LLC, No. 10-1415, 2011 U.S. Dist. LEXIS 51412 (E.D. Pa. May 11, 2011), the court reiterated that an essential element of a legal malpractice claim is proof of actual loss. To prove actual loss, the plaintiffs were required to establish they would have succeeded in the underlying action, but for

the defendant's actions. Id. at \*12-13. The court found that plaintiffs failed to establish actual loss, as plaintiffs offered "little more than assertions that the damages are 'liquidated' in the amount of the lost deficiency." Id. at \*13.

In Coleman v. Duane Morris, LLP, 588 A.3d 833 (Pa. Super. Ct. 2012), the court reversed the trial court, holding that the limit on damages to the amount actually paid for services plus interest, as discussed by Bailey v. Tucker, 533 621 A.2d 108 (Pa. 1993), only applied to legal malpractice in the context of criminal cases. The Pennsylvania Supreme Court granted an appeal to determine whether Bailey applies when the underlying action is a civil matter, but the appeal was withdrawn. See Coleman v. Duane Morris, LLP, No. 29 EAP 2013 (Pa. Sept. 17, 2013).

Bailey's application was considered in Lodato v. Silvestro, No. 12-1130, 2013 U.S. Dist. LEXIS 6174 (E.D. Pa. Jan. 15, 2013), and the court held that the Bailey limitations do not apply in the context of non-criminal legal malpractice proceedings. Instead, it wrote "contract-based civil attorney malpractice action(s) are not limited solely to legal fees paid." Id. at \*10. The court noted that it was persuaded by substantial differences between a criminal and a civil proceeding. Id.

In Theise v. Carroll, No. 3:10cv1715, 2011 U.S. Dist. LEXIS 45723 (M.D. Pa. Apr. 27, 2011), the court noted under Pennsylvania law that "punitive damages may be awarded in legal malpractice cases where the defendant has engaged in conduct that is outrageous because of the defendant's evil motive or reckless indifference to the rights of others." The court found the complaint sufficiently stated a punitive damages claim where it alleged that defendants took unauthorized actions on the plaintiffs' behalf and failed to notify the plaintiffs of such actions. Id. at \*3. Specifically, plaintiffs alleged that defendants filed a complaint in New York, despite knowing that venue was not proper. Id. at \*2. Additionally, after the case was transferred to Pennsylvania, the defendants failed to file a statement of material facts or memorandum in opposition to the motion to dismiss. Id. at \*8. The complaint also alleged that the actions were intentional, fraudulent, and/or reckless to hide the defendant's professional negligence. Id.

In Kirschner v. K & L Gates LLP, 46 A.3d 737 (Pa. Super. Ct. 2011), a bankruptcy trustee appealed the trial court's order dismissing a professional negligence claim for lack of compensable damages. The Superior Court reversed, determining that although the trustee did not claim the company experienced deepening insolvency as a result of the alleged malpractice, the trustee sought traditional tort damages for increased liabilities and decreased asset values and losses. Id. at 753. The company's insolvency did not negate the harm the attorneys caused from their alleged professional negligence. Id. As such, the court concluded that the trustee averred legally compensable and cognizable damages. Id.

In Gordon v. Herman, No. 871, 2014 Phila. Ct. Com. Pl. LEXIS 378 (Pa. C.P. Oct. 7, 2014), the court recommended affirmance of its decision assessing damages against counsel in a legal malpractice action. The court explained that the disgorgement of fees is an appropriate remedy when plaintiff shows that an attorney has breached the fiduciary duty owed to his or her client by engaging in impermissible conflicts of interest. Id. at \*6. Because plaintiffs did not

show that there was a conflict of interest, the court found that such an award was inappropriate. Id.

In Tod Gordon & Carver W. Reed & Co. v. Herman, No. 1961 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 1691 (Pa. Super. Ct. June 9, 2015), the court found the trial court was within its discretion in determining the amount of awardable damages.

**In J.W. Hall, Inc. v. Nalli, No. 771 WDA 2016, 2017 Pa. Super. Unpub. LEXIS 595 (Pa. Super. Ct. Feb. 15, 2017), the plaintiffs filed a legal malpractice claim in connection with the sale of a restaurant and liquor license. The damages alleged included that the plaintiffs had to re-purchase a restaurant with their own personal monies and the funds of a newly formed limited liability company. Id. at \*16. Because the restaurant was sold by the plaintiffs' separate legal entity in the underlying action, however, they could not claim actual loss related to their re-purchase by a different legal entity. Id. Therefore, the court affirmed the lower court's summary judgment ruling in favor of the defendants for lack of actual damages. Id.**

**In Cook v. Gelman, No. 3528, 2017 Phila. Ct. Com. Pl. LEXIS 31 (Pa. C.P. Jan. 24, 2017), a grant of summary judgment in favor of defendants was proper because plaintiff's damages claim was too speculative based on the evidence presented.**

**In Cohen v. Gold-Bikin, No. 2663, 2017 Phila. Ct. Com. Pl. LEXIS 98 (Pa. C.P. Feb. 22, 2017), the court held that there was no "actual loss" sufficient to support a legal malpractice claim related to an underlying custody proceeding because the plaintiff was still able to pursue custody by other means in a separate legal action.**

### **Collectability**

In Kituskie, *supra*, the Pennsylvania Supreme Court recognized the affirmative defense of non-collectability in legal malpractice actions. The court held:

[t]he collectability of damages in an underlying case is a matter which must be considered in a legal malpractice action and the Defendant/lawyer bears the burden of proving by a preponderance that the underlying case which formed the basis of the damages award in a legal malpractice action would not have been fully collectible.

Id. at 1030. The court explained, "it would be inequitable for the Plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the Plaintiff could have collected from the third party; the Plaintiff would be receiving a windfall at the attorney's expense." Id. Finally, the court noted that collectability is a jury question. Id. at 1030 n.5.

In Scott v. Carabello, No. 337, 2009 Phila. Ct. Com. Pl. LEXIS 60 (Pa. C.P. Mar. 11, 2009), the court found that an attorney forfeited his right to argue the collectability of damages as a defense to a legal malpractice action where he failed to answer the complaint, allowing the court to enter a default judgment against him.

In Bayview Loan Servicing, LLC, *supra*, the court found defendant's affidavit in the underlying lawsuit describing his limited resources, and stating he did not have the financial capacity to pay a deficiency judgment, was sufficient "to give rise to a genuine issue of fact regarding collectability."

### **Privity**

In Cost v. Cost, 677 A.2d 1250 (Pa. Super. Ct. 1996), *app. denied*, 689 A.2d 233 (Pa. 1997), the court granted defendants' demurrer. The court found that the allegations in plaintiff's complaint failed to allege that the plaintiff "sought" legal assistance that defendants either expressly or impliedly agreed to render. *Id.* at 1254. Consequently, since the requisite element of privity was missing, the court held that plaintiff failed to aver facts sufficient to establish grounds for a legal malpractice suit. *Id.*

In a case of first impression, the court in Erwin v. Clark, 38 Pa. D. & C. 4th 170, (Pa. C.P. 1997), ruled that an attorney working for a corporation may be sued by its shareholder for legal malpractice.

In Silver v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, No. 03-4393, 2004 U.S. Dist. LEXIS 14651 (E.D. Pa. July 28, 2004), the court had to determine whether an allegedly champertous assignment was valid. Because the assignee communicated with defendant law firm on behalf of the assignor and had paid a portion of the retainer fee, the assignment was deemed not champertous and, therefore, valid. *Id.* at \*10-11.

Privity issues frequently arise when there is no written fee agreement or contract between clients and their attorneys. In the absence of an express contract, an attorney-client relationship will be found if it can be shown that:

- (1) the purported client sought advice or assistance from the attorney;
- (2) the advice sought was within the attorney's professional competence;
- (3) the attorney expressly or impliedly agreed to render such assistance; and
- (4) it was reasonable for the putative client to believe the attorney was representing him.

Capital Care Corp., *supra*, (citing Minnich v. Yost, 817 A.2d 538, 542 (Pa. Super. Ct. 2003), *app. denied*, 827 A.2d 1202 (Pa. 2003)).

In Capital Care Corp., the Superior Court was presented with the issue of whether a cause of action for legal malpractice could lie against an attorney who formally withdrew from representation of a client corporation, but who continued to assist in handling the corporation's legal affairs. At trial, plaintiff corporation asserted that defendant attorney made false representations to the corporation at a shareholders' meeting prior to its sale, which resulted in the corporate assets being sold for an inadequate price. *Id.* at 82. The jury found in favor of the plaintiff and awarded \$2.5 million in damages. *Id.* at 81. Defendant attorney filed for post-trial relief, requesting JNOV, and the trial court granted the relief. *Id.* On appeal, the plaintiff asserted that the trial court erred in entering JNOV because it had presented sufficient evidence to prove that the attorney provided legal services during the corporate shareholders' meeting. *Id.* The

Superior Court agreed, finding that while defendant attorney had formally withdrawn from representation of the plaintiff corporation, he continued to provide legal services with respect to matters of corporate governance, and in representing the corporation in hearings before the U.S. Securities and Exchange Commission. Id. at 83. The court maintained that despite the defendant attorney's formal withdrawal from representation, he continued to assist in corporate legal matters, his area of expertise, and that it was reasonable for plaintiff to believe that the attorney was still representing the corporation at the time of the shareholders' meeting. Id.

In Capitol Surgical Supplies, Inc. v. Casale, 86 Fed. Appx. 506 (3d Cir. 2004), the Third Circuit held that there was no attorney-client relationship between an attorney who drafted a product manufacturer's distribution agreement with a corporation, which included provisions proposed by the corporation. The court reasoned that there was never communication between the corporate representatives and the attorney to support an attorney-client relationship, and while the attorney added the provisions proposed by the corporate representatives, he never discussed the legal ramifications of those provisions with the representatives. Id. at 507. The corporate representatives' subjective belief that an attorney-client relationship existed was not sufficient to establish privity. Id. at 509.

In Kirschner v. K & L Gates LLP, 46 A.3d 737 (Pa. Super. Ct. 2012), the defendant law firm was hired to provide legal advice to a special committee created by a company's board of directors to investigate allegations regarding the accuracy of the company's sales figures, but the defendant failed to timely uncover fraud being committed by the company's CEO. Id. at 743. The engagement letter between the defendant and the special committee stated "[y]ou have asked us to represent the [company's] Special Committee...." After the fraud was uncovered, bankruptcy proceedings were instituted and the bankruptcy trustee initiated the action against the defendant on behalf of the company. Id. at 746.

In reversing the lower court, the Superior Court held that an implied attorney-client relationship existed between the defendant and the company, even though the retention letter expressly identified the client as the Special Committee. Id. at 748-49. Specifically, an implied relationship was formed because (1) the corporation, through its board and Special Committee, sought defendant's legal advice and assistance in investigating fraud and in preparing recommendations for the company's Board; (2) the investigation and preparation of recommendations was within the professional competence of defendant; (3) defendant agreed to render such assistance to the company through its board and Special Committee; and (4) it was reasonable for the company to believe that defendant was representing it in the investigation preparation of recommendations. Id. at 751.

In Solow v. Berger, No. 10-CV-2950, 2011 U.S. Dist. LEXIS 29691 (E.D. Pa. Mar. 22, 2011), the plaintiffs alleged a legal malpractice claim against an attorney who prepared a will for the plaintiffs' step-grandmother. The will did not name the plaintiffs as beneficiaries. Id. at \*1-2. The court dismissed the case pursuant to the probate exception to federal subject matter jurisdiction, but found that even if the probate exception did not apply, the legal malpractice claim failed to adequately state a claim. Id. at \*3-5. The court found no attorney-client relationship existed between the plaintiffs and the defendant, and the third-party beneficiary must be named in the will to state a claim for legal malpractice. Id. at \*5-7. That the decedent

contracted with the defendant to draft a later will, and that the plaintiffs were mentioned in an earlier will, did not accord them third-party beneficiary status. Id. at \*5-6.

In Conley v. Stockey, No. 548 WDA 2015, 2016 Pa. Super. Unpub. LEXIS 1356 (Pa. Super. Ct. Apr. 26, 2016), the Superior Court upheld the trial court's award of summary judgment based on the determination that the plaintiff failed to establish an attorney-client relationship with the defendant. The matter arose out of a loan transaction and subsequent default by a third-party borrower who suggested that plaintiff's attorney facilitate the transaction. Id. at \*1-2. Although the defendant attorney met with plaintiff and the borrower once, and had spoken to plaintiff on the phone at least once, plaintiff could not recall if defendant ever gave any advice regarding the loan. Id. The transactional documents were eventually drafted by another attorney. Id. at \*3. Although plaintiff had a prior relationship with the defendant, defendant was not present at closing, never discussed the loan documents with plaintiff, never billed for any legal services, and there was no fee agreement. Id. Citing the four factors discussed in Kirschner and Cost supra, the Superior Court held that plaintiff failed to establish an implied attorney-client relationship because plaintiff could not establish that defendant ever agreed to provide plaintiff with legal assistance. Id. at \*9-10. Despite a prior relationship, plaintiff's subjective belief that defendant attorney represented his interests in the loan closing was insufficient to establish an attorney-client relationship. Id. at \*10.

In Brychczynski v. Robbins, No. 306 MDA 2015, 2016 Pa. Super. Unpub. LEXIS 634 (Pa. Super. Ct. Feb. 29, 2016), the court held that there was no privity between the defendant and the plaintiff, who had brought a legal malpractice claim on behalf of a decedent, and there was no third-party beneficiary claim to support the action, either. Therefore, the trial court erred in failing to dismiss the breach of fiduciary duty claim against the defendant for lack of standing. Id. at \*18-19.

In Grimm v. Grimm, 149 A.3d 77 (Pa. Super. Ct. 2016), the court held that in accordance with Supreme Court precedent, to pursue a legal malpractice claim, there must be privity between an attorney and the plaintiff, except—as relevant to estate matters—when a named beneficiary of a will is also named executrix, and the attorney who drafted the will directed the plaintiff to witness the will, in turn causing her entire legacy to be voided and her appointment as executrix to be terminated. This extremely narrow circumstance was not present in the case at hand, and therefore, the court was required to uphold demurer. Id. at 88.

### **Comments on Dragonetti Act**

The Dragonetti Act, 42 Pa.C.S.A. § 8351-54, provides in relevant part:

#### **§ 8351 Wrongful Use of Civil Proceedings:**

(a) Elements of action. A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]:

(1) he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper

discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) the proceedings have terminated in favor of the person against whom they are brought.

### **§ 8352 Existence of Probable Cause:**

A person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either:

(1) reasonably believes that under those facts the claim may be valid under the existing or developing law; or

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(3) believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil case is not intended to merely harass or maliciously injure the opposite party.

### **§ 8353. Damages**

When the essential elements of an action brought pursuant to this subchapter have been established as provided in section 8351 (relating to wrongful use of civil proceedings), the plaintiff is entitled to recover for the following:

(1) The harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of his land, chattels or other things, suffered by him during the course of the proceedings.

(2) The harm to his reputation by any defamatory matter alleged as the basis of the proceedings.

(3) The expense, including any reasonable attorney fees that he has reasonably incurred in defending himself against the proceedings.

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### **§ 8354. Burden of proof**

In an action brought pursuant to this subchapter the plaintiff has the burden of proving, when the issue is properly raised, that:

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(5) The plaintiff has suffered damages as set forth in section 8353 [relating to damages].

**In Villani v. Seibert, 159 A.3d 478 (Pa. 2017), the Pennsylvania Supreme Court granted permission to seek interlocutory appeal to consider whether the Dragonetti Act, a legislative enactment recognizing a cause of action for wrongful use of civil proceedings,**

**infringes on the Court’s power to regulate the practice of law, insofar as wrongful-use actions may be advanced against attorneys. The underlying litigation involved a land dispute, and the appellants had previously prevailed in those proceedings. Id. at 479. Appellants subsequently indicated their intent to pursue a lawsuit for wrongful use of civil proceedings based on use of the judicial process to raise allegedly groundless claims. Id. Appellee filed a declaratory judgment action in response, and the matters were consolidated before the issue was presented to the Pennsylvania Supreme Court. Id. at 479-80.**

**The Court held that the Dragonetti Act is meant to “compensate victims of frivolous and abusive litigation, and therefore, has a strong substantive remedial thrust.” Id. at 491-92. Accordingly, the Court declined to recognize general attorney immunity under the Act. Id. Furthermore, while the Court has a role in lawmaking, it is for the Legislature to enact substantive litigation, *i.e.*, the Dragonetti Act. Id. at 492. Ultimately, the Court concluded that Appellee failed to establish that the Dragonetti Act clearly violated the Pennsylvania Constitution, as evidence by the Legislature’s prerogative to enact substantive legislation, or that attorneys should be *per se* immunized from application of the substantive law promulgated by the Legislature in enacting the Dragonetti Act. Id. at 492-93.**

In Miller v. St. Luke’s University Health Network, et al, 142 A.3d 884 (Pa. Super. Ct. 2016), plaintiffs brought and subsequently dismissed a wrongful death action against defendant hospital. Defendant hospital subsequently filed suit against plaintiffs, their attorneys, and their medical expert for, *inter alia*, wrongful use of civil proceedings. Id. at 888. After depositions, St. Luke’s voluntarily discontinued its claims against plaintiffs, but not against their attorneys or the expert. Id. Plaintiffs later sued defendant hospital and its attorneys, alleging wrongful use of civil proceedings under the Dragonetti Act. Id. The trial court entered judgment on the jury verdict finding that hospital lacked probable cause to bring its action against plaintiffs, but awarding no damages. Id. at 889. Subsequent motions for post-trial relief were denied. Plaintiffs appealed, and hospital cross-appealed. Id.

On appeal, plaintiffs argued that a violation of the Dragonetti Act presumes damages, and therefore, the trial court erred in not instructing the jury on presumed or nominal damages. Id. 889-90. Specifically, plaintiffs claimed that the trial court erred in refusing to instruct the jury on the law of presumed damages, as set forth in Standard Civil Jury Instruction 17.90B related to the Dragonetti Act. Id. In other words, plaintiffs claimed the trial court erred in instructing the jury that a plaintiff who proves wrongful use still carries the burden of proving resultant damages pursuant to 42 Pa.C.S.A. § 8353-54. Id. The Superior Court affirmed the trial court’s ruling, holding that the plain language of Section 8354 modifies the enumerated damages provision (Section 8353), and that the overall statutory scheme requires a wrongful use plaintiff to prove damages by a preponderance of the evidence. Id. at 893-894. The Superior Court explained:

Construing the Act, instead, simply to presume damages from proof of defendant’s wrongful conduct under Section 8351 would render the Section 8354 component part of the damages-related statutory scheme superfluous, a nullity serving no purpose. Our rules of statutory construction, however, do not permit us to invalidate a clearly expressed requirement in this manner, nor may we

disregard Section 8354's directive that a plaintiff must prove Section 8353 damages by a preponderance of the evidence where such directive may be read in harmony with the "entitled to recover" damages language of Section 8353.

Accordingly, we discern no intent from the plain wording of the statutory framework of the Dragonetti Act to presume damages upon proof of a defendant's wrongful conduct as defined in Section 8351. Had the General Assembly intended presumed damages, it would not have fashioned Section 8354 to place the onus upon a plaintiff to put in issue any damages delineated under Section 8353 and to prove such damages by a preponderance of the evidence.

Id.

### **Waiver of Meritorious Defense**

In Ammon v. McCloskey, *supra*, the Court ruled that waiver of a viable release defense, resulting in the entry of a judgment against the client, constituted a viable cause of action for legal malpractice which might subject the attorney to damages for the underlying judgment. However, the Court further stated that the issue of whether a waiver had actually occurred had never been fully litigated against the lawyer, and therefore remained a valid factual question to be resolved in litigation of the legal malpractice case. Id. at 553-54.

### **Duty to Keep Client Informed**

In Perkovic v. Barrett, 671 A.2d 740 (Pa. Super. Ct. 1996), plaintiffs sued their attorney for legal malpractice based on the following fee agreement:

CLIENTS expressly retain Attorney for the handling of the appeal of this matter to Superior Court which has been timely filed; ATTORNEY is to prepare and prosecute said appeal in a diligent and professional manner; CLIENTS agree to pay ATTORNEY the sum of \$15,000 to prepare and prosecute this appeal; this includes the preparation and filing of the proper notices of appeal, preparation, legal research and legal writing necessary for the Legal Brief... ATTORNEY agrees to represent CLIENTS at any oral argument that may be necessitated by the Superior Court in the perfecting of this appeal.

Id. at 743. The court held that this fee agreement required defendant-attorney to notify the client of the results of the appeal. The Court also held, however, that the fee agreement did not impose upon defendant-attorney a duty to continue representation following the remand of the case as it only contemplated the appeal referenced therein. Id. at 744.

### **Statute of Limitations**

A legal malpractice action founded upon negligence is subject to the two-year statute of limitations while such an action founded upon breach of contract is subject to the four-year statute of limitations. See, e.g., Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. Ct. 1997), appeal denied, 701 A.2d 577 (Pa. 1997). The court, citing Sherman Industries, Inc. v.

Goldhammer, 683 F. Supp. 502 (E.D. Pa. 1988), explained, “[a] malpractice plaintiff may not sidestep the two-year limitation on tort actions by pleading tort claims as breaches of contract.” Id.

The Pennsylvania Supreme Court held in Steiner v. Markel, 600 Pa. 515, 968 A.2d 1253 (Pa. 2009), that plaintiffs had waived their right to argue that their professional malpractice claim should be construed as a contract claim, in order to avoid the two-year limitation, when their Complaint did not contain a claim described as a breach of contract claim. Additionally, the Court held that the Superior Court may not *sua sponte*, search within a complaint to find a cause of action that plaintiffs never argued was present in their complaint. Id.

Similarly, in Javaid v. Weiss, No. 4:11-CV-1084, 2011 U.S. Dist. LEXIS 145513, \*5 (M.D. Pa. Dec. 19, 2011), plaintiff’s complaint made clear that he was only asserting claims for professional malpractice, and couched these claims as arising either in tort or contract. However, the court held plaintiff had failed to adequately plead a separate claim sounding in contract. Id. Specifically, the court found plaintiff was proceeding under the theory that his attorney failed to exercise the appropriate duty of care towards him, but had not attached an engagement letter or other contract to his complaint, and had supplied only the barest of allegations regarding any agreement he may have had with defendant regarding his representation. Id. at \*6. Plaintiff’s attempt to bolster his contract theory via a brief opposing defendant’s motion to dismiss was misplaced because a complaint cannot be amended in that manner. Id. Further, the court reasoned, plaintiff’s complaint attempted to set forth two distinct causes of action, one sounding in contract and one in tort, but the claims as plead in the complaint were substantially identical. Id. Accordingly, the complaint lacked any distinct factual allegations to support the distinct claim of breach of contract. Id. at \*5, \*7. The court also noted that plaintiff was still able to file an amended complaint more adequately pleading his claims, provided he reasonably believed he had a legal basis for bringing claims under either or both theories. Id. at n.3.

Under Pennsylvania law, the “occurrence rule” is used to determine when the statute of limitations begins to run. Fiorentino, 693 A.2d at 208. Under this rule, “the statutory period commences when the harm is suffered, or if appropriate, at the time an alleged malpractice is discovered.” Id.; see also Deere & Co. v. Reinhold, 2000 U.S. Dist. LEXIS 5276, 2000 WL 486607 (E.D. Pa. Apr. 24, 2000) (a cause of action for legal malpractice accrues on the date the harm is suffered and not on the date that the attorney-client relationship ends); Tower Investments, Inc. v. Rawle & Henderson, LLP, 2009 WL 8151571, 2009 Phila. Ct. Com. Pl. LEXIS 18 (Pa. C.P. 2009) (holding “[t]he statute of limitations in legal malpractice actions begins upon the happening of an alleged breach of duty and is tolled only when the client, despite the exercise of due diligence, cannot discover the injury or its cause”).

To date, Pennsylvania courts have expressly rejected the “continuing representation exception” under which a claim for malpractice accrues upon termination of the professional relationship which gave rise to the alleged malpractice. See, e.g., Glenbrook Leasing Co. v. Beausang, 2003 PA Super 489, 839 A.2d 437, 441-42 (Pa. Super. Ct. 2003), appeal granted, 870 A.2d 318 (Pa. 2005), aff’d, 881 A.2d 1266 (Pa. 2005); see also Ward v. Knox McLaughlin Gornall & Sennett, 2009 U.S. Dist. LEXIS 20302, 2009 WL 693260 (W.D. Pa. Mar. 13, 2009) (citing Glenbrook, court refused to apply “continuous representation rule”). It is noteworthy, however, that after the Superior Court’s discussion of the continuous representation rule in

Glenbrook, and acknowledgment there that adoption of this rule would have to come from the Supreme Court, the Pennsylvania Supreme Court granted an appeal in this case limited to the issue of “[w]hether the continuous representation rule should be adopted in Pennsylvania to toll the applicable statute of limitations in an action for legal malpractice.” Glenbrook Leasing Co. v. Beausang, 582 Pa. 101, 870 A.2d 318 (Pa. 2005) (Pa. 2005). Without issuing a written opinion, the Supreme Court affirmed the Superior Court’s decision. Glenbrook Leasing Co. v. Beausang, 584 Pa. 129, 881 A.2d 1266 (Pa. 2005).

If the discovery rule applies, the statutory period commences at the time the alleged malpractice is discovered. Davis v. Grimaldi, Haley & Frangiosa, P.C., 1998 U.S. Dist. LEXIS 15681, 1998 WL 967516 (E.D. Pa. Sept. 29, 1998) (citing Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993)). The discovery rule “provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible.” Id. at 4-5 (citing Dalrymple v. Brown, 549 Pa. 217, 701 A.2d 164, 167 (Pa. 1997)). The Dalrymple Court discussed the standard for the application of the discovery rule:

The party seeking to invoke the discovery rule bears the burden of establishing the inability to know of the injury despite the exercise of reasonable diligence. The standard of reasonable diligence is objective, not subjective. It is not a standard of reasonable diligence unique to a particular Plaintiff, but instead, a standard of reasonable diligence as applied to a “reasonable person.”

Id. at 167; see also Radman v. Gaujot, 53 Fed. Appx. 606 (3d Cir. 2002) (not precedential) (the happening of the breach and the injured party’s awareness of the breach, not his knowledge of the resulting damage, is the focus of Pennsylvania law) Igbonwa v. Cameron, No. Civ. A. 03-5407, 2004 WL 257358 (E.D. Pa. 2004), motion to vacate denied, 2004 WL 1505352 (E.D. Pa. 2004) (in order to qualify for the discovery rule, a plaintiff must have made reasonable efforts to protect his own interests, and must show why he was unable to discover the facts necessary to plead the cause of action); Foueke v. Dugan, 187 F. Supp. 2d 253 (E.D. Pa. 2002) (to bring a claim outside of the statute of limitations, a plaintiff faces the burden of demonstrating that his claim falls into one of the exceptions to the occurrence rule); Amoroso v. Morley, 2002 U.S. Dist. LEXIS 4989 (E.D. Pa. Mar. 25, 2002) (the statute of limitations is tolled only if a person in the plaintiff’s position exercising reasonable diligence would not have been aware of the salient facts) (citing Baily v. Lewis, 763 F. Supp. 802, 806 (E.D. Pa. 1991), aff’d, 950 F.2d 721 (3d Cir. 1991); Edwards v. Duane, Morris & Heckscher, LLP, et al., 2002 U.S. Dist. LEXIS 16301, 2002 WL 32348269 (E.D. Pa. Aug. 7, 2002)(discovery rule may be applied to breach of contract actions “where the injured party is unable, despite the exercise of due diligence to know of an injury or its cause”); cf. Fine v. Checcio, 582 Pa. 253, 870 A.2d 850 (Pa. 2005) (medical malpractice case in which Supreme Court held that “discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises” and rejected argument that rule should not extend statute of limitations in any case where cause of injury is discovered within original statutory period.)

In Whitley v. Allegheny County, 2008 U.S. Dist. LEXIS 28739, 2008 WL 794508 (W.D. Pa. Mar. 24, 2008), plaintiff filed the instant action in March 2007 and asserted, *inter alia*, a state law claim for professional negligence against his criminal defense attorney (“defense attorney”). By way of background, defense attorney represented plaintiff in the first of two petitions of post-conviction relief (“PCRA”) and not the underlying criminal trial. The initial PCRA petition was denied. Id. Plaintiff subsequently filed a second PCRA petition. Plaintiff informed the court that he was no longer represented and requested appointment of counsel. Different counsel was appointed; but defense attorney did not formally withdraw. Plaintiff alleged that the criminal defense attorney disregarded his duty to plaintiff by failing to communicate with plaintiff and failing to perform a proper investigation, which resulted in plaintiff suffering a prolonged incarceration. The court noted, “[the parties] agree[d] that the appropriate starting point for a legal malpractice action arising for an underlying criminal representation commences at the termination of the attorney-client relationship.” However, the parties disagreed as to when the attorney-client relationship terminated. Defense attorney maintained that the relationship ended when the first PCRA petition was dismissed and new counsel was appointed; therefore, Plaintiff’s claims fell outside the two year statute of limitations. In response, plaintiff contended that the relationship continued until the denial of the second PCRA petition, approximately ten months prior to plaintiff filing the instant action. In finding plaintiff’s claims barred, the court noted that Plaintiff petitioned the court to appoint new counsel to represent him in the appeal of the first PCRA petition in 1999. After new counsel was appointed in December 1999, plaintiff was no longer represented by defense counsel. Therefore, the court noted that the termination of the attorney-client relationship occurred on the date of appointment of new counsel. Accordingly, the court found plaintiff’s claims against defense attorney were barred by the statute of limitations.

In Wachovia Bank, N.A. v. Ferretti, 2007 PA Super 320, 935 A.2d 565 (Pa. Super. Ct. 2007), the Superior Court examined when a cause of action for legal malpractice accrues when an attorney fails to mark a judgment as satisfied. The Superior Court reiterated that “the trigger for the accrual of a legal malpractice action, for the statute of limitations purposes, is not the realization of actual loss, but the occurrence of a breach of duty.” Id. at 572. The court explained that an exception to the occurrence rule is the equitable discovery rule, which provides the statute of limitations is tolled when the “injured party is unable, despite the exercise of due diligence, to know of the injury or its cause.” The court cautioned, “[l]ack of knowledge, mistake or misunderstanding will not toll the running of the statute.” Id. The Superior Court stressed that Pennsylvania does not follow the actual loss rule, where the statute of limitations is told in the legal malpractice suit until a final judgment is entered in the underlying lawsuit. Id.

The Superior Court explained that the statute of limitations began to toll when the attorney failed to mark the judgment as satisfied, that is, when the attorney breached a duty. Id. Furthermore, the court stated that the equitable discovery rule could only toll the statute of limitations until the time when the client was informed that a proceeding was being instituted against them regarding judgment that their attorney failed to mark as satisfied. Id. at 574. The court recognized that the occurrence rule requires the filing of a legal malpractice claim before the client in the underlying claim knows whether he will suffer any damages as a result of his attorney’s negligence. Id. at 574 The court stated while there is a dilemma in taking competing positions in the underlying claim and the legal malpractice claim, the public policy concern of

avoiding stale claims must prevail over the public policy concern over having two cases simultaneously proceed with inconsistent positions. Id. The court reasoned, “[t]he purpose of the statute would not be served if an attorney is kept in the state of breathless apprehension while a former client pursues appeal from the trial court, to the Court of Appeal, to the Supreme Court . . . during which time memories fade, witnesses disappear or die, and evidence is lost. Id. In sum, the public policy concern of raising stale legal malpractice claims requires the filing of a claim for legal malpractice at the time of the breach of a duty. The statute of limitations will only be tolled under the doctrine of equitable discovery until the time clients are made aware of proceedings against them, even if the clients are uncertain whether they will prevail in defending the underlying claim.”

The United States Court of Appeals for the Third Circuit addressed the applicability of the discovery rule to legal malpractice claims in Knopick v. Connelly, 639 F.3d 600 (3d Cir. 2011). In Knopick, plaintiff hired the Connelly defendants to represent him in a lawsuit involving a motion to set aside a separation and property agreement between him and his wife. His wife alleged plaintiff failed to disclose two million dollars’ worth of stock prior to entering the agreement. Plaintiff informed defendants of four witnesses who could testify as to his wife’s knowledge of the assets. At the August 2, 2004, hearing, defendants called no witnesses, and assured plaintiff the agreement would not be set aside. On July 7, 2005, the Court granted the motion to set aside the agreement and subjected plaintiff’s assets to an equitable distribution hearing. On July 28, 2006, plaintiff met with defendant Downey to discuss a legal malpractice action against the Connelly defendants. On October 26, 2006, Downey sent a letter to the Connelly defendants indicating they committed malpractice, informing the Connelly defendants to inform their insurance carrier, and stating the statute of limitations began to run on July 7, 2005, the date of the judge’s order. On March 30, 2007, plaintiff signed an official agreement to file suit, but Downey did not file the lawsuit. On February 25, 2008, Downey sent plaintiff a letter terminating the representation because the two-year statute of limitations began to run on August 2, 2004, the date of the hearing, and, therefore, it expired on August 2, 2006, before plaintiff met with Downey. Plaintiff filed suit on July 6, 2009 against the Connelly defendants and against Downey, alleging legal malpractice. Downey filed a Motion for Summary Judgment alleging the statute of limitations barred any cause of action against the Connelly defendants, and, therefore, the legal malpractice claim against Downey failed as a matter of law. The district court applied the occurrence rule, and found the claim barred by the statute of limitations, which began to run on August 2, 2004, the date of the hearing. The Third Circuit reversed, finding the discovery rule applied and the statute of limitations did not begin to run until July 7, 2005, the date of the order.

The court noted that “under the occurrence rule, ‘the statutory period commences upon the happening of the alleged breach of duty.’” Knopick, 639 F.3d at 607 (citing Wachovia Bank N.A. v. Ferretti, 935 A.2d 565, 572 (Pa. Super. Ct. 2007)). “Where a plaintiff could not reasonably have discovered his injury or its cause, however, Pennsylvania courts have applied the discovery rule to toll the statute of limitations.” Id. (citing Wachovia, 935 A.2d at 572–74). If the discovery rule applies, the statute of limitations begins to run when the plaintiff knew or in the exercise of reasonable diligence should have known of the injury and its cause. Id. (citing Crouse v. Cyclops Indus., 560 Pa. 394, 745 A.2d 606, 611 (Pa. 2000)). The court noted the discovery rule is “grounded on considerations of basic fairness.” Id. (quoting Taylor v.

Tukanowicz, 290 Pa. Super. 581, 435 A.2d 181, 183 (Pa. Super. Ct. 1981)). It is applied where requiring the plaintiff's knowledge would be unreasonable and it tolls the statute until the plaintiff is put in a position to discover the injury or its cause. The court noted knowledge can be imputed where an adverse action is taken against plaintiff. The court noted the Pennsylvania Supreme Court has not addressed the discovery rule's applicability to legal malpractice actions in a civil suit. It analyzed the Pennsylvania Superior Court decisions discussing the rule's applicability in the civil context as well as the Pennsylvania Supreme Court's discussion of the discovery rule in medical malpractice cases.

The court noted that “[o]f critical importance in this case is the distinction between the act constituting the alleged breach—the Connelly defendants’ failure to call witnesses, which would start the statute under the occurrence rule—and the injury that flowed from this failure, constructive knowledge of which would trigger the statute of limitations under the discovery rule.” Id. at 615. The court found, although it is undisputed the plaintiff knew the witnesses were not called, “it remains in dispute, and a question . . . a jury should decide, when [plaintiff] knew that he was injured as a result of the witnesses not being called.” The court concluded “reasonable minds could disagree in determining whether Knopick knew or should have known, through the exercise of reasonable diligence, of his alleged injury as early as August 2, 2004, the date of the hearing.” Id. at 616.

In Walker v. Stern, 2012 U.S. Dist. LEXIS 122763, 2012 WL 3731375 \*1 (E.D. Pa. Aug. 29, 2012) , plaintiff alleged that defendants, his child’s mother and her attorney, “tricked” him into signing a waiver of claims relinquishing his rights in a medical malpractice suit involving his child. Plaintiff signed this waiver on August 25, 2005. Id. In 2006, the medical malpractice suit resulted in a settlement agreement in favor of the child. Id. During this time, plaintiff received a notice of the child’s estate, stating he was entitled to a portion of the settlement, and then requested a hold be placed on the funds, pending the determination of the administration of the child’s estate. Id. On December 14, 2006, the Philadelphia Court of Common Pleas, allocated the settlement agreement and did not distribute any of the settlement funds to plaintiff. Plaintiff filed suit against defendants on March 8, 2011. Id. In analyzing the case in light of the discovery rule, the court held that the statute of limitations for plaintiff’s fraud and misrepresentation claims against defendants was tolled until the entry of the court’s December 14, 2006 order, when plaintiff discovered the waiver he signed precluded him from recovering any settlement proceeds. Id. at \*4. Consequently, plaintiff’s claims were untimely because he failed to file his complaint by December 14, 2008. Id. The Third-Circuit affirmed the dismissal of Plaintiff’s suit. Id., 525 Fed. Appx. 84 (3d Cir. 2013) (non-precedential opinion). As to the dismissal of Plaintiff’s claim for legal malpractice, the Third Circuit agreed that Plaintiff could not maintain this claim, as he could not demonstrate employment of the attorney.

Courts are also willing to permit the fact finder to determine whether the discovery rule applies. In Lefta Associates v. Hurley, No. 1:09-CV-2487, 2012 WL 4484948 (M.D. Pa. Sept. 27, 2012), plaintiffs, after discovering their guaranty obligations under a loan agreement were greater than originally believed, brought suit claiming that defendants were liable for failing to obtain signed copies of certifications clarifying that the plaintiffs’ guaranty obligation was limited to 25% of the outstanding loan balances. Defendants asserted that plaintiffs’ claims sounding in tort were brought after the expiry of the statute of limitations, as the alleged breach

had occurred on December 27, 2005, nearly four (4) years before plaintiffs commenced the action. Id. at \*15. Specifically, defendants alleged that any breach of legal duty occurred in late December 2005, when plaintiffs alleged defendant breached his legal obligations to ensure timely filing of certain certifications needed for loan documents, and alleged plaintiffs should have reasonably known that the certifications were not signed by February 2006, when plaintiffs received copies of the executed loan documents. Id. at \*16. According to defendants, the absence of the certifications within the loan document was, at a minimum, sufficient to trigger a duty on the part of plaintiffs to exercise reasonable diligence to discover any failure to act on the part of defendants. Id. Plaintiffs, on the other hand, argued the statute of limitations did not begin to run until 2009, when they suffered harm by first making payments on the loan guaranties, and until that time, they had not been injured as there was only the theoretical possibility they would have to pay. Id. The court agreed with plaintiffs that disputed questions of fact existed with respect to whether and when the discovery rule applied to their malpractice claim, and held that the dispute should await resolution by a jury. Id. at \*16-\*17.

Another notable case is New York Central Mut. Ins. Co. ["NYCMI"] v. Margolis Edelstein, Civ. Act. No. 3:14-0829 (M.D. Pa. Jan. 30, 2015) (Memorandum Opinion) affirmed at 637 Fed.Appx. 70 (3d Cir. 2016). In NYCMI the district court, resolved to dismiss an action against an attorney and the attorney's firm for legal malpractice, on statute of limitations grounds, importantly holding that the two-year statute of limitations for tort actions applied, rather than the four-year statute of limitations for breach of contract. Essentially, a motor vehicle accident resulting in personal injury resulted in a pre-suit demand for the insured's policy limit of \$25,000. The insurer refused to tender the full \$25,000, instead, offering a lesser sum. The injured individual then brought suit, and demanded \$200,000. The insurer retained counsel for purposes of determining, inter alia, the viability of a bad-faith suit, and counsel determined that a bad-faith suit would not likely succeed, and that the insurer should not offer in excess of the policy limits. This opinion was repeated by counsel in an additional letter. Ultimately, the injured party recovered nearly \$1,000,000 at trial. The insured assigned their rights against the insurer to the prevailing injured party, resulting in the insurer paying the injured party \$2,000,000 in settlement of the ensuing bad-faith suit. The insurer then brought suit against counsel, for allegedly deficient legal advice, approximately four years from the day that counsel authored the second opinion letter re-affirming that a bad-faith claim would not likely be successful. Following amendments to the complaint on account of subject matter jurisdiction issues related to matters of diversity of the parties, defendants moved to dismiss on statute of limitations grounds, contending that the gist of the insurer's claims was for negligence, and the two-year statute of limitations applied.

The District Court's analysis recognized that there is no dispute that a legal malpractice breach of contract claim can be brought under a four-year statute of limitations, nor that a legal malpractice claim can be brought under a breach of contract theory. Instead, the District Court concluded that the insurer failed to state a claim for breach of contract for violating a specific instruction or provision in the agreement between counsel and the insurer. The District Court's decision is particularly notable for this latter point, which may be viewed as the subject of seemingly disparate state and federal law. The District Court expressly recognized that in Gorski v. Smith, 812 A.2d 683 (Pa. Super 2002), the Superior Court articulated that a "plaintiff's successful establishment of a breach of contract claim against an attorney . . . does not require

proof by a preponderance of the evidence that an attorney failed to follow a specific instruction of the client . . ." Gorski, 812 A.2d at 697. However, the District Court cited to several sources of authority, to support its variance from Gorski's holding. One of these was Knopick v. Downey, 963 F. Supp. 2d 378 (M.D. Pa. 2013), another legal malpractice action, with a somewhat complex procedural history. However, for our purposes, it suffices to note that the District Court in Knopick opined:

Gorski is a Pennsylvania Superior Court decision, and not a Supreme Court decision, and although the decisions of intermediate appellate courts are afforded due weight, it is less than clear that Gorski was controlling [on the facts before it]. Indeed, even following this court's December 29, 2009 decision, federal courts applying Pennsylvania substantive law to professional malpractice breach of contract actions continued to hold that plaintiffs "may not repackage a negligence based malpractice claim under an assumption theory to avoid the statute of limitations." . . . Rather, it remained consistent that, in a claim based on breach of an attorney-client agreement, the attorney's liability "must be assessed under the terms of the contract." . . .

Knopick, 963 F. Supp. 2d at 390-391 (citations omitted; emphasis added by the NYCMI Court not included). The District Court in NYCMI further bolstered its conclusion in reliance on the decision reached in another case before it, Frantz v. Fasullo, Civ. Act. No. 3:13-CV-02345, 2014 WL 6066020 (M.D. Pa. Nov. 13, 2014), wherein it wrote:

In addition to the express provisions of an attorney-client agreement, "[a]n attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large." . . . Thus, absent allegations that the attorney failed to follow specific client instructions or breached a specific provision of their contract, a client's breach of contract claim against a lawyer "is not a true contract cause of action but sounds in negligence by alleging [that the attorney] failed to exercise the appropriate standard of care."

Frantz, 2014 WL 6066020 at \*4 (citations omitted; emphasis added by the NYCMI Court not included). The District Court also relied, quite substantially, on Bruno v. Erie Ins. Co., 2014 WL 7089987 (Pa. December 15, 2014), discussed elsewhere infra. Suffice it to say here that in Bruno, part of the Pennsylvania Supreme Court's analysis in considering an interlocutory appeal turned on whether the plaintiffs' negligence claims for an insurance company's engineer's allegedly improper analysis concerning mold in the home, were barred by the gist of the action doctrine, on the grounds that the true nature of plaintiffs' claims were for breach of an insurance contract. The NYCMI District Court quoted Bruno at length. The quote is excerpted here as follows:

[T]he substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by the plaintiff of a claim

as being in tort, e.g., for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract--i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract--then the claim is to be viewed as one for breach of contract. . . . If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort. . . . Although this duty-based demarcation was first recognized by our Court over a century and a half ago, it remains sound, as evidenced by the fact that it is currently employed by the high Courts of the majority of our sister jurisdictions to differentiate between tort and contract actions. We, therefore, reaffirm its applicability as the touchstone standard for ascertaining the true gist or gravamen of a claim pled by a plaintiff in a civil complaint. . . . [T]he mere existence of a contract between two parties does not, ipso fact, classify a claim by a contracting party for injury or loss suffered as the result of actions of the other party in performing the contract as one for breach of contract. Indeed, our Court has long recognized that a party to a contract may be found liable in tort for negligently performing contractual obligations and thereby causing injury or other harm to another contracting party . . . or to a third person . . .

Consequently, a negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract. Instead, the contract is regarded merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed.

Bruno, 2014 WL 7089987 at \*18-19. Thus, in examining the allegations in the insurer-plaintiffs' complaint, which alleged breach of the standard of care, rather than violation of a specific instruction or agreement, the NYCMI Court concluded that insurer-plaintiffs' claims sounded in negligence, and were therefore time-barred under the two year statute of limitations applicable to tort claims. Compare NYCMI, supra, with Coleman v. Duane Morris, 58 A.3d 833 (Pa. Super. 2012), supra and infra.

In Coleman, it appeared that plaintiff's breach of contract claim for legal malpractice, entailed the allegedly negligent/incorrect rendition of advice concerning tax consequences, but no violation of a specific instruction or agreement. However, the reader should note that the particular issue of the viability of a breach of contract legal malpractice claim absent breach of a specific instruction or agreement, was not itself critically analyzed and there was no argument that the claim was not legally cognizable on that basis. Indeed, Coleman's analysis focuses mostly on what damages are available in a civil breach of contract claim for attorney malpractice.

### **Contributory Negligence Defense**

In the seminal case, Gorski v. Smith, et al., 812 A.2d 683 (Pa. Super. Ct. 2002), appeal denied, 856 A.2d 834 (Pa. 2004), the Superior Court adopted the rule that a plaintiff/client's

contributory negligence will bar recovery in a legal malpractice case. In Gorski, plaintiffs/clients (Gorskis) were land developers who brought an action against defendant/attorney (Raymond Jenkins) and his law firm for, *inter alia*, professional negligence and breach of contract in the preparation and negotiation of a land sales agreement with a third party buyer (Iacobucci). Id. at 688-690. The jury found defendants liable for breach of contract and negligence in representing the Gorskis. Id. at 690. The jury also found the Gorskis were contributorily negligent, awarding them no damages on their negligence claim. Id. The trial judge denied the defense motion for judgment notwithstanding the verdict but granted the Gorskis' motion to mold the jury's verdict to award damages on the jury's finding that the defendants had committed legal malpractice. Id. On appeal, defendants argued, *inter alia*, that the trial court improperly entered judgment on the negligence claims notwithstanding the verdict because the jury found plaintiffs contributorily negligent and did not award damages. Id. at 697.

Although the Superior Court affirmed the entry of JNOV in favor of the Gorskis, it adopted the rule that the negligence of a client may be raised as an affirmative defense by an attorney in a legal malpractice action that is based on a theory of negligence. Id. at 699. Once a client's contributory negligence is proven, it will serve as a complete bar to recovery. Id. at 702-703 Furthermore, the Gorski court explained that because a legal malpractice action is based on monetary loss, rather than bodily injury or damage to property, it is outside the scope of the Comparative Negligence Act (42 Pa.C.S.A. § 7102). Id. In other words, the comparative negligence statute is not applicable to claims brought to recover pecuniary loss, and therefore, the doctrine of contributory negligence applies in legal malpractice cases. Id.

In Gorski, the Superior Court defined the doctrine of contributory negligence in the context of legal malpractice, in relevant part, as follows:

Contributory negligence is conduct on the part of a plaintiff which falls below the standard of care to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant, in bringing about the plaintiff's harm. Contributory fault may arise from a plaintiff's carelessness or from his failure to exercise reasonable diligence for his own protection...

A client who retains an attorney to perform legal services has a justifiable expectation that the attorney will exhibit reasonable care in the performance of those services, since that is the attorney's sacred obligation to the client. The client is, therefore, under no duty to guard against the failure of the attorney to exercise the required standard of professional care in the performance of the legal services for which the attorney was retained. Imposing such a duty on the client would clearly defeat the client's purpose for having retained the attorney in the first place. Consequently, as a matter of law, a client cannot be deemed contributorily negligent for failing to anticipate or guard against his or her attorney's negligence in the performance of legal services within the scope of the attorney's representation of the client.

Id. at 703.

Citing to cases from other jurisdictions, the Superior Court further clarified that “a client cannot be contributorily negligent as a matter of law for relying on a lawyer's erroneous legal advice or for failing to correct errors of the lawyer which involve professional expertise.” The defense of contributory negligence, however, is applicable in situations where a client has “failed to exercise the reasonable care necessary for his or her own protection,” and where a client’s “actions are a clear hindrance to the attorney's ability to adequately protect or advance the client's interests during the course of the attorney's representation.” Examples include: a client who “withholds information from his attorney;” a client who “misrepresents to the attorney crucial facts regarding circumstances integral to the representation;” or a client who “fails to follow the specific instructions of the attorney.” Id.

Applying the above principles to the case at bar, the Superior Court held that plaintiffs/clients were not contributorily negligent in relying on defendant/lawyer’s advice in the preparation and execution of land sales agreement. More specifically, the court held:

The Gorskis' actions under the circumstances of the case did not amount to contributory negligence. With respect to the negotiation of the land sale contract with Iacobucci, Mr. Gorski specifically relied on Attorney Jenkins to review the contract which was prepared by Iacobucci's representatives and to ensure that the contract legally accomplished what Mr. Gorski sought, namely to enable him to walk away if the requisite sewer approvals were not granted by the government authorities. Attorney Jenkins assured Mr. Gorski that the due diligence clause enabled the Gorskis to walk away from the agreement if the sewer approvals were not forthcoming. By so doing, Attorney Jenkins was giving legal advice to Gorski regarding the legal meaning and operation of contractual language. This advice, unfortunately for the expectation of the Gorskis, turned out to be erroneous. As a matter of law, then, the Gorskis could not have been contributorily negligent for relying on Attorney Jenkins' erroneous legal advice.

Id. at 704.

**Most recently, in New Jersey Manufacturer’s Insurance Co. v. Brady, 2017 WL 264457 (M.D. Pa., January 20, 2017), the trial court granted, in part, plaintiff’s motion for partial summary judgment and to strike defendant lawyer’s affirmative defense of contributory negligence. In this case, plaintiff insurance company sued Brady for legal malpractice, claiming that Brady negligently defended a UIM claim brought by one of plaintiff’s policy-holders. Brady allegedly never advised the arbitration panel of the UIM policy limit, and the panel ultimately awarded an amount in excess of the policy limit. Before plaintiff sued Brady for malpractice, the policy-holder sued plaintiff for bad faith, claiming that plaintiff repeatedly ignored policy-holder’s demands for the policy limits. In his answer to plaintiff’s complaint, Brady pled that plaintiff’s bad faith conduct was contributory negligence, and thus an affirmative defense.**

**The court determined that Brady’s affirmative defense of contributory negligence should be stricken to the extent that plaintiff’s bad faith conduct was not causally related to**

**the pertinent injury (i.e. the portion of the arbitration award in excess of the UIM policy limits). Interestingly, however, the court determined that evidence of bad faith conduct was relevant to damages and that Brady may still conduct discovery on this issue. Brady was further permitted to “pursue theories of contributory negligence, including theories based on [plaintiff’s] conduct that could also be characterized as acting in bad faith, so long as that conduct bears a causal relationship to the arbitration award.” Id. at \*8.**

**Citing Gorski, the trial court clarified that “[u]nder Pennsylvania law, in order to make out an affirmative defense of contributory negligence, the defendant must show that the plaintiff acted negligently, and that his negligence was a ‘legally contributing cause’ in bringing about the plaintiff’s complained-of injury.” Id. at 7.**

### **Subrogation**

In a case of first impression, the Pennsylvania Supreme Court in Poole v. Workers’ Compensation Appeal Board (Warehouse Club, Inc.), 810 A.2d 1182 (Pa. 2002), held that proceeds from a legal malpractice action are subject to subrogation pursuant to 77 Pa. Cons. Stat. § 671. Plaintiff Poole was injured when he slipped on a patch of ice in front of his employer’s building. Poole received worker’s compensation benefits from his employer. Poole attempted to file a complaint against the owner of the property on which he fell, but his attorney filed the complaint against the wrong persons. The complaint was dismissed and Poole’s cause of action against the owner was barred by the statute of limitations. Poole filed a legal malpractice action against his former counsel. The malpractice action settled and Poole’s employer sought subrogation from the proceeds of the settlement for the amounts it had paid. The Supreme Court held that the employer was entitled to subrogation under 77 Pa. Cons. Stat. § 671, which provides for subrogation where the compensable injury is caused in whole or in part by the act or omission of a third party. Because a plaintiff must demonstrate not merely an injury as a result of the negligence of his former attorney, but also the negligence of the third party which resulted in the underlying injury, an employer may rely on the employee’s legal malpractice action to demonstrate that the compensable injury was caused by a third party. Id.

In 2011, the Supreme Court of Pennsylvania addressed the issue of whether a restoration of employer subrogation rights arising from payment of workers’ compensation benefits also afforded public employers, such as the city, a right of subrogation for benefits paid under the Heart and Lung Act (HLA). Oliver v. City of Pittsburgh, 11 A.3d 960, 961 (Pa. 2011). The relevant facts are as follows: a city employee, injured in a motor-vehicle accident in her capacity as a police officer, sued the city, seeking a judgment declaring that it had no subrogation claim against the civil settlement she received to recover the benefits the city paid her under the HLA Act (53 Pa. Stat. Ann. §§ 637-638. Id. Plaintiff alleged that an employer, such as the city, should be precluded from obtaining reimbursement of HLA benefits paid to employees through subrogation. Id. In response, the city, citing Brown v. Rosenberger, 723 A.2d 745, 747 (Pa. Cmwlth. 1999), argued that the amendments to the Workers’ Compensation Act implemented via Section 25(b) of Act 44 not only restored a right of subrogation for benefits paid under the WCA, but also conferred a subrogation right relative to HLA benefits. In response, Plaintiff argued that the Pennsylvania Motor Vehicle Financial Responsibility Act (MVFRL), 75 Pa.C.S. §§ 1701-1799.7, precluded an employer from obtaining reimbursements. In its decision, the Court, agreeing with Plaintiff, found Section 25(b) repealed Sections 1720 of the MVFRL "insofar as

[it] relate[d] to workers' compensation payments or other benefits under the Workers' Compensation Act." Act of July 2, 1993, P.L. 190, No. 44, §25(b). Id. at 966. The Court noted however, that provision does not impact any anti-subrogation mandates pertaining to HLA benefits. Id.

### Venue

In Zampana-Barry v. Donaghue, 921 A.2d 500 (Pa. Super. Ct. 2007), appeal denied, 596 Pa. 709, 940 A.2d 366 (Pa. 2007), the Superior Court affirmed the trial court's order refusing to transfer venue in a legal malpractice case from Philadelphia to Delaware County. Plaintiff brought claims in the Philadelphia Court of Common Pleas against a lawyer who had represented her in a personal injury against K-Mart and whom she claimed had negligently failed to preserve her right to proceed against K-Mart after it filed for bankruptcy. Defendants, the lawyer and his firm, filed preliminary objections, arguing that venue was improper under Rules 1006(b) and 2179(a)(2) of the Pennsylvania Rules of Civil Procedure, which pertain to venue over a corporation or similar entity. After conducting a hearing, the trial court determined that Defendants regularly conducted business in Philadelphia and overruled the objections.

On appeal, the Superior Court first noted that it was unable to ascertain if Defendant law firm was a corporation or a partnership, and further noted that Rule 2130 contains the provisions relating to venue over partnerships and Rule 2179 the provisions relating to venue over corporations. Both rules, however, allow for venue in a county where the entity "regularly conducts business" and so the Court's ignorance on this point did not impact the appeal. The Court next noted that although Defendants voiced many arguments relating to a request to transfer venue based on *forum non conveniens*, i.e. under Rule 1006(d), their motion actually was based only on improper venue, i.e. Rule 1006(b). Consequently, the Court would only consider whether the trial court abused its discretion under Rule 1006(b).

In addressing this question, the Court applied the required qualitative/quantitative analysis. The Court noted that Defendant lawyer testified that he and the firm were in the business of providing legal representation, that he appeared and would continue to appear in federal courts in Philadelphia as a solicitor for several townships, and that he appeared and would continue to appear in state courts in Philadelphia as a litigator. The firm also submitted an affidavit stating that for the past two years no more than three (3) to five (5) percent of the firm's gross revenue was generated by Philadelphia cases. Based on this information, the Superior Court ruled that the trial court had not abused its discretion in determining that the firm's acts were of sufficient quality and quantity to qualify as regularly conducting business, and so to sustain venue, in Philadelphia.

In a case involving qualitative/quantitative analysis, Kappe v. Lentz, Cantor & Massey, Ltd., 2011 Phila. Ct. Com. Pl. LEXIS 231(C.P. Phila. Aug. 5, 2011), (reversed in part, remanded in part) 39 A.3d 1008 (Pa. Super. Ct. 2012), Plaintiff brought suit against, *inter alia*, Defendant law firm corporation. The court noted that, pursuant to Pennsylvania Rule of Civil Procedure 2179(a), venue against a corporation, was appropriate in the county where its principal place of business is located, a county where it regularly conducts business, the county where the cause of action arose, or a county where an occurrence took place out of which the cause of action arose. The Defendant had its sole office in Chester County, did not maintain a registered office in

Philadelphia County, and the underlying litigation giving rise to Plaintiff's claim occurred in Chester County, the only possible basis for venue in Philadelphia would be Defendant's regular transacting of business in Philadelphia County. The court first held that Defendant's contacts with Philadelphia County did not satisfy the "quality prong" of Rule 2179(a)(2) because Defendant's contacts, namely advertisement and participation in hearings, appellate proceedings and arbitrations in Philadelphia, were not essential to or in direct furtherance of corporate objects, but were rather mere incident acts insufficient to impose venue jurisdiction. Additionally, the court held Defendant's contacts did not satisfy the "quantity prong" of Rule 2179(a)(2) because the 1.7% of revenue its revenue Defendant generated from representing clients in Philadelphia was insufficient to confer venue and compel Defendant to defend itself in Philadelphia. The Superior Court would disagree, overturning the trial court's decision. In a concurring decision, citing to the Superior Court's holding, Judge Strassburger noted, "under our current rules and case law, Lentz Cantor, by deriving 1.7% of its revenue from Philadelphia County by representing clients in courts or arbitrations there, meets the current criteria for regularly conducting business; accordingly, the trial court erred in transferring this case to Chester County." 39 A.3d 1008 (Pa. Super. Ct. 2012).

Courts are still bound by standard jurisdictional principles in determining venue in legal malpractice cases. In Lay v. Bumpass, 2012 U.S. Dist. LEXIS 111728, (M.D. Pa. Aug. 6, 2012), Plaintiff, a resident of the Middle District of Pennsylvania, secured Defendant, an attorney with a business address in Arkansas, to file a personal injury claim in accordance with the Federal Tort Claims Act (FTCA). Plaintiff brought suit against Defendant in the Middle District, alleging Defendant failed to timely provide notice pursuant to the FTCA's terms, resulting in a violation of the statute of limitations. Id. In determining venue, the court recognized that it is the location of the events or omissions giving rise to the claim that are important. Id. at \*4. Plaintiff alleged venue in the Middle District was proper, as a substantial part of the events or omissions precipitating the legal malpractice action arose in the Middle District and the dismissal of the FTCA action, Plaintiff's actual harm, occurred in the Middle District. Id. at \*4. The court rejected this notion, holding that proper venue for a legal malpractice action is not necessarily commensurate with proper venue in the underlying tort claim. Id. The court held that venue depended on the court's personal jurisdiction over Defendant, who did not solicit Plaintiff's business in Pennsylvania, did not travel to Pennsylvania, was not admitted to practice law in Pennsylvania, and did not maintain a business in Pennsylvania. Id. at \*8. Consequently, the court held that Plaintiff failed to set forth contacts sufficient to establish general jurisdiction over Defendant. Id. at \*11. Further, Plaintiff's complaint failed to establish any specific contact with Pennsylvania, aside from the fact of Defendant's representation of Plaintiff, a Pennsylvania resident, in an action in Arkansas. The court held it would be improper to deem the attorney-client relationship between Plaintiff and Defendant, alone, was tantamount to an intentional direction of activity toward Pennsylvania warranting personal jurisdiction over Defendant. Id. Accordingly, the court held that the Middle District was an improper venue for the suit. Id. (Author's Note: Of course, it is important to remember that venue and jurisdiction are distinct concepts).

In Zurich Am. Ins. Co. v. Budzowski, 95 A.3d 339 (Pa. Super. 2014), appeal denied, 2014 Pa. LEXIS 3248 (Pa. Dec. 11, 2014), the Court addressed a venue challenge in a personal injury action in which Plaintiff claimed that the matter, originally filed in Philadelphia, should be

transferred to Dauphin County. The issue before the Court was where venue would be proper when actions were pending in different counties involving a common question of law and fact which arose from the same transaction or occurrence.

In addressing this issue, the Court cited to Pa. R.C.P. 213.1, which states, in relevant part:

a) In actions pending in different counties which involve a common question of law or fact or which arise from the same transaction or occurrence, any party, with notice to all other parties, may file a motion requesting the court in which a complaint was first filed to order coordination of the actions. Any party may file an answer to the motion and the court may hold a hearing.

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Pa.R.C.P. 213.1.

However, the Court determined that in the present matter, the Moving Defendant could not attempt to cite to Pa.R.C.P. 213.1 in attempt to “deprive [Plaintiff] of the benefit of her chosen forum in which to litigate [the] malpractice case.” Id. at 342, see generally Dillion McCandless King Coulter & Graham, LLP v. Rupert, 81 A.3d 912 (Pa. Super. 2013).

Another important case on the issue of venue, though turning on principles of *forum non conveniens*, is Bratic v. Rubendall, 99 A.3d 1 (Pa. 2014), decided by the Pennsylvania Supreme Court in August 2014. In Bratic, appellant-attorneys had on behalf of their clients, filed an earlier lawsuit against appellees in Dauphin County, which action ended with the trial court granting summary judgment in favor of the appellees. The appellees then initiated an action in Philadelphia County, for wrongful use of civil proceedings and abuse of process. The Bratic Supreme Court was left to determine whether the Superior Court<sup>12</sup> erred in reversing the decision of the Philadelphia trial court (the Honorable Mark Bernstein presiding), which had granted the appellants’ application for transfer based upon *forum non conveniens*. The Supreme Court determined that Superior Court erred in reversing the trial court, and so reversed the order from the Superior Court.

The Bratic opinion represents a watershed decision in clarifying what factors a trial court is permitted to consider in assessing petitions to transfer venue for *forum non conveniens* purposes. In holding as it did, the Bratic Court removed the prohibition on trial courts’ consideration of a number of factors that case law subsequent to Cheeseman v. Lethal Exterminator, Inc., 701 A.2d 156 (Pa. 1997), suggesting trial courts could not consider in evaluating a petition to transfer for *forum non conveniens*. For instance, the Bratic appellees argued that the Bratic trial court erred in considering the fact that none of the appellees were from Philadelphia. Yet, the Supreme Court’s opinion in Bratic makes clear that whether a plaintiff is from the venue chosen for their action, *is* a factor which may be considered in resolving a motion for *forum non conveniens*. Bratic, 99 A.3d at 8. Additionally, under Bratic, courts may once again consider their own congestion as a factor in evaluating a motion to transfer venue, in so far as congestion may bear upon the determination of whether a plaintiff’s

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<sup>12</sup> The original Superior Court panel, divided, but affirmed the trial court; however, at argument before the Superior Court, sitting *en banc*, the Superior Court divided in favor of reversal.

chosen venue is oppressive or vexatious. Bratic, 99 A.3d at 8. Further, the Supreme Court's holding in Bratic makes clear that there is no particular form of proof required to make a showing of entitlement to relief in bringing a petition for *forum non conveniens*. As observed by the Supreme Court:

We thus cannot accept appellees' argument that appellants' affidavits were "plainly inadequate to overcome the great deference owed to a plaintiff's choice of forum[.]" Appellees' Brief, at 11. *A petition to transfer venue must be supported by detailed information on the record, but "Cheeseman and Rule 1006(d) do not require any particular form of proof. All that is required is that the moving party present a sufficient factual basis for the petition[, and t]he trial court retains the discretion to determine whether the particular form of proof is sufficient."* Wood [v. E.I du Pont de Nemours & Company, 829 A.2d 707 (Pa. Super. 2003)], at 714 (citing Cheeseman, at 162); see also [Wood], at 714 n.6 (*collecting cases and noting affidavits have never been held necessary to obtain transfer*).

Bratic, 99 A.3d at 9-10 (emphasis added).

By permitting trial courts to consider factors that had earlier been removed from their purview following Cheeseman, the Bratic Supreme Court has signaled to all courts that defendants need not demonstrate "near-draconian" levels of oppression in order to secure transfer, all the while reinforcing the substantial discretion that trial courts have in evaluating petitions to transfer. As the Bratic Supreme Court wrote:

We reaffirm the *Cheeseman* standard, but hold the showing of oppression needed for a judge to exercise discretion in favor of granting a *forum non conveniens* motion is not as severe as suggested by the Superior Court's post-*Cheeseman* cases. . . . there is no burden to show near-draconian consequences.

Id., 99 A.3d at 10. Note too, the Supreme Court's suggestion of increasing indicia of oppressiveness as parties are forced to travel 100 or more miles for plaintiff's selected forum:

As between Philadelphia and adjoining Bucks County, the situation in *Cheeseman*, we speak of mere inconvenience; as between Philadelphia and counties 100 miles away, simple inconvenience fades in the mirror and we near oppressiveness with every milepost of the turnpike and Schuylkill Expressway.

Id., 99 A.3d at 10.

Fessler v. Watchtower Bible and Scott v. Menna and WaWa Inc. are consolidated cases, retrievable at 131 A.3d 44 (Pa. Super. 2015). The Superior Court held it improper to have transferred the actions for *forum non conveniens*. The opinion (J. Jenkins) has a good summary of the post-Bratic requirements.

Richman v. Perelman, 121 A.3d 1136, 2015 Pa. Super. Unpub. LEXIS 1053 (Pa. Super. 2015), is another non- precedential opinion from April 21, 2015 authored by Judge Platt (with

Judges Wecht and Donohue concurring, and Judge Donahue also joining in Judge Platt's opinion), which affirmed preliminary objections to improper venue in Philadelphia and transferred the case to York county. The Superior Court wrote:

We discern no abuse of discretion or error of law in the trial court's determination that Appellee is a resident of York County, and any alleged transactions complained of would have occurred in York. "[I]f there exists any proper basis for the trial court's decision to grant the petition to transfer venue, the decision must stand."

Richman, 121 A.3d 1136, 2015 Pa. Super. Unpub. LEXIS 1053 at \*12 (citation omitted).

Most recently, in Bettwy v. American Premier Underwriters, 2016 WL 5798850 (Pa. Super. 2016) (non-precedential decision), the Superior Court held that the trial court abused its discretion in transferring a personal injury case from Philadelphia County to Blair County. Applying the Bratic requirements and analyzing the totality of the circumstances, the Superior Court concluded that the defendants failed to meet their "heavy burden" to show that trying the case in Philadelphia would be an "oppressive burden," rather than a mere inconvenience. It was not enough that appellant resided and worked in Blair County, the injuries occurred (and were later treated) in Blair County, and that the plaintiff's former co-workers and supervisors resided in Blair County.

The appellate court pointed out that the defense's supporting affidavit failed to show how traveling from Blair County to Philadelphia posed an undue burden or significant disruption in the daily activities of any anticipated witnesses. In other words, the affidavit was "devoid of any facts regarding the witnesses' personal, professional employment and family obligations..." The appellate court noted it was "troubled by the trial court's willingness to infer oppression from travel distance alone under the particular circumstances of this case." In support of its decision, the appellate court highlighted that most, if not all, of plaintiff's former co-workers and supervisors were now retired, and thus, "were less likely to have daily personal, professional, employment and family commitments..." In addition, the appellate court emphasized plaintiff's five affidavits from former co-workers who stated that traveling to Philadelphia would not be overly burdensome. The court also highlighted that medical records could be transferred during discovery without any undue burden, and that testimony of physician witnesses could be preserved by video recording and later presented to the jury at trial. The court also noted that Philadelphia offered access via multiple methods of transportation, and could "more easily accommodate the travel burdens" of expert witnesses from around the United States. Finally, the court noted that five of the defendants' executives (who plaintiff planned to depose) resided in the Philadelphia area.

### **Certificate of Merit**

Pennsylvania Rule of Civil Procedure 1042.3 provides in pertinent part:

- (a) In any action based upon an allegation that a license professional deviated from an acceptable professional standard, the attorney for the Plaintiff, ..., shall file with the complaint or within sixty days after the filing of the

complaint, a certificate of merit signed by the attorney ...  
that either

- (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm .... Pa. R. Civ. P. 1042.3.

In Parkway Corp. v. Margolis Edelstein, 861 A.2d 264 (Pa. Super. Ct. 2004), appeal denied, 912 A.2d 1293 (Pa. 2006), the Superior Court addressed whether a judgment of *non pros* is properly entered upon plaintiff when the Complaint was unaccompanied by a Certificate of Merit, and Plaintiffs failed to request an extension of the filing period. Plaintiffs instituted a claim for legal malpractice after a verdict in a wrongful death action was rendered against them for approximately \$7 million. The complaint was unaccompanied by a Certificate of Merit, and appellants never requested an extension of time in which to file one. Defendants successfully moved for judgment of *non pros*. Thereafter, plaintiffs filed a Petition to Open and/or Strike, which was denied by the trial court.

On appeal, plaintiffs claimed they had substantially complied with the Certificate of Merit requirements because two partners in the law firm had outlined the bases for legal malpractice in the underlying wrongful death suit, and that such an outline satisfied the requirement of a written statement by “an appropriate licensed professional.” In addition, Plaintiffs asserted that verification submitted by their attorney constituted substantial compliance because it was served the same function as the Certificate of Merit. Id. The Superior Court disagreed, reasoning that plaintiffs’ interpretation of an “appropriate licensed professional” was overly broad in that it would encompass almost every member of the firm representing appellants, and would allow certification by parties who have a vested interest in the case. Moreover, the court asserted that attorney verifications are not sufficient substitutes for Certificates of Merit. Verifications can be submitted by any person with sufficient knowledge, information and belief. Pa. R.Civ. P. 1024(c). Therefore, if verifications were appropriate substitutes for a Certificate of Merit, the requirement that the certificate be submitted by an “appropriate licensed professional” would be nullified.

In Moore v. John A. Luchsinger, P.C., 862 A.2d 631 (Pa. Super. Ct. 2004), the Superior Court determined that a praecipe for *non pros* cannot be filed for failure to timely file a Certificate of Merit, or a petition to extend the time for filing, after a Certificate of Merit has already been filed, regardless of whether the certificate was filed late.

In Scaramuzza v. Sciolla, 345 F. Supp. 2d 508 (E.D. Pa. 2004), the United States District Court for the Eastern District of Pennsylvania, sitting in diversity, declared that Rule 1042.3 was controlling substantive state law. The court further concluded that Plaintiff’s failure to file a Certificate of Merit within sixty days of filing original complaint did not warrant dismissal with

prejudice where defendants did not show prejudice from the delay and responded to defendants' motion to dismiss by filing a proper certificate. The court found that plaintiff was entitled to the relief provided by Rule 3051 (relief from entry of judgment for *non pros*) and denied Defendants' Motion to Dismiss. But see Helfrick v. UPMC Shadyside Hospital, 65 Pa. D. & C. 4th 420, 424-425 (Allegheny Co. 2003) (If a defendant was required to show prejudice to withstand a petition to open a judgment of *non pros* against a plaintiff who had failed to timely file the COM, "the petition would almost always be granted. Defendants are not going to be able to show that they were prejudiced by the late filing of a certificate of merit regardless of whether the delay involves 10 days, 30 days, or 90 days. Consequently, the use of a prejudice standard would eliminate the rule's deadlines for filing certificates of merit.")

The United States District Court for the Western District of Pennsylvania has held that Rule 1042.7 (Entry of Judgment of *Non Pros* for Failure to File Certification) is procedural in nature and thus inapplicable to federal practice. Because the Federal Rules of Civil Procedure do not provide for a judgment of *non pros*, the proper procedure in federal court is to treat a motion to dismiss a professional negligence action for failure to comply with Rule 1042.3 as a motion to dismiss, without prejudice. Ward v. Knox, McLaughlin, Gornall & Sennett, No. 08-43 Erie, 2009 WL 693260 (W.D. Pa. Mar. 13, 2009).

The United States District Court for the Eastern District of Pennsylvania did not hesitate to dismiss a legal malpractice case, with prejudice, for failure to file a Certificate of Merit because Plaintiff's claim would nonetheless be time-barred. The trial court dismissed the case pursuant to Fed.R.Civ.P. 12(b)(6), failure to state a claim upon which relief may be granted. Slewion v. Weinstein, No. 10-CV-5325, 2012 U.S. Dist. LEXIS 110527\*1, \*4 (E.D. Pa. Aug. 6, 2012). But see Robles v. Casey, 2011 U.S. Dist. LEXIS 10602, 2011 WL 398203 \*1, (M.D. Pa. Feb. 3, 2011) (declining to dismiss a case, despite Plaintiff's failure to file a timely Certificate of Merit, as Plaintiff's claim was not yet time-barred and dismissal would result in nothing more than the re-docketing of documents already filed in the case and consequent further delay).

Notably, the Third Circuit affirmed the District Court's decision in Slewion in a non-precedential opinion. Slewion, 2012 U.S. Dist. LEXIS 110527(3rd Cir. March 4, 2013) (non-precedential opinion), cert. denied, 134 S. Ct. 176 (U.S. 2013), rehearing denied, 134 S. Ct. 815 (U.S. 2013). The Third Circuit wrote:

In order to proceed with a legal malpractice claim in Pennsylvania, a Plaintiff must file a Certificate of Merit with his complaint or within sixty days thereafter. Pa. R. Civ. P. 1042.3(a)(3). This requirement is a substantive rule and applies in federal court. Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 264-65 (3d Cir. 2011). It is undisputed that, in the two years his case was pending before the District Court, Slewion never filed a Certificate of Merit. Nor did he indicate that he intended to proceed without expert testimony, or that such testimony was unnecessary to advance his legal malpractice claims. *See id.* at 265. Importantly, Slewion did nothing to comply with the certificate of merit requirement or provide a reasonable excuse for his noncompliance, even after Appellees raised the issue in both state and federal court. (Dkt. No. 27, p. 6 (citing Womer v. Hilliker, 589 Pa. 256, 279 (Pa. 2006))).

The District Court correctly noted that, generally, a Plaintiff's failure to comply with the certificate of merit requirement would result in the dismissal of his complaint without prejudice. (Dkt. No. 27, p. 7.) However, Slewion's legal malpractice claims were time-barred by Pennsylvania's two year statute of limitations, see 42 Pa. Stat. Ann. § 5524, as they arose at the latest in January of 2009. Therefore, the District Court properly dismissed Slewion's complaint with prejudice as amendment would have been futile.

Id., 2013 WL 979432 at \*1.

Of note, in Slewion, the plaintiff re-filed his complaint for legal malpractice against the same defendants in 2014. The Third Circuit recently upheld the district court's dismissal based on res judicata, or claim preclusion. The prior order granting defendant's Fed.R.Civ.P. 12(b)(6) motion, with prejudice, was considered a final order. Slewion v. Weinstein, 650 Fed.Appx. 93, 95 (3d Cir. 2016).

In Cuevas v. U.S., No. 09-43J, 2010 WL 1779690, \*3 (W.D. Pa. April 29, 2010), the court addressed whether *pro se* prisoner Plaintiff substantially complied with the certificate of merit requirement.

In Liggon-Redding v. Estate of Robert Sugarman, 659 F.3d 258 (3d Cir. 2011), the United States Court of Appeals for the Third Circuit found Pennsylvania's Certificate of Merit statute was substantive law. Although district courts recognized Rule 1042.3 was substantive law, no precedential Third Circuit opinion previously addressed the issue. The Court applied the Chamberlain v. Giampapa, 210 F.3d 154 (3d Cir. 2000) three-part test to determine whether the statute was procedural or substantive. The Court found there was no direct collision between the Certificate of Merit statute and Federal Rules of Civil Procedure 7, 8, 9, 11 or 41(b). The Court also found failure to apply the Certificate of Merit statute would be outcome determinative and failure to apply the statute would "frustrate the twin aims of the [Erie Rail Road v. Tompkins, 304 U.S. 64 (1938)] Rule: discouraging forum shopping and avoiding inequitable administration of the laws." Liggon-Redding, 659 F.3d at 264. The Court noted that if a Plaintiff fails to comply with the statute in state court, a Defendant may file a Praecipe for Entry of Judgment of *non pros*, which would result in dismissal of the Plaintiff's claims. Id. "Dismissing a claim or case can certainly determine the outcome of the matter." Id.

The Court also reasoned failing to apply the statute in federal court would encourage forum shopping because, if the rule was found procedural and inapplicable in federal court, it would theoretically be easier to pursue a frivolous or meritless professional liability cause of action in federal court in diversity or pendent jurisdiction cases than in state courts. Id. Failure to apply the rule also would result in an inequitable administration of the law. If the state rule did not apply, a Defendant in federal court would be forced to engage in additional litigation and expense in a non-meritorious malpractice suit simply because the Plaintiff was from a different state. Id. In addition, non-diverse Plaintiffs would be required to follow the rule in state court, but diverse Plaintiffs could avoid the rule in federal court. The Court also found there was no countervailing federal interest that would prevent the application of the rule. Id.

In Liggon-Redding, the Third Circuit found the *pro se* Plaintiff complied with the Rule when she filed two documents labeled certificate of merit stating expert testimony would not be required to prove her claim. 659 F.3d at 265. It found the district court erred when it characterized her statements as an argument that she was not required to file a certificate of merit, rather than a statement that expert testimony was not required, which was permitted under Rule 1042.3(a)(3). Liggon-Redding, 659 F.3d at 265. The Court found a court cannot reject a filing under Rule 1042.3(a)(3) in favor of a filing under 1042.3(a)(1). Id. The Third Circuit noted that if a certificate asserts that no expert testimony is required, the Plaintiff is prohibited from offering expert testimony at a later date, absent “exceptional circumstances.” Id.

In Perez v. Griffin, 2008 WL 2383072 (M.D. Pa. June 9, 2008), aff’d, 304 Fed. Appx. 72 (3d Cir. 2008) (not precedential), cert. denied, 129 S.Ct. 2439 (2009), the *pro-se* plaintiff failed to file a Certificate of Merit in accordance with Rule 1042.3. The court noted that plaintiff failed to file a Certificate of Merit or request an extension and explained that “[f]ailure to file either a Certificate of Merit under Rule 1042.3(a) or motion for extension under Rule 1042.3(d) is fatal unless the Plaintiff demonstrates that his or her failure to comply is justified by a ‘reasonable excuse.’” Plaintiff maintained that the attorney-defendant’s actions constitute common law fraud, not legal malpractice, and as such no Certificate of Merit is required. In dismissing Plaintiff’s legal malpractice claim, the court reasoned that Plaintiff’s allegations of fraud cannot serve as a ‘reasonable excuse’ for his failure to file a Certificate of Merit.

The Certificate of Merit requirement applies regardless of whether plaintiff files the claim as a malpractice action, fraud action, or breach of contract action. Donnelly v. O’Malley & Langan, P.C., 370 Fed. Appx. 347 (3d Cir. 2010).

In Bruno v. Erie Ins., Co., 106 A.3d 48 (Pa. 2014) (2014), the Pennsylvania Supreme Court addressed among other things, the issue of whether a Certificate of Merit was necessary in situations where there is no direct client relationship with a licensed professional. The Court determined that a Certificate of Merit in a professional liability claim is necessary *only if* the Plaintiff is in a direct client relationship with the licensed professional.

The facts of the case, in relevant part, are as follows: The Brunos filed a claim with their homeowners’ insurance after discovering mold in their home during their remodeling. The homeowner’s policy included coverage for mold and other related issues. As part of the original claim adjustment, Erie hired an engineer to inspect the mold and to provide an opinion based on whether there was mold, and if so, how much cost would be required to remedy it. The engineer, led Mr. Bruno (and therefore his family) to believe that the mold was harmless, and that the Brunos would be able to continue with their renovations, without worry regarding the mold. The Brunos thereafter began experiencing multiple health-related problems attributed to the mold and as a result got a second opinion at their own expense. The second engineer determined there to be a problem. As a result, the Brunos filed a complaint against both Erie and the original engineer, alleging, among other things, negligence for failing to recognize the nature and severity of the mold problem and creating a dangerous condition. Defendants in turn, argued that Plaintiff’s claims should be stricken due to their failure to file a Certificate of Merit. In ruling on this specific issue, the Court looked to Pa.R.C.P. 1042.1, which provides, in relevant part, as follows:

Rule 1042.1. Professional Liability Actions. Scope. Definition.

(a) The rules of this chapter govern a civil action in which a professional liability claim is asserted by or on behalf of a patient or client of the licensed professional against

(1) a licensed professional, and/or

(2) a partnership, unincorporated association, corporation or similar entity where the entity is responsible for a licensed professional who deviated from an acceptable professional standard, and

In its review, the Court determined it was evident that the language of Rule 1042.1 expressly cabins the application of the requirements of Rule 1042.3 (as listed above) for the filing of a Certificate of Merit to *only* those professional liability claims which are asserted against a licensed professional "by or on behalf of a patient or client of the licensed professional." Accordingly, because the [first] engineer was hired by Erie, not the Brunos, the Brunos were not a patient or client and thus were not required to file a Certificate of Merit.

**Requirement and Substance of Expert Testimony / Expert Qualification**

In the context of legal malpractice, under Pennsylvania law, the Plaintiff must put on expert testimony to establish the relevant standard of care and noncompliance therewith. Int'l Land Acquisitions, Inc. v. Fausto, 39 Fed. Appx. 751 (3d Cir. 2002) (not precedential); see also Ballinger v. Bock & Finkelman, 823 A.2d 1020 (Pa. Super. Ct. 2003), aff'd, 823 A.2d 1020 (Pa. 2003) (trial court properly granted summary judgment due to plaintiff's failure to present expert testimony).

Only where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of ordinary experience and comprehension of non-professional persons, are expert witnesses unnecessary. Antonis v. Liberati, 821 A.2d 666 (Pa. Commw. Ct. 2003), appeal granted, 842 A.2d 407 (Pa. 2004) (no expert needed to establish that attorney failed in duty to secure proper recording of client's mortgage); see also Amoroso v. Morley, No. 00-3496, 2002 WL 461999 (E.D. Pa. Mar. 25, 2002); Philadelphia Waterfront Partners, L.P. v. Churchill Dev. Group, 2007 Phila. Ct. Com. Pl. LEXIS 175 (Pa. C.P. 2007) (expert testimony required in case involving complex real estate transactions and an attorney's duties in representing a client in said real estate transactions); see also, Vadovsky v. Treat, 2010 WL 3766810 (M.D. Pa. Sept. 21, 2010), report and recommendation adopted, 2010 WL 3766810 (M.D. Pa. Sept. 21, 2010) (expert testimony required when Plaintiff's allegations were that Defendant attorney breached "the duty to timely resolve the case, the duty of diligence and the duty of honest and timely dealing with the client").

Expert testimony is also required to demonstrate that plaintiff would have won the underlying case had defendant not been negligent. Int'l Land Acquisitions, 39 Fed. Appx. 751.

Expert testimony in a legal malpractice case must be based on facts in the record, and exclusion of expert testimony that is without proper foundation is not excluded in error. Jones v. Wilt, 871 A.2d 210 (Pa. Super. Ct. 2005) (trial court correctly excluded expert testimony premised on fact for which there was no support in the record; order granting summary judgment in favor of Defendant lawyer was affirmed).

In Frost v. Fox Rothschild, 18 Pa. D. & C.5th 295, 2010 Phila. Ct. Com. Pl. LEXIS 346, No. 03292 (Nov. 12, 2010), Plaintiff alleged legal malpractice claims of negligence against his divorce attorney, as well as a claim of breach of fiduciary duty. Defendant filed a motion for summary judgment, which raised the issue of whether Plaintiff was required to provide an expert witness and report in support of his claims. Noting that “expert testimony becomes necessary when the subject matter of the inquiry is one involving special skills and training not common to the ordinary lay person,” the court addressed each of the Plaintiff’s claims to assess the need for an expert. Id. quoting Storm v. Golden, 371 Pa. Super. 368, 376, 538 A.2d 51, 64 (1988). The court determined that whether Defendant’s analysis and recommendation of a settlement agreement was reasonable, whether Defendant failed to exercise reasonable care and skill in choosing not to obtain a vocational expert, whether Defendant should have filed a post-trial motion on the issue of the trial court’s right to impose an obligation of evaluation of Plaintiff’s business, and whether Defendant should have had an expert do a valuation of Plaintiff’s personal effects were all issues that required an expert witness, which Plaintiff failed to produce. Therefore, the court granted summary judgment in Defendant’s favor on those claims. Plaintiff’s remaining claims were determined to have no supporting evidence, or evidence that directly contradicted Plaintiff’s position and were, therefore, dismissed.

Courts are willing to scrutinize the substance of an expert’s testimony when evaluating whether such testimony is sufficient to support Plaintiff’s claims. In Cruickshank-Wallace v. Klehr, Harrison, Harvey, Branzburg & Ellers LLP, 2011 Phila. Ct. Com. Pl. LEXIS 374 (Pa. C.P. 2011), Defendants represented Plaintiff in an underlying action in which the claims were dismissed before trial. Plaintiff then initiated a legal malpractice claim, alleging Defendant failed to plead and prosecute her claims properly in the underlying action, and failed to disclose to Plaintiff a conflict of interest during the course of the underlying action. The expert Plaintiff presented in support of her claim opined that Defendant breached its duties by laboring under a conflict of interest, failing to properly plead abuse of process, and failing to take discovery in the underlying action, citing the facts giving rise to the claim and relevant malpractice law in support. The court held that the expert’s opinions regarding failure to take discovery and laboring under a conflict of interest included sufficient evidence of duty and breach to support that claim. However, because the expert’s opinion that the abuse of process claim in the underlying action was not properly plead since it did not offer any facts or law in support of this notion, it was insufficient to sustain Plaintiff’s claim that Defendant breached any professional duty to Plaintiff. Specifically, the expert failed to describe what Defendants improperly omitted or misstated in the pleadings in the underlying action, instead making only vague and non conclusory statements. Importantly, the court then held that, in order to withstand a motion for summary judgment, Plaintiff was required to offer expert evidence to prove Defendant’s breaches of duty caused Plaintiff not to obtain her damages claimed in the underlying action, a complicated issue requiring a determination of the viability of Plaintiff’s legal claims and the sufficiency of Defendant’s professional acts in the underlying action. Plaintiff’s expert testimony

on this point was insufficient because it failed to describe how Defendant's breaches of duty caused the dismissal of the underlying action, or increased the risk that the underlying action would be wrongfully dismissed.

Other decisions have emphasized breach of fiduciary duty, as a matter that is not within the range of ordinary experience and comprehension of non-professional persons, and is one matter which requires the support of expert testimony. See, e.g., Bancroft Life & Cas. ICC, Ltd v. Intercontinental Mgmt., Ltd, 2012 U.S. Dist. LEXIS 160518, 2012 WL 5458941 (W.D. Pa. Nov. 8, 2012) (holding expert testimony was necessary to support Plaintiff's claim against Defendant attorney, which alleged breach of fiduciary duty by failing to inform Plaintiff that Defendant was never licensed to practice law in Pennsylvania and failing to ensure Plaintiff was in compliance with all laws governing insurance companies in St. Lucia, because the claims involved issues beyond the knowledge of the average layperson); ACC Fin. Corp. v. Law Office of Byck, 2010 Phila. Ct. Com. Pl. LEXIS 415 (Pa. C.P. 2010) (holding Plaintiff's breach of fiduciary duty claim required the support of expert testimony because the jury would need to consider whether Defendant law office breached a standard of care by failing to collect on thousands of consumer credit card accounts in collection actions which, by Plaintiff's own admission, was an unpredictable enterprise within the realm of consumer debt assignments, a field which itself required specialized knowledge to understand).

In Amato v. Bell & Gossett, 116 A.3d 607 (Pa. Super. Ct. 2015), rehearing denied, 2015 Pa. Super. LEXIS 352 (Pa. Super. June 18, 2015), an asbestos exposure case, the Superior Court considered whether the trial court erred in, inter alia, excluding certain expert testimony. More particularly, defendant asserted that the trial court erred by excluding the testimony of its psychology expert, Dr. Weaver, whose testimony was being offered in an attempt to refute the plaintiffs' identification, 40 years after the fact, that Cranite, a sheet gasket material, along with other asbestos-related material, was present in their workplaces. Defendant Crane offered Dr. Weaver "to address the complex intricacies of refreshing human recollection, which are particularly apposite in an asbestos case, where the plaintiff's lawyer, not plaintiff, often controls the product identification evidence." This testimony was critical to Crane, because Crane maintained that "neither Crane Co. nor Cranite was ever identified as a qualified supplier or product for use on Navy ships" and, thus, would not have been present at the Navy Yard, despite claims to the contrary. Plaintiff, in response argued a jury is "fully equipped, by virtue of its collective knowledge and experience," to assess the reliability of an eyewitness, and that "[t]he workings and reliability of memory and the possibility of forgetting over time are not concepts that elude the jury without the aid of expert testimony." Id. at \*7-8.

The Superior Court ruled that the trial court properly excluded Dr. Weaver's testimony, finding that expert testimony would not have aided the jury in evaluating the reliability of his testimony. The Superior Court reasoned that "the average person understands not only that memories fade and people forget, but that the human mind may be susceptible to suggestion." Accordingly, the trial court did not abuse its discretion in excluding the testimony of Dr. Weaver.

Most recently, on February 1, 2016, the Supreme Court granted allocatur in Amato only as to the issue of whether under the court's recent decision in Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014), a defendant in a strict-liability claim based on a failure-to-warn theory has

the right to have a jury determine whether its product was “unreasonably dangerous.” Amato v. Bell & Gossett, 130 A.3d 1283 (Pa. 2016).

### **Immunity From Liability**

In a case involving a question of first impression, the Third Circuit Court of Appeals in Carino v. Stefan, 376 F.3d 156 (3d Cir. 2004), considered the issue of whether an attorney hired by a labor union to represent a union member in an arbitration hearing as part of a collective bargaining agreement is immune from liability to the member for legal malpractice.

In Carino, an attorney, Stefan, was hired by the United Food and Commercial Workers International Union (“Union”) to represent Plaintiff, Ms. Carino, in an employment dispute against Prudential Insurance Company of America (“Prudential”). Union had entered into a collective bargaining agreement with Prudential. The Union was dissatisfied by the initial grievance procedure and exercised its right to have the matter arbitrated. Id. at 158. Shortly before the arbitration was to commence, Stefan contacted Ms. Carino to discuss the matter. Id. Stefan asked Carino what she hoped to gain from the arbitration, to which she replied with several conditions, including having her employment record cleared, having a federal investigation closed, and having her pension reinstated. Id. Stefan stated that he would be able to satisfy her wishes in return for her withdrawal of her grievance against Prudential. Ms. Carino released Prudential, but none of her concessions were ever granted. Id. The trial court dismissed Carino’s claim under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The Third Circuit agreed, stating that the Labor Management Relations Act barred the suit. The court relied on the Supreme Court’s interpretation of Section 301(b) of the LMRA, 29 U.S.C. § 185(b), and Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) (overruled on other grounds) and its progeny, to conclude that “§ 301 of the LMRA immunizes attorneys employed by or hired by unions to perform services related to a collective bargaining agreement from suit for malpractice.” Carino, 376 F.3d at 162.

In Cole v. Beros, No. 2:08-cv-541, 2008 WL 2225825 (W.D. Pa. May 29, 2008), the district court held that the LMRA “[i]mmunizes an attorney hired by the union against legal malpractice claims from union members.” By way of background, Plaintiff was suddenly hospitalized and required surgery, causing her to remain out of work for three weeks. Plaintiff alleged that she called Defendants, the union president and also a union attorney, Steve Jordan, and was instructed to request medical leave. Mr. Jordan subsequently assisted Plaintiff in requesting medical leave, but her leave was ultimately denied. Plaintiff alleged that Mr. Jordan’s negligence in assisting with her medical leave resulted in denial of benefits under the Federal Family and Medical Leave Act. In holding that Mr. Jordan was immune to such suit, the court explained that Mr. Jordan was acting in his role as union attorney when he allegedly assisted in connection with her labor grievance proceeding.

The Supreme Court of Pennsylvania held that the judicial privilege does not absolutely immunize an attorney from liability for legal malpractice for publishing to a reporter a complaint that had already been filed. Bochetto v. Gibson, 860 A.2d 67 (Pa. 2004). The judicial privilege grants absolute immunity to persons for “communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought.” Id. at 71 (quoting Post v. Mendel, 507 A.2d 351, 355 (Pa. 1986)). Because the attorney published the

complaint to a reporter outside the context of judicial proceedings and publishing it was not relevant to the proceedings, the communication was not protected by the judicial privilege. Id. at 73.

### **No Liability Under UTPCPL**

In Beyers v. Richmond, 937 A.2d 1082 (Pa. 2007), the Supreme Court of Pennsylvania held that (1) Unfair Trade Practices and Consumer Protection Law (UTPCPL) does not apply to an attorney's misconduct, and (2) the Rules of Professional Conduct and Rules of Disciplinary Enforcement provided the exclusive remedy for attorneys' misconduct. The case arose from the admitted conversion of funds by an associate of Appellants' Pennsylvania law firm in the underlying case, for which the firm was held vicariously liable. Id. at 1084. Appellee contended that deductions reflected on her settlement distribution schedule were improper. See Id. at 1085. Appellee filed suit against the firm alleging, *inter alia*, negligence by her former attorneys and violation of consumer protection laws (UTPCPL). See Id. A bench trial was held on the sole issue of damages and the court found in favor of appellee as to all claims. See Id.

The Superior Court affirmed the decision of the trial court, and adopted its reasoning that "appellants' actions did not arise from the practice of law, and therefore, appellants could not use their profession as a shield from the application of the UTPCPL." Id. In addressing applicability of the UTPCPL to attorney conduct, the Supreme Court stated that "[a]lthough we find the egregious conduct of appellants in this case to be reprehensible, we decline to hold that Pennsylvania's UTPCPL applies to an attorney's conduct in collecting and distributing settlement proceeds. Applications of the UTPCPL under these circumstances would encroach upon this Court's exclusive power to regulate the practice of law in this Commonwealth." Id. at 1085-86. In reaching its holding, the Pennsylvania Supreme Court pointed out that the Superior Court of Pennsylvania had held that the UTPCPL does not apply to treatment provided by physicians and that it is clear that the legislature did not intend the Act to apply to medical services rendered by physicians. See Id. at 1088. Extending this reasoning to professional services provided by attorneys, the Supreme Court held that the UTPCPL does not apply to services provided by attorneys. See Id. Additionally, to support its holding, the Pennsylvania Supreme Court relied on the power granted to it by Article V, Section 10(c) of the Pennsylvania Constitution, which grants exclusive power to the Supreme Court to regulate attorney conduct. See Id. at 1089.

Thus, the Pennsylvania Supreme Court held that the Pennsylvania Rules of Professional conduct and Rules of Disciplinary Enforcement "exclusively address the conduct complained of in this case." See id. at 1092 (citing Pa. Rules of Prof'l Conduct 1.5(c), 1.15(b), 8.4(b) and 8.4(c)). Therefore, the Court found that the appellants' conduct in "collecting and distributing settlement proceeds does not fall within the purview of the UTPCPL, but rather within this court's exclusive regulatory powers." Id. at 1093.

In Strayer v. Bare, 2008 WL 1924092 (M.D. Pa. Apr. 28, 2008), Plaintiff, Pennsylvania Lawyers Fund for Client Security ("PLFCS"), made payments to a number of former clients of the Frankel firm in exchange for subrogation agreements and assignment of rights. Those who assigned their rights to the PLFCS had received awards from personal injury litigation which were placed in the Frankel firm's trust account, but, the funds were never paid to the clients. Id.

at \*2. Claims were filed with the PLFCS by these people and they received a portion of the funds which the Frankel firm allegedly misappropriated. Plaintiff Strayer was involved in a personal injury litigation which resulted in a settlement of \$530,000, which was paid to the Frankel firm, but, never properly paid out to Strayer. Id. at \*3. Plaintiffs brought suit against the Frankel firm and other Defendants, alleging, *inter alia*, a claim under the UTPCPL. Defendants filed a motion to dismiss the complaint and the court, as to the UTPCPL claim, granted the motion to dismiss and held that the misappropriation of client funds “[d]oes not fall within in the purview of the UTPCPL, but rather within the Court’s exclusive regulatory powers.” Id. at \*41.

Other decisions have emphasized that attorney immunity under the UTPCPL does not extend to attorneys whose debt collection practices are challenged under the statute. In Yelin v. Swartz, 790 F. Supp. 2d 331, 333 (E.D.Pa. Mar. 24, 2011), Plaintiff brought suit against Defendant law firm and attorneys, alleging that debt collection practices used by Defendant violated, *inter alia*, the UTPCPL. Defendants moved to dismiss, arguing attorney immunity from the UTPCPL pursuant to Beyers, *supra*. Id. at 337. Plaintiff contended that Beyers was a plurality opinion, and noted that Beyers involved Defendants’ mishandling of their own client’s funds, while Defendants in the instant case were not Plaintiff’s attorneys and were attempting to collect a debt owed to a third party. Id. Plaintiff averred this distinction was important because the Eastern District of Pennsylvania had previously allowed for the application of the UTPCPL to attorneys engaged in debt collection. Id. The court noted that the Supreme Court in Beyers did not hold that an attempt to collect a debt constituted the practice of law, but rather acknowledged that debt collection was “an act in trade or commerce” within the meaning of the UTPCPL. Id. at 337-38 (citing Beyers, *supra*, 937 A.2d at 1089). Consequently, the court continued, if a complaint did not allege a Defendant committed misconduct during the course of practicing law, the mere fact that the Defendant happened to be an attorney would not trigger immunity pursuant to the UTPCPL. Id. at 338. Because Plaintiff was challenging Defendants’ debt collection practices, and not the adequacy of their legal representation, the court held application of the UTPCPL to Defendants would not infringe upon the Pennsylvania Supreme Court’s exclusive power to regulate attorneys, and denied Defendants’ motion to dismiss. Id. See also Fratz v. Goldman & Warshaw, P.C., 2012 U.S. Dist. LEXIS 148744 (E.D. Pa. Oct. 16, 2012) (holding that the UTPCPL applied to Defendant law firm because Plaintiff challenged Defendant’s debt collection practices and not the adequacy of their legal representation); Beckworth v. Law Office of Thomas Landis, LLC, 2012 U.S. Dist. LEXIS 55007, 2012 WL 1361671\_\*1, \*7 (E.D. Pa. Apr. 18, 2012) (holding that Plaintiff had identified Defendant’s debt collection attempts as an “act in trade or commerce” within the meaning of the UTPCPL and had consequently properly stated a claim under the UTPCPL. Wilcox v. Bohmueller, 2011 Pa. Dist. & Cnty. Dec. LEXIS 403 (Pa. County Ct. 2011)(holding Defendant attorney immune from prosecution under the UTPCPL because Defendant’s actions challenged by Plaintiff, namely the collection and distribution of settlement proceeds, were part of the practice of law and not, as Plaintiff alleged, tantamount to selling a product on behalf of or in connection with a company).

In 2014, the Supreme Court of Pennsylvania considered whether the “UTPCPL” defines a “person” subject to liability as including both *private* entities and *political* subdivision agencies in Meyer v. Cmty. College of Beaver County, 93 A.3d 806 (Pa. 2014).

More recently, in Bernstein v. Keaveney Legal Group, 2017 WL 2180306 (E.D. Pa., May 18, 2017) the trial court denied, in part, defendant law firm's 12(b)(6) motion to dismiss plaintiff's claim for, *inter alia*, violation of the UTPCPL. The court concluded, in pertinent part, that the law firm was not subject to immunity under the UTPCPL for the conduct of a non-attorney salesperson employed by the law firm. The sales person counseled plaintiff about securing a loan modification in a mortgage foreclosure action, and then the law firm failed to timely submit the application. The court concluded that only plaintiff's allegations based on the conduct of the non-attorney salesperson would survive the motion to dismiss under the UTPCPL.

Most recently, in Machles v. McCabe, Weisberg & Conway, P.C., 2017 WL 5172516 (E.D. Pa., November 7, 2017) the trial court denied the defendant law firm's 12(b)(6) motion to dismiss plaintiff's claims under the UTPCPL. The court determined that that plaintiff was alleging improper debt collection practices of the defendant bank's legal counsel (defendant law firm); therefore, the acts complained of were "acts of trade or commerce" within the definition of the UTPCPL and [were] not exempt from its coverage."

### Disciplinary Actions – Offensive Collateral Estoppel Applies

In Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47 (Pa. 2005), the Pennsylvania Supreme Court held that, under the circumstances of the case, the doctrine of collateral estoppel could be applied offensively in a disciplinary matter against an attorney. The ODC's petition for discipline alleged that the respondent had engaged in fraud by misappropriating family assets, and relied upon the civil verdict previously entered against the respondent. The civil litigation arose from a dispute between the lawyer and his sisters and involved the three siblings' inheritance. A jury found Defendant-attorney liable for breach of fiduciary duty, unjust enrichment and fraud. The trial court in the civil action ruled that the lawyer's total liability was over \$3.6 million, which included \$500,000 in punitive damages.

In the subsequent disciplinary action, the Hearing Committee ultimately ruled that the doctrine of collateral estoppel precluded the respondent from relitigating the issue of whether he had engaged in fraud, and recommended that he be disbarred. On the initial appeal, the Supreme Court vacated the Board's Order and remanded the matter to the Discipline Board and instructed the Board to apply the doctrine of collateral estoppel as set forth in ODC v. Duffield, 644 A.2d 1186 (Pa. 1994). On remand, the Board ruled that collateral estoppel applied to this case and that the misappropriation of \$2.4 million constituted dishonest and egregious conduct warranting disbarment. Respondent filed a request to present oral argument pursuant to Pa. Rule D. Ethics 208(e)(2), which the Supreme Court granted.

In its December 2005 Opinion, the court noted that it had previously ruled, in Duffield, that the doctrine of collateral estoppel could be asserted defensively in a disciplinary action. The court acknowledged it had not yet addressed whether the doctrine could be applied offensively to establish professional misconduct by a lawyer, but concluded that, when fairness dictated, there was no prohibition to doing so, even with respect to a civil case. Citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-331 (1979), the court noted that the United States Supreme Court had crafted four factors to examine to ensure fairness in application of the doctrine, and concluded that these factors were satisfied in this case. The Court further emphasized that when the

elements of the doctrine were satisfied, it then made its own determination as to whether the findings in the previous action constitute professional misconduct, and an independent determination as to what sanction is appropriate.

The Court concluded that elements of the doctrine were satisfied in this case, and that the Disciplinary Board had properly applied it. It also determined that the facts found in the civil fraud case constituted professional misconduct and held, specifically, that the lawyer's actions in defrauding his sisters of family assets violated Pennsylvania Rule of Professional Conduct 8.4(c), which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit and misrepresentation. Finally, the Court held that this misconduct warranted disbarment. Duffield, 537 Pa. at 500. It noted that an aggregating factor was that the lawyer had made no voluntary payment on the civil judgment, which had been final for several years.

### **Suspension of License - Interplay Between State and Federal Authority**

In Surrick v. Killion, 449 F.3d 520 (3d Cir. 2006), the Third Circuit addressed the peculiar situation of an attorney who was licensed to practice before the District Court for the Eastern District of Pennsylvania, but was not licensed to practice before the Pennsylvania state courts. In Surrick, a Pennsylvania attorney, Robert B. Surrick, was suspended from the Pennsylvania Bar for five years following disciplinary proceedings. Id. at 522. Subsequently, the District Court ordered a reciprocal thirty-month suspension of his license to practice before the federal courts. Id. at 533. Following his readmission to the Federal Bar (and while his Pennsylvania license was still suspended), Surrick sought a declaratory judgment from the District Court allowing him to open a law office in the state of Pennsylvania, for the sole purpose of supporting his practice before the federal courts, without fear of reprisal from the Pennsylvania Office of Disciplinary Counsel (ODC). Id. at 525.

The ODC opposed Surrick's attempt to find relief before the federal courts, arguing that as a matter of state sovereignty, the Commonwealth of Pennsylvania retained the authority to regulate the practice of law within its borders without federal interference. The District Court ultimately ruled in favor of Surrick, and allowed him to open a law office in Pennsylvania for the sole purpose of handling cases before the federal courts, subject to certain conditions (most notably, he was compelled to comply with all Pennsylvania procedures for reinstatement to the state bar, he was prohibited from posting signs outside of his office or anywhere else in public and he was required to indicate on his letterhead that he was not licensed to practice before the state courts in Pennsylvania). Id. at 522. The ODC also raised several justiciability arguments in opposition to Surrick's argument for a declaratory judgment, which were denied.

Departing from (although not expressly overruling) the Pennsylvania Supreme Court's pronouncement in Office of Disciplinary Counsel v. Marcone, 855 A.2d 654 (Pa. 2004), cert. denied, 543 U.S. 1151 (2005), that an attorney is not permitted to open a law office in the state of Pennsylvania for the purpose of practicing before the federal courts if his Pennsylvania license is suspended, the Third Circuit Court of Appeals upheld the District Court's entry of a declaratory judgment in favor of Surrick (subject to the conditions noted above), and held that under the Supremacy Clause of the United States Constitution, a state may not prohibit an attorney

admitted to the bar of a federal district court, but suspended from the state bar, from maintaining a legal office for the sole purpose of handling federal cases. Id. at 534.

Arriving at this holding, the court explained that the central issue of this case was whether a state law prohibiting Surrick from maintaining a law office was preempted by the exclusive authority vested in the Eastern District of Pennsylvania, under federal law, to determine who may practice law before it. The court started with the proposition that the establishment of a law office is necessary for the effective practice of law. The court held, in turn, that the state law prohibiting Surrick from maintaining a law office in Pennsylvania would effectively prohibit him from practicing before the federal courts in Pennsylvania, and would thus place “additional conditions,” not contemplated by congress, on the Eastern District’s ability to determine who is permitted to practice before it. Id. at 532. In other words, the court was concerned that if the state restriction were upheld, it would be necessary for Surrick to be admitted to practice in Pennsylvania before he could be permitted to practice before the federal courts in Pennsylvania, thus undermining the power retained by the District Court under federal law. Under principles of federalism, the Third Circuit thus reasoned that the Commonwealth of Pennsylvania could not wield such power over the United States Congress, and ruled that the Pennsylvania law prohibiting Surrick from establishing a law office in Pennsylvania, under the facts of this case, was preempted by federal law. Id.

It should also be noted that the Third Circuit gave no credence to the ODC’s argument that Surrick should be prohibited from maintaining a legal office in Pennsylvania with a suspended Pennsylvania license because Surrick would be handling federal cases based predominantly on diversity of jurisdiction and would therefore essentially be practicing Pennsylvania law. Rejecting this argument, the Court explained that it was not willing to base its decision whether or not to allow Surrick to open a law office in Pennsylvania on the particular facts of each case that Surrick might handle.

### **Disqualification of Trial Counsel in Civil Case – Not Immediately Appealable**

In Vaccone v. Syken, 899 A.2d 1103 (Pa. 2006), the Pennsylvania Supreme Court addressed the issue of whether an order disqualifying trial counsel in a civil case is an interlocutory order, which is not immediately appealable. In Vaccone, counsel for Plaintiffs in an attorney malpractice action was disqualified by the trial court because he was scheduled to appear as a witness in the case and because he had previously served as co-counsel with Defendant attorney in the underlying matter, thus giving rise to a conflict of interest. Plaintiffs appealed the trial court’s order to the Superior Court, but the Superior Court quashed the appeal as interlocutory and unappealable. Plaintiffs then appealed to the Pennsylvania Supreme Court. Id. at 1105.

Upholding the Superior Court’s Order quashing Plaintiff’s appeal as interlocutory, the Pennsylvania Supreme Court explained that in determining whether the disqualification of trial counsel in a civil matter is immediately appealable, the court must determine whether such an order is a “collateral order” under Pennsylvania Rule of Civil Procedure 313, and therefore appealable before a final judgment is rendered. The Court explained that the collateral order doctrine allows for immediate appeal of an order which:

(1) is separable from and collateral to the main cause of action; (2) concerns a right too important to be denied review; and (3) presents a claim that will be irreparably lost if review is postponed until final judgment in the case.

See Pugar v. Greco, 394 A.2d 542, 545 (Pa. 1978).

Holding that the disqualification of trial counsel in a civil case does not qualify as a collateral order, the Supreme Court first noted that under Pennsylvania law, an order removing counsel in a criminal case is interlocutory and not immediately appealable. See Commw. v. Johnson, 705 A.2d 830 (Pa. 1998). The court then analyzed the disqualification of trial counsel in a civil case in light of the three factors considered in determining whether an order is collateral to the proceeding, and concluded that: (1) in this case, an order disqualifying counsel could not be separated from the merits of the case; (2) although Plaintiffs would be inconvenienced if they were compelled to find new counsel, they would not be unable to find substitute counsel; and (3) Plaintiffs would not irreparably lose their right of review of the disqualification order, as the Superior Court could order a new trial on appeal if it saw fit to do so, with Plaintiffs free to choose their counsel as they pleased. The Supreme Court specifically held, in turn, that “a trial court order disqualifying counsel in a civil case is an interlocutory order.” Vaccone, 890 A.2d at 1108; see also, Commonwealth v. Knauss, No. CR-5595-2010, 2012 Pa. Dist. & Cnty. Dec. LEXIS 65 (Lehigh Ct. Com. Pl. March 12, 2012) (in case involving, *inter alia*, attempt by criminal Defendant to proceed *pro se*, noting “Claims regarding counsel have been treated as interlocutory and unappealable.”). See also Commonwealth v. Scarborough, 64 A.3d 602 (Pa. 2013) (Effective March 7, 2011, the Rules of Appellate Procedure were amended to provide that such challenges should proceed by petition for allowance of appeal).

To be immediately appealable, a trial court order must be either a final order under Pa.R.A.P. 341, or a collateral order under Pa. R.A.P. 313. Dougherty v. Phila. Newspapers, LLC, 85 A.3d 1082, (Pa. Super. Ct. 2014), citing Vaccone v. Syken, 899 A.2d at 1106. For the collateral order doctrine to apply, the Pennsylvania Superior Court has delineated three requirements that must be satisfied (as listed above):

- (1) The order must be separable from and collateral to the main cause of action;
- (2) it must involve a right that is too important to be denied review; and
- (3) if review is postponed until final judgment, the claim will be irreparably lost.

see also Rae v. Pennsylvania Funeral Directors Association, 977 A.2d 1121, 1126 (Pa. 2009).

The issue before the Pennsylvania Superior Court in Dougherty was whether an order *denying* a motion to disqualify counsel was appealable as a collateral order. In reaching its decision the Superior Court referenced the Vaccone Court, wherein the Supreme Court concluded that an order *disqualifying* counsel was not appealable as a collateral order. The Dougherty Superior Court concluded that inasmuch as Dougherty had averred facts establishing a colorable claim of the potential disclosure of attorney work product and breach of attorney-client privilege leading to irreparable harm, the trial court order *denying* disqualification, was appealable as a collateral order. Dougherty, 85 A.3d 1086.

### **Attorney's Untruthfulness and Deceit Warranted Disbarment**

In Office of Disciplinary Counsel v. Akim Frederic Czmus, 889 A.2d 1197 (Pa. 2005), the Pennsylvania Supreme Court considered the proper disciplinary action for an attorney who had lied about his background on his law school application and bar application, and was repeatedly untruthful before the Pennsylvania Office of Disciplinary Counsel (ODC), the Pennsylvania Board of Bar Examiners and various entities investigating his background on behalf of the New Jersey Board of Bar Examiners.

In 1977, respondent, Akim Frederic Czmus, received his degree in medicine from Brown University School of Medicine. Id. at 1206. Czmus subsequently completed a year of residency at Thomas Jefferson University in Philadelphia, and was issued a license to practice medicine in the state of New York in November 1978. Id. After engaging in private practice in New York and serving as Assistant Clinical Professor of Ophthalmology at New York Medical College, St. Vincent's Hospital and Medical Center and the New York Eye Infirmary, Czmus was granted a license to practice medicine and surgery in California in 1984, and moved there in 1985. Id. On his applications to several hospitals in California, Czmus falsely represented that he was certified by the American Board of Ophthalmology. Id. at 1200. In 1986, upon learning of these false representations and Czmus' grossly negligent treatment of six of his patients, the Attorney General of California revoked Czmus' license to practice medicine in California. Id. at 1199. Czmus' New York license was also revoked after a reciprocal disciplinary proceeding was conducted by the New York Licensing Board. Id. at 1200.

In 1992, unable to practice medicine, Czmus was accepted at Temple University School of Law. In his law school application, Czmus failed to disclose that he had attended medical school, received medical licenses, lived in California, worked as a physician, had disciplinary proceedings in California and New York and had both states' medical licenses revoked. Furthermore, Czmus falsely represented in an application to a law firm that he held medical licenses in California and New York. Id. In 1995, Czmus submitted applications to sit for the Pennsylvania and New Jersey bar examinations, and failed to include in either bar application any mention of his medical education, career, or disciplinary proceedings. Id. at 1199. Additionally, Czmus falsely represented that he lived in Delaware and worked for Kennard Lab Associates as a lab supervisor during the time he was actually working as a physician in California. Czmus passed both bar examinations, and each state's character and fitness evaluation failed to reveal his falsifications. Id. at 1200. In 1998, the New Jersey disciplinary authorities learned that Czmus was a former physician with a record of professional misconduct and discipline, and they began an investigation into Czmus' background. During an interview with an investigator, Czmus lied about his past and attributed the discrepancies on his application to confusion. Id. In November 1999 and January 2000, Czmus began seeing two psychiatrists who diagnosed him with various psychiatric disorders. Although Czmus' psychiatrists attributed his falsifications, in part, to his psychiatric disorders, the New Jersey Supreme Court found that Czmus had violated two rules of professional conduct, and his license to practice law was revoked for two years. Id.

Subsequently, the Pennsylvania Office of Disciplinary Counsel filed a petition for discipline charging Czmus with violations of Pennsylvania Rules of Profession Conduct 8.1(a)

and 8.4(b)-(d). Id. at 1201. On June 5, 2001, a Hearing Committee appointed by the ODC recommended that Czmus' license to practice law be suspended for five years, followed by a two-year probationary period. Id. at 1205. The ODC rejected the recommendation of the Hearing Committee, however, and held that Czmus' violations "required disbarment." Id.

The Supreme Court reviewed the ODC's disciplinary actions and upheld Czmus' disbarment, holding that, "we find respondent's level of fraud, which transcended professions and jurisdictions, requires disbarment." Czmus, 889 A.2d at 1205. Discussing the distinction between disbarment and suspension, the Court explained that disbarment is appropriate in cases of such blatant untruthfulness:

Only disbarment, which places a higher burden on respondent if he should seek readmittance, will properly protect the goals of the profession and require respondent to be totally candid to the reviewing tribunal before his readmittance will be considered.

Id.

Rejecting revocation and suspension of Czmus' license, the Pennsylvania Supreme Court held that disbarment is the best method of discipline for transgressions based upon such blatant and repeated episodes of deceit and untruthfulness.

In Office of Disciplinary Counsel v. Brian J. Preski, 134 A.3d. 1027 (Pa. 2016), the Supreme Court ordered that Mr. Preski be disbarred from the practice of law. The court found that while Mr. Preski was serving as Chief of Staff to State Representative, John Perzel (Majority Leader and later Speaker of the Pennsylvania House of Representatives) between 2000 and 2007, he misappropriated millions of dollars in public resources for his own personal and political gain. Funds were misappropriated through a three-pronged conspiracy. Id. at 1028. "First, Preski and his cohorts misused public employees and resources to advance campaign efforts. Second, they used taxpayer funds to purchase campaign-related software, data, and services from outside technology vendors. Third, Preski and Perzel formed two consulting companies in an effort to profit personally from those taxpayer-financed technologies." Id. Emphasizing the magnitude, duration, and cost of Preski's crimes, the Hearing Committee characterized this matter as "one of the most serious political corruption cases in our disciplinary jurisprudence." Id. at 1031. The Committee determined Mr. Preski violated Rule of Professional Conduct 8.4(b), which states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Id. at 1030. Given the fact that Ms. Preski was a highly visible figure in law and government, the court flatly rejected his argument that his misconduct did not speak to the integrity of the legal profession. Id. at 1033. The court further explained:

Preski's fraud against the public at large is no less reprehensible than a practitioner's theft of client funds. If anything, the transgressions of a lawyer who is also a public servant are even more injurious to the reputation of the bar because they bring dishonor both to the profession and to our democratic institutions. Public trust is an indispensable prerequisite to the effective

administration of government. When a public official violates that trust, he or she undermines the integrity of the entire system. Considering the unprecedented scope, duration, and cost of Preski's criminal conduct, any sanction short of disbarment here would necessarily suggest that disbarment is virtually never warranted in cases of public corruption. This we decline to do.

Id. at 1033-1034.

**In Office of Disciplinary Counsel v. Peter J. Quigley, 161 A.3d. 800 (Pa. 2017), the Supreme Court ordered that Mr. Quigley be disbarred from the practice of law. The court found that Mr. Quigley mishandled funds of five clients between 2012 and 2015, in violation of Rules of Professional Conduct 1.3 and 1.15. Notably, most of the clients were only paid in full through personal checks after Mr. Quigley had depleted his IOLTA account and was already facing disciplinary action. Id. at 802-803. Mr. Quigley attributed his mishandling of client funds to a combination of personal circumstances in 2013, including: problems with the IRS; loss of his bookkeeper; dissolution of a long-term romantic relationship; and a decline in business due to a misprint of his office phone number in a phone book advertisement. Id. at 804-805. On Mr. Quigley's behalf, a psychologist testified that, based on these personal hardships, Mr. Quigley would have been diagnosed with depression and/or PTSD had he sought counseling in 2013. Id.**

The court rejected Mr. Quigley's argument that his mishandling of client funds was more the result of negligence rather than dishonesty. Id. at 807. Mr. Quigley argued that he lacked criminal intent to defraud clients, had repaid his clients in full, and that his mishandling of funds stemmed from poor record keeping and poor understanding of trust accounting principles. The Court, however, was unpersuaded due to the fact that the misappropriations involved five separate clients over a three year period. In addition, the Court found that Mr. Quigley made full restitution to four of the five clients only after disciplinary proceedings were initiated. Id.

The Court also determined that Mr. Quigley failed to demonstrate, by clear and convincing evidence, that his psychiatric condition was a causal factor to the misconduct and hence warranted a lesser sanction. Id. at 808-809. The court determined that the psychologist who testified on Mr. Quigley's behalf gave speculative testimony and failed to appreciate that some of the misappropriations occurred before Mr. Quigley was facing the personal hardships supporting a psychiatric diagnosis.

### **Standing to Assert Claim**

In Hess v. Fox Rothschild, LLP, 925 A.2d 798 (Pa. Super. Ct. 2007), appeal denied, 945 A.2d 171 (Pa. 2008), the Superior Court was asked to determine whether Plaintiffs had standing to bring a legal malpractice action against Defendant law firm based on the estate planning advice and services provided by Defendants to Plaintiffs' deceased stepmother.

Defendant law firm was retained by the deceased, Mr. and Mrs. Rosewater, to provide estate planning services, which included drafting their wills and the creation of various trusts. Plaintiffs, who are the stepsons of Mrs. Rosewater, brought an action against Defendant law firm

sounding in negligence, breach of contract, and intentional breach of the covenant of good faith and fair dealing. Plaintiffs also sought punitive damages. All of Plaintiffs' claims involved Mrs. Rosewater's will, which established several trusts including a marital trust and a residuary trust. Plaintiffs were named as beneficiaries of the residuary trust. Shortly after Mrs. Rosewater died, Mr. Rosewater withdrew \$5 million from the marital trust. Mrs. Rosewater's will provided that her husband had the unlimited right to withdraw as much of the principal as he wished from the marital trust during his lifetime, and provided him a testamentary power of appointment, which if not exercised, would result in the corpus remaining in the trust at his death to pass into the residuary trust and, therefore, to Plaintiffs. In their Complaint, Plaintiffs alleged that their inheritance was improperly diminished and that the withdrawal of funds from the marital trust was contrary to the testamentary wishes of Mrs. Rosewater. Defendant law firm filed preliminary objections to Plaintiffs' Amended Complaint averring that Plaintiffs lacked standing to raise their claims, and that Plaintiffs Amended Complaint was factually deficient. Following oral argument, the trial court sustained Defendant's preliminary objections.

The Superior Court was presented with the following issues: (1) whether a Plaintiff has standing to bring a malpractice suit against an attorney with whom they did not have an attorney-client relationship, and (2) whether Plaintiffs in Hess raised a cognizable claim sounding in negligence or contract.

In addressing the merits of Plaintiffs' claims, the Superior Court applied the rule of Guy and its progeny, which stand for the proposition that although a Plaintiff in a legal malpractice claim must generally show an attorney-client relationship (or analogous professional relationship), persons who are legatees under a will "and who lose their intended legacy due to the negligence of the testator's attorney should be afforded some remedy." Hess, 925 A.2d at 806 (citing Guy v. Liederbach, 459 A.2d 744, 746, 750 (Pa. 1983)). The Supreme Court's holding in Guy carved out a narrow class of third-party beneficiaries of the contract between the testator and the attorney who have standing to assert a legal malpractice claim. To determine whether a particular legatee is an intended third-party beneficiary our Court has established a two-part test:

(1) recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and

(2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." The first part of the test sets forth a standing requirement. For any suit to be brought, the right to performance must be "appropriate to effectuate the intentions of the parties."

Id. at 807 (citing Guy, 459 A.2d at 751-52).

The Superior Court recognized the class of legatees that may bring suit under the third-party beneficiary theory is narrow. Applying Guy to the case before the Superior Court, the Court stated that Mrs. Rosewater's intentions under her will were clear and that the rule of Guy did not allow Plaintiffs to bring suit simply because they felt Mrs. Rosewater's intent was to bequeath them a greater legacy than they received. Thus, the Superior Court held that Plaintiffs

did not have standing to bring their legal malpractice action against Defendant law firm and that the trial court properly dismissed their action.

In Mahonski v. Engel, 145 A.3d 175 (Pa. Super. 2016), the Superior Court upheld the trial court's award of summary judgment in favor of defendant attorney (Roman) who assisted plaintiff's counsel (Klementovich) in preparing a written agreement of sale (of property) and related assignment of subsurface rights. Klementovich had previously sought the assistance of Roman in preparation of the written agreements, but Roman never communicated with any of the plaintiffs (although they did pay a share of the attorney's fees). Id. at 178. The appellate court noted that Roman only communicated advice to Klementovich, "who was not a client but a fellow attorney with the training, education, and ability to research the issues and form a conclusion." Id. at 178-179. Therefore, plaintiffs failed to establish an attorney-client or analogous relationship with Roman. Id.

**Most recently, in Fortunato v. CGA Law Firm, 2017 WL 3129825 (M.D. Pa. July 24, 2017) the trial court considered whether three grandchildren had standing to assert claims for breach of contract and professional negligence against the attorney who handed their grandfather's estate planning. In summary, the attorney from CGA (representing the grandfather) allegedly insured one of the plaintiffs and the grandfather/client that the grandfather's Meryl Lynch Investment account would be part of the estate's residue and that (per grandfather's intent) plaintiff would receive 70% of the account. Following the grandfather's death, Meryl Lynch advised that the account was a "transfer on death" account, and that the plaintiffs would only receive a 50% share. After plaintiffs filed suit, CGA's filed a 12(b)(6) motion to dismiss based on lack of standing. Plaintiffs argued that they had standing for a breach of contract claim as third-party beneficiaries due to CGA's failure to effectuate their grandfather's intent. The trial court denied defendants' motion with respect to the breach of contract claim, but granted it with respect to the negligence claim.**

**Applying the two-part test from Guy, the trial court determined that plaintiffs adequately pled facts to establish standing for a breach of contract claim as third party beneficiaries. First, the facts, as pled, showed that the grandfather executed a will entitling plaintiffs to a percentage of his estate's residue. Thus, it was reasonable to infer that plaintiffs were legatees. Second, the facts, as pled, showed that CGA promised to draft a will to effectuate the grandfather's intent to benefit the legatees (plaintiffs). In other words, the facts showed that CGA knew of the grandfather's intentions to convey a certain portion of the Meryl Lynch account to his grandchildren and then (mistakenly) assured the grandfather that the account was part of the residue of his estate.**

**Although the court determined that plaintiff sufficiently stated a claim for breach of contract, the complaint was dismissed, without prejudice, as to the professional negligence claim due to plaintiffs' failure to allege any attorney-client relationship between plaintiffs and CGA.**

#### **Entry of Non Pros for Failure to Comply With Discovery Order**

In Sahutsky v. Mychak, Geckle & Welker, P.C., 900 A.2d 866 (Pa. Super. Ct. 2006), appeal denied, 916 A.2d 1103 (Pa. 2007), Plaintiff's attorneys malpractice claim was dismissed by the trial court by an entry of *non pros* pursuant to Pennsylvania Rule of Civil Procedure 4019, for failure to comply with a discovery order. Plaintiff subsequently filed a petition to open/strike off the entry of *non pros* which the trial court denied. After the Superior Court quashed Plaintiff's appeal, the Pennsylvania Supreme Court vacated the Superior Court's order and remanded for disposition on the merits.

On remand, the Superior Court considered three questions relating to the entry of *non pros*:

- (1) Where a case had been non pros under Rule 4019, do appellants have to file a petition to open/strike off before the order is appealable, or is the order granting non pros immediately appealable?
- (2) Does the Supreme Court's remand order overrule existing precedent regarding whether actual prejudice must be shown if non pros is ordered by a trial judge for failure to comply with a judicial order as a sanction under Rule 4019, as opposed to a *non pros* entered due to failure of a party to act?
- (3) Is there a requirement that a trial court must give notice and a hearing before it may enter a *non pros* under Rule 4019?

Id. at 869.

The court reached the following conclusions:

- (1) As mandated by Supreme Court precedent, a uniform procedure applies for appealing any type judgment of non pros, whether entered upon praecipe of a party or by court-ordered sanction. This procedure consists of the filing of a petition to open or strike off the judgment as prescribed in Pennsylvania Rule of Civil Procedure 3051. Therefore, no type of order granting non pros is immediately appealable, including orders entered by the courts as sanctions under Rule 4019;
- (2) Because trial courts are burdened with a heavy docket, a court may non pros a case for failure to follow its orders or directives without first requiring a showing of prejudice; and
- (3) Courts are not required to first conduct a hearing with the parties before imposing a sanction under Rule 4019(a).

See Id. at 872.

### **Insurance Coverage as to Professional Liability Claim**

In Post v. St. Paul Travelers Insurance Co., 593 F. Supp. 2d 766 (E.D. Pa. 2009), Benjamin Post, Esquire, ("Post") was hired by Mercy Hospital in Wilkes-Barre, Pennsylvania to

defend a medical malpractice case. The Plaintiffs William and Tukishia Bobbett, claimed that their four year old son had died as a result of medical malpractice while at Mercy Hospital. The Bobbetts' attorney claimed discovery abuses against Post. Id. at 769. The case was settled, in part due to allegations against Post for improperly abusing discovery procedures. Id.

After the medical malpractice action was settled, Post was put on notice from Catholic Health East Partners that Mercy Hospital intended to sue Post. Post then retained George Bochetto ("Bochetto") as his attorney. The Bobbetts' attorney filed a Sanctions Petition against Post for the alleged discovery violations which took place in the medical malpractice action. Mercy Hospital effectively joined in the petition against Post. Post notified his Professional Liability Insurance carrier, St. Paul Travelers Insurance Co. ("St. Paul") of the pending Sanctions Petition against him, and they denied him coverage. Id. It was St. Paul's position that the Sanctions Petition only sought relief in the form of sanctions which are excluded under his Professional Liability Policy ("Policy"). Id.

Post, through Bochetto, attempted to discuss coverage responsibilities with St. Paul regarding the Sanctions Petition. St. Paul offered to pay \$36,220.26 when Post had already accrued \$400,000 in attorneys' fees. Id. Post declined the offer and proceeded to file suit.

Post filed a Complaint against St. Paul alleging a breach of contract. He then filed a Motion for Partial Summary Judgment as to Count I, II and V in his Complaint. Those Counts alleged, a Breach of Contract as to the insurance policy, breach of contract as to the agreement to pay the costs of the sanctions proceeding and declaratory judgment, respectively. In analyzing Post's Motion for Partial Summary Judgment the Court stated:

The sanctions exclusion in the Liability Policy, however, under the commonly understood definition of sanctions as discussed above, refers to sanctions motions brought by opposing counsel. This exclusion does not preclude from coverage a sanctions petition joined by a lawyer's former client, particularly one brought in anticipation of a malpractice suit based on identical allegations of wrongdoing. The attorney-client relationship between Post and Mercy indicates that the damages Mercy requested in the sanctions petition were actually malpractice damages, though Mercy termed them "sanctions." As Post's former client, the fact alleged by Mercy in the sanctions petition sound in malpractice, even though brought under a cause of action for sanctions. It is the facts in the complaint that dictate whether the exclusion in the liability policy applies, not the cause of action selected by Mercy. If the sanctions petition were excluded from coverage, Mercy could choose whether to proceed with an action where Post was covered by his insurance carrier, or an action where Post was not, and potentially be awarded similar relief in either action.

A professional liability insurance carrier should not be able to avoid coverage for what is essentially a malpractice claim simply because of how an attorney's former client chooses to term the requested relief. Because the sanctions exclusion in the liability policy was unclear, it must be construed in favor of the insured. Therefore, the sanctions petition was not excluded from coverage under the

liability policy after Mercy joined the sanctions petition and St. Paul had a duty to defend Post at that time. St. Paul breached their duty to defend Post under the Liability Policy and are therefore liable for breach of contract.

Id. at 13.

The court proceeded to Grant Post's Motion for Partial Summary as to Count I and V, and denied relief at to Count II, with the amount of the reimbursement to be determined. Id. at 775.

### **Consequential Damages in Breach of Contract Action Re: Civil Litigation**

Coleman v. Duane Morris, LLP, 58 A. 3d 833 (Pa. Super. 2012), involved a legal malpractice claim concerning advice provided in connection with the sale of a company, and more particularly, advice the Plaintiffs received regarding whether the sale of that company would, as structured, terminate the Plaintiffs' personal liability for unpaid taxes. The Coleman Plaintiffs complained that following the consummation of the transaction at issue, they learned that they remained personally liable for unpaid taxes, the company's assets were plundered, and the unpaid taxes at issue were not paid until the IRS seized a bank account held in the company's name. Id. at 835.

The Plaintiffs filed a breach of contract action against Defendant-counsel and her firm rather than one sounding in trespass for professional negligence. In the Defendants' response to the claims brought against them, they maintained that the Plaintiffs had failed to pay for the legal services with which they were provided, and thus had no actionable damages. Id. Defendants brought a motion for judgment on the pleadings, which the trial court granted, in reliance on the Supreme Court's decision in Bailey v. Tucker, 621 A. 2d 108 (Pa. 1993). Bailey, addressing claims of malpractice in a criminal matter, limited damages sought on a breach of contract theory to attorneys' fees, plus statutory interest. The Plaintiffs maintained that they were entitled to pursue their consequential damages, and the Superior Court agreed, finding that the Supreme Court's limitation in Bailey on damages recoverable in a breach of contact malpractice action was limited to the criminal arena. Id. at 836.

The Supreme Court determined to hear an appeal of the Superior Court's decision, as to the following issue:

Does the limitation on damages in a legal malpractice action sounding only in contract set forth in Bailey v. Tucker, 533 Pa. 237, 252, 621 A.2d 108, 115 (1993) - which limited such damages to "the amount actually paid for the services plus statutory interest" in a case involving an underlying criminal representation - apply where the underlying representation is a civil one?

68 A. 3d 328, 328 (Pa. 2013).