Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102

TEL 215 851 8400
FAX 215 851 8383
www.eckertseamans.com

# 2022 ESCM PROFESSIONAL LIABILITY UPDATE

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# 2022 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 Andrew J. Bond, Kevin F. Farrington, Alexandra D. Rogin, Brooke Scicchitano, and Jessica Southwick 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.

Peter J. Hoffman, Esquire
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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 Rachlin 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 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 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. 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, 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. 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 for reconsideration in light of the decision in Seebold, 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, 720 A.2d

1032, 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.

In Walters v. UPMC Presbyterian Shadyside, 144 A.3d 104 (Pa. Super. Ct. 2016) aff'd, 187 A.2d 214 (Pa. 2018), the Supreme Court affirmed the Superior Court's ruling that UPMC had a duty to report an employee technologist's criminal behavior to appropriate authorities. Id. at 243. The case involved a technologist who was fired from UPMC 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 (Pa. Super. Ct. 2016). 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 (Pa. Super. Ct. 2016). Defendants, relying in part on Seebold, argued that there was no duty of care between them and a patient who had not been treated at their facility. Id. at 115-116. The Superior Court, applying the Althaus factors, determined that plaintiffs pled sufficient facts to support 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 Superior Court found that defendants had a special relationship with the technologist that created a duty to report his behavior to enforcement agencies. Id. at 119. However, the Supreme Court noted that while complying with the federal reporting obligation might be sufficient to discharge the duty, an analogous action to similar effect might suffice. Id. at 241 (Pa. 2018). For instance, it might be sufficient that UPMC maintained it timely reported the technologist to the PA Attorney General, who then opened an investigation. Id. at 241-242.

In Maas v. UPMC Presbyterian Shadyside, the Superior Court considered defendants' appeal from an order denying their motion for summary judgment, where the trial court found plaintiff made the requisite *prima facie* showing of a duty to warn under Emerich. 192 A.3d 1139, 1149 (Pa. Super. Ct. 2018), app. granted, No. 7 WAP 2019, 2020 Pa. LEXIS 3992 (Pa. July 21, 2020). Plaintiff filed suit against defendants based on their negligent failure to warn decedent of the risk presented by a psychiatric patient who had been under their care, Terrence Andrews. Id. at 1143. Plaintiff alleged that defendants had a duty to attempt to identify decedent as a subject of Mr. Andrew's death threat, and to warn the victim. Id. Defendants asserted that mental health care professionals only have a duty to warn specifically identified persons, not a nebulous group of individuals. Id. Ultimately, the Court found that while Mr. Andrews did not specifically identify his victim, he did communicate his intent to kill his next door neighbor by stabbing her with a pair of scissors, and the duty to warn exists where the target is identifiable, not just by name, but through the use of reasonable efforts Id. at 1147. The Court noted that the

defendants knew where Mr. Andrews lived, having assisted him in securing his apartment, which made it possible for defendants to readily ascertain the identities of the victim to communicate a reasonable warning. Id. at 1148. Therefore, plaintiff made "the requisite prima facie showing of a duty under Emerich." Id. at 1149.

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

In Allen v. Ellis, No. 17-652, 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. Following the accusation, 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 Sabo v. UPMC Altoona, plaintiff brought an action sounding in discrimination and negligence. 386 F. Supp. 3d 530, 543 (W.D. Pa. 2019). Plaintiff was terminated from defendant hospital as part of restructuring of her department. Id. at 539-542. Following her termination, she told a superior that she wanted to kill herself. Id. The superior relayed plaintiff's statements to another superior, and attempted to contact plaintiff's family. Thereafter, one of the superiors reported the threats to a crisis center, which found that there were no grounds for an involuntary commitment, but agreed to do a wellness check at plaintiff's home. Id. After a wellness check, one superior was asked to sign a petition for involuntary commitment, but he refused because he was not present for plaintiff's statements. Id. 542-543. Thereafter, plaintiff claimed that she attempted to commit suicide. Id. In her negligence claim, plaintiff alleged that defendants breached the duty of care by ignoring her suicide threats. Id. at 558. The court weighed the Althaus factors, and determined that defendant owed plaintiff a duty of care because there was a close relationship between the parties, the superiors understood that plaintiff expressed thoughts related to suicide, and they acknowledged there was some risk that plaintiff would attempt suicide if she was permitted to leave the campus. Id. at 559. The Court determined it was reasonable to impose a general duty of care on employers where a recently terminated employee expressed suicidal thoughts while still on the employer's premises, and that the public had an interest in requiring employers to react appropriately to suicide threats by recently terminated employees. Id. Additionally, the Court found that the hospital had a duty to take reasonable actions to attempt to prevent plaintiff's reasonably foreseeable suicide attempt. Id. at 560. The Court found that a jury could determine that defendant breached its duty to plaintiff by allowing her to leave the hospital's premises after she threatened to commit suicide. Id. at 560-561.

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

In Toney v. Chester Cty. 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, No. 13-3145, 2014 U.S. Dist. LEXIS 139226 (E.D. Pa. Oct. 1, 2014), the District Court distinguished plaintiff's claim for NIED from 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 defendants' 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 to establish a *prima facie* case of negligence, a plaintiff must prove that the injuries were proximately caused by negligent conduct of the alleged tortfeasor. See Flickinger v. Ritsky, 305 A.2d 40 (Pa. 1973). 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 asserted injury. See Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); 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.

In Hyrcza v. W. Penn Allegheny Health Sys., Inc., 978 A.2d 961, 968 (Pa. Super. Ct. 2009), app. denied, 987 A.2d 161 (Pa. 2009), the court held that a settling defendant may be included on a verdict slip if the evidence presented at trial is sufficient to meet the *prima facie* burden of proving that the settling defendant is liable. See also Taylor v. Tenet, Inc., 237 A.3d 449 (Pa. Super. Ct. 2020).

In order for a settling defendant to be included on a verdict slip, the evidence must establish a *prima facie* case of negligence against the settling defendant. Hyrcza, 978 A.2d at 969; see also Ball v. Johns-Manville Corp., 625 A.2d 650 (Pa. Super. Ct. 1993); Davis v. Miller, 123 A.2d 422 (Pa. 1956); Hamil v. Bashline, 392 A.2d 1280, 1283-86 (Pa. 1978); c.f. Herbert v. Parkview Hosp., 854 A.2d 1285 (Pa. Super. Ct. 2004) (including a settling defendant on the verdict sheet where plaintiff's expert apportioned liability at trial against all defendants). Therefore, if evidence is insufficient to support a *prima facie* case against a settling co-defendant then the law makes clear that the co-defendant may be left off of the verdict sheet. *Id*.

In professional liability actions that criticize the how a medical provider should act when presented with a particular patient, and where there is no "obvious causal relationship" between the injury and the alleged negligence, expert testimony is required to establish a *prima facie* case of negligence. See Grossman v. Barke, 868 A.2d 561, 566 (Pa. Super. Ct. 2005) (stating that "[o]ne of the most distinguishing features of a medical malpractice suit is, in most cases, the need for expert testimony, which may be necessary to elucidate complex medical issues to a jury of laypersons."). Further, "[t]he expert testimony requirement in a medical malpractice action means that a plaintiff must present medical expert testimony to establish that the care and treatment of the plaintiff by the defendant fell short of the required standard of care and that the breach proximately caused the plaintiff's injury." Id. (citing Toogood v. Owen J. Rogal, D.D. S.,P. C., 824 A.2d 1140, 1145 (Pa. 2003)).

**What is Enough Proof?**

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 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 DiStefano v. Robin, No. 2015-07319, 2020 Pa. D.&C.. Dec. LEXIS 1312 (Pa. Ct. Com Pl. June 4, 2020), **aff'd, 2021 Pa. Super Unpub. LEXIS 1654 (June 22, 2021),** the court granted plaintiff's appeal for a new trial on damages where the jury awarded no Wrongful Death and Survival damages and only $4,000 in lost earnings, despite finding liability as to the defendant. Id. at 45-46. The Court held that defendant had presented no evidence that

contradicted plaintiff's experts' calculation of $632,982 in lost earnings and $404,000 in household services. Id. at 43-44. Nor had defendant presented an economic damages witness at trial to substantiate a $4,000 lost earnings award. Id. at 11. The Court further held that the jury's award of zero dollars as to noneconomic damages was inexplicable in the face of the record, which established pain experienced by the decedent. Id. at 12, 44. The record had also established a strong bond between decedent and her husband, as well as her sons. Id. at 12. Based on the clear record, the Court found that "the jury's inadequate damages verdict is this case represents a miscarriage of justice which, in the words of our appellate courts, "stands forth like a beacon." Id. at 45.

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.

In Bishop v. Wexford Health Sources, Inc., Plaintiff filed a medical malpractice claim against UPMC Hamot, alleging negligence in the care of her brother who succumbed to cancer. No. 1:17-cv-60, 2019 U.S. Dist. LEXIS 203919, 1-2 (W.D. Pa. 2019). Defendant moved for summary judgment, asserting that plaintiff's sole expert failed to raise a genuine issue of material fact concerning the essential elements of her medical malpractice claim. Id. at *2. Plaintiff's expert report stated that a delay in diagnosis "more likely than not increased the risk of bladder invasion by the cancer." Id. at *21. Plaintiff's expert did not, however, specifically address or offer any opinions regarding the standard of medical care applicable to defendant's care, any deviation from that standard, or any causal relationship between any deviation from the standard of care and an increased risk of harm to plaintiff's decedent. Id. at *25. Therefore, the Court concluded that since plaintiff's lone expert report did not support the essential elements of his medical malpractice claim it was compelled to grant defendant's motion for summary judgment. Id. at *2, 23-25.

## 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. 4th 449, 459 (Pa. Ct. Com. Pl. 2002) (while physicians who attain board certification might be more skilled or knowledgeable, "the level of care provided to a patient may be equally and competently performed by a non-board certified physician"). The Court 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 A.2d at 989.

The court provided a similar analysis in Becker v. Penrod, No. 2322, 15 Phila. 347 (Pa. Ct. Com. Pl. Mar. 3, 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. 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, and reasoned, "the absence of certification by a professional association does not render a physician legally unqualified to practice a specialty." Id. at 350, 353-54. 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 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 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 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, plaintiff argued 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 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 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 loquitor*. 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,* as 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 loquitor* 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 Seminara v. Dershaw, No. 2014-31546, 2018 Pa. D. & C. Dec. LEXIS 314 (Pa. Ct. Com. Pl. Feb. 8, 2018), aff'd, 195 A.3d 1050 (Pa. Super. Ct. 2018), plaintiff brought a *res ipsa loquitur* claim asserting that a retained sponge left from a cesarean section caused her to suffer transient ischemic attacks, cerebral ischemia, and brain injury, among other injuries. Id. at *1-2. However, her physicians could not agree that she had retained a foreign body from the procedure, or even that she had retained a foreign body at all. Id. at *19. Her doctors disputed how to interpret her various radiological scans, and it was not self-evident that a sponge was left in her as a result of the procedure. Id. The trial court held that the plaintiff was required to present expert testimony to show the harm she suffered was factually caused by the alleged retained foreign body, as it was not self-evident that her claimed transient attacks and cerebral

ischemia were causally related to any alleged negligence. Id. at *20-21. The court held that a lay juror would require the aid of expert testimony to conclude that plaintiff's claimed injuries of transient ischemic attacks, cerebral ischemia, brain injury, etc. were caused by a retained surgical sponge or foreign body. Id. at *22. Further, because the causal relationship between the harm suffered and the alleged retained foreign body was not obvious, expert testimony was required to establish it. Id. at *22-23.

In Lageman v. Zepp, 237 A.3d 1098 (Pa. Super. Ct. July 20, 2020), **aff'd, No. 21 MAP 2021, 2021 Pa. LEXIS 4314 (Pa. Dec. 22, 2021),** the Superior Court found that the trial court abused its discretion in denying a *res ipsa loquitur* charge where the plaintiff's expert offered testimony that insertion of a catheter into an artery does not occur in the absence of negligence, but also testified as to specific deviations in the standard of care. Id. at 1113-14. The Court relied on the Pennsylvania Supreme Court's decision in Quinby, which had "implicitly sanctioned the plaintiff's introduction of specific negligence ansssd concomitant reliance on the inference of negligence under *res ipsa*." Quinby, 907 A.2d at 1067.

**On appeal, the Pennsylvania Supreme Court affirmed the Superior Court decision finding that "[t]he question that must drive when the [res ipsa loquitor] Instruction is warranted hinges entirely upon whether the plaintiff has made out a *prima facie* showing as to the Section 328D factors, *not* whether the defense has a credible counternarrative or plaintiff also has made out a plausible basis for recovery without resort to that doctrine. In effect, the two run in parallel toward the same destination, and if either arrives, the plaintiff recovers. There is nothing more in this approach than the assurance that, with the sum of the available information, a jury of the parties' peers has rendered a just verdict." 2021 Pa. LEXIS 4314, *50.**

**In Schweigart v. Schmalenberger, 2021 Pa. Super. Unpub. LEXIS 1766 (Pa. Jul. 2, 2021), Plaintiff claimed physical pain, distress, and emotional damage suffered by defendant physician's taking of a photograph of plaintiff while under the effects of anesthesia for a hip replacement procedure and sending the at-issue photograph to plaintiff. Id. at *1-2. The Superior Court upheld a grant of summary judgment on behalf of defendant finding, in part, that the *res ipsa loquitor* doctrine did not apply where plaintiff had a litany of prior medical ailments, including emotional distress treated with medication, for which no expert evidence was provided to tie her current emotional damage to the actions of the defendant physician. Id. at *9-10.**

**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 Court followed Daubert, finding 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 expert did not rely on literature and 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," so 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. Furthermore, the Court noted that the testimony was not unreliable just because there is no test to definitively determine the cause of a stroke. 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. 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. No. 04-3234, 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. App'x 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. U.S., 571 F. Supp. 2d 615 (E.D. Pa. 2007), aff'd, 292 Fed. App'x 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, No. 09-4937, 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, No. 02-8211, 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 U.S. Dist. LEXIS 50255 (E.D. Pa. May 9, 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), aff'd 511 Fed. App'x. 225 (3d Cir. 2013), 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 preclude 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 Rule 702, and the Frye test, are the applicable rules controlling admissibility of expert testimony in Pennsylvania. Id. at 555, 557. The Court noted the following elements of proper application:

1. The proponent of expert evidence bears the burden of establishing all elements for its admission under Rule 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 expert's conclusion;

3. The Frye test is only one of several criteria under Rule 702.
4. 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;
5. The appellate court is not to consider all the evidence and reach its own conclusion.

See id. at 559. Applying these principles, the Supreme Court concluded that the Superior Court improperly substituted its own judgment, and 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 Frye. The Court 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., No. 915 EDA 2014, 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., No. 1893 EDA 2010, 2012 Pa. Super. LEXIS 1593 (Pa. Super. Ct. July 20, 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), 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 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 *1 2. 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., No. 3516 EDA 2015, 2017 Pa. Super. Unpub. LEXIS 1734 (Pa. Super. Ct. May 8, 2017), app. denied, 176 A.3d 845 (Pa. Dec. 13, 2017), plaintiff sought to link her use of Zoloft 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 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 Zoloft 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 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 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.

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 for cross-examination. 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 contrast, in Nazarak v. Waite, defendants appealed a judgment entered in favor of plaintiff in part based on alleged improper testimony from the motorist's vocational expert. 216 A.3d 1093, 1108 (Pa. Super. Ct. 2019). Defendants claimed plaintiff's expert improperly relied on and repeated a non-testifying doctor's MRI report. Id. at 1109. However, plaintiff's expert relied on "voluminous medical records," and in addition to "his own professional knowledge and experience, to arrive at his opinion." Id. The Court determined that plaintiff's expert's testimony did not "merely parrot Dr. Brooks' report regarding the MRIs," but rather used the report along with numerous other sources to form his opinions. Id. Therefore, the Superior Court found that "the trial court properly rejected Appellants' argument that Dr. Harvey was a mere conduit for the report and opinions of Dr. Brooks." Id.

In Buckman v. Verazin, 54 A.3d 956 (Pa. Super. Ct. 2012) , app. denied, 77 A.3d 1258 (Pa. 2013), 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. U.S., No. 2:16-cv-01389-NBF, 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.

In Locke v. Fox Chase Cancer Ctr., 240 A.3d 173 (Pa. Super Ct. Unpub. 2020), **app. denied, 250 A.3d 471 (Pa. Mar. 9, 2021),** plaintiff appealed the trial court's denial of her motion for a new trial. Id. at *1-2. Plaintiff argued that the trial court improperly precluded introduction of decedent's autopsy report as hearsay. Id. at 1-2. The Superior Court found that 1) plaintiff sought to offer the autopsy report against a defendant other than the author of the autopsy report, therefore, it was not an exception as an opposing party statement under Rule 803(25); 2) the business records exception did not apply, as the autopsy report contained medical opinions, not facts, and the author was not available to testify; and 3) that experts could rely on the autopsy report, however, as hearsay with no exceptions, it could not be published to the jury. Id. at *22-26. The Superior Court affirmed the trial court's denial, finding that the autopsy report did not qualify as any exception to hearsay. Id. at 26.

**Learned Treatises**

The Pennsylvania 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 Hyrcza 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 (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 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.

In Charlton v. Troy, 236 A.2d 22 (Pa. Super. Ct. 2020), **app. denied, 251 A.3d 772 (Pa. Mar. 30, 2021),** the Superior Court vacated judgment in favor of plaintiffs, determining that the trial court committed reversible error in permitting plaintiffs to use a textbook to cross-examine the defendant doctor without first establishing that he found the text authoritative. Id. at 33. The Superior Court found that the record did not support qualifying the defendant doctor as an expert witness where he opined that he had not been negligent, even if foundation had been properly laid as to the text's authority. Id. at 35-36. The trial court also erred in permitting the contents of the textbook to be read to the jury as substantive evidence, as there is no learned treatise exception to hearsay. Id. at 33. Nor is there an exception to hearsay simply because an attorney has read the hearsay into the records, as opposed to a witness. Id. at 40.

**In Keri v. Conemaugh Valley Mem. Hosp., No. 1774 WDA 2021, 2021 Pa. Super Unpub. LEXIS 803 (Super. Ct. Mar. 23, 2021), plaintiff appealed a trial court ruling that disallowed use of a supposed "learned treatise" on the basis that the source did not qualify as a learned treatise and did not contain information that pre-dated the at-issue surgery. Id. at *3-4. Despite a lack of discussion of the content of the articles by plaintiff's expert, the Superior Court found that plaintiff's expert's testimony that the articles were "authoritative" was sufficient to establish the articles as learned treatises. Id. at 11. However, the Superior Court sided with the trial court on the issue of relevance – namely, finding that the plaintiff had failed to show that the use of articles dated 2019 were relevant to the standard of care for a surgery performed in 2011. Id. at 12.**

## 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. C.S. § 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.

In Madden v. A.I. duPont Hosp., 264 F.R.D. 209 (E.D. Pa. 2010), before the court 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 moved for summary judgment on the basis that plaintiff could not establish a *prima facie* case of malpractice because she lacked qualified experts under § 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. 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, No. 1764 WDA 2016, 2017 Pa. Super. Unpub. LEXIS 2649 (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 moved to preclude plaintiff's expert, 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), the Pennsylvania Supreme 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 the latter issue was not properly preserved 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.

In Tong-Summerford v. Abington Mem. Hosp. & Radiology Grp. of Abington, P.C., 190 A.3d 631 (Pa. Super. Ct. 2018), defendants argued the Court should vacate the judgment and grant a JNOV or, in the alternative, remand for a new trial due to the trial court's permitting plaintiff's expert to opine as to a radiologist's conduct, despite him being unqualified to do so. Id. at 663. Defendants asserted that the finding of liability hinged on a radiologists interpretation of a chest x-ray. Id. Defendants asserted that the verdict was unsupported by proficient expert testimony as the expert admitted he was not a radiology technologist who had taken x-ray films and that he had not positioned a patient for x-rays in over thirty years. Id. The trial court allowed the expert to testify, over objection, as an expert regarding policies, procedures, and protocols relating to feeding tubes from a radiologic perspective. Id. The Superior Court noted that the expert had instructed and supervised radiology technologists concerning proper procedures that he, himself, helped to create in a hospital setting and held the role of Chairman of a hospital's radiology department. Id. at 664. The Court noted the liberal standard for qualification of an expert witness and found the trial court had properly permitted the expert to testify regarding the applicable standard of care of radiology technologists. Id.

In Fargione v. Sweeney, defendants moved for summary judgment on the grounds that plaintiffs failed to support their claim for professional liability under the expert witness requirements of Section 512 of the MCARE Act. No. 16-5878, 2019 U.S. Dist. LEXIS 28243, *40-42 (E.D. Pa. Feb. 22, 2019). Defendants argued that plaintiff's only expert, a board certified pathologist, was not competent to testify as to defendant correctional facility's policies, procedures, or practices because he expert had never practiced in correctional medicine, nor had he formulated any policies or procedures in that area. Id. at *43. Defendants argued that plaintiff's expert could not provide any opinion as to correctional medicine standards and how it relates to the treatment of asthma, as he had no understanding of the security issues related to rescue inhalers and the potential for the inhalers' misuse. Id. The court cited Goldberg v. Nimoityn, 193 F. Supp. 3d 482, 488-492 (E.D. Pa. 2016), on the issue of whether an otherwise qualified physician can render an opinion on the standard of care under MCARE in the absence of board certification. Id. In Goldberg, despite the same board certification, the doctor had extensive experience in treating elderly patients in the setting at issue. Id. In Fargione, the Court reasoned that it was possible the plaintiff's expert was not competent to render an opinion as to

the quality of care at issue because he did not practice in a correctional facility. Id. at *45. The extent of the expert's expertise in a correctional facility, however, was "an appropriate focus of cross-examination," and therefore, the Court denied defendant's motion for summary judgment as to plaintiff's claims for negligence. Id.

**Licensure**

In Cimino v. Valley Family Med., 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), app. denied, 172 A.3d 592 (Pa. 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 the expert's opinions were supported by 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, 168 A.3d 278 (Pa. Super. Ct. Unpubl. 2017), app. denied, 169 A.3d 1040, the Superior Court allowed physicians to testify as to the nursing standard of care. Id. at *21. At issue was whether 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). The trial court struck an 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 an 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.

**In Mazzie v. Lehigh Valley Hosp.-Muhlemberg, 257 A.3d 80 (Pa. Super. Ct. Apr. 16, 2021), app. denied, No. 412 MAL 2021, 2021 Pa. LEXIS 3858 (Pa. Oct. 25, 2021), the Superior Court affirmed the trial court's denial of defendants' request for JNOV asserting plaintiff's expert failed to support his opinions with the requisite certainty. Id. at 86. The Superior Court held that, despite plaintiff's expert's failure to use the phrase "reasonable degree of medical certainty" his testimony otherwise substantiated his findings where he answered in the affirmative that the use of a Verness needle through an umiblical hernia was a deviation from the standard of care. Id. at 88-89. Even the use of "more likely than not" on cross-examination did not negate the certainty of his testimony where "the totality of [his] testimony revealed that his opinions were rendered to the requisite degree of certainty." Id. at 89, citing Carrozza v. Greenbaum, 866 A.2d 369, 379 (Pa. Super. Ct. 2004).**

**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) , app. denied, 872 A.2d 173 (Pa. 2005) (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 Court held that plaintiff's radiation oncology expert was qualified to opine as to the standard of care applicable to a urologist regarding failure to diagnose decedent's prostate cancer because plaintiff's expert had 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 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 that MCARE "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 further stated 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 stated that in light of its conclusion concerning issue preservation, it 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 purposes of reform legislation." Id. at 460.

The Superior Court addressed the issue of expert qualification in Hyrcza, *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.; C.f. 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 alleged that defendant doctor breached the applicable standard of care in treating plaintiff's bunion. Defendant sought to preclude plaintiff's podiatry 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: "We 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. Ct. 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); Glasgow v. Duncan, No. 2384 EDA 2016, 2018 Pa. Super. Unpub. LEXIS 3595, *12-18 (Sept. 25, 2018) (holding an orthopedic and sports medicine expert who did perform knee replacements could testify regarding pre and post-op surgical care to prevent infection and other complications).

In Sonnenfeld v. Meadows, 229 A.3d 374 (Pa. Super. Ct. 2020), plaintiffs sought a new trial based on the exclusion of expert testimony as to causation. Id. at *4-5. The Superior Court granted the new trial, finding that plaintiff's expert had been improperly excluded on the basis that the trial court held him to the MCARE requirements for an expert testifying as to the standard of care, requiring an expert to practice in the same subspecialty as a defendant

physician. Id. at *20-22. Because plaintiff's expert only opined as to causation, he was only required to qualify under 40 P.S. § 1303.512(a)-(b). Id. at *22. As plaintiff's expert was qualified in internal medicine and geriatric medicine, he was competent to testify in cardiology, pulmonology, and nephrology, as it related to causation. Id.

In Shober v. St. Joseph Med. Ctr., 236 A.3d 1130 (Pa. Super. Ct. 2020), app. denied, 242 A.3d 908 (Pa. 2020), plaintiffs appealed the trial court's exclusion of testimony of their surgical expert as to the standard of care relating to managing surgical complications for an anesthesiologist under subsection 512(e) of the MCARE Act. Id. at *6. In granting a new trial, the Superior Court noted that the trial court had allowed *voir dire* on the issue of whether the plaintiff's expert was qualified as a surgeon. Id. at *9. However, appellant was not permitted to conduct *voir dire* on the issue of whether its expert was qualified to offer opinions as to the standard of care as to a related subspecialty – anesthesiology – under Section 512(e) of the MCARE Act due to the trial court's ruling on a *motion in limine* to exclude plaintiff's expert from testifying. Id. The Superior Court noted that a "relatedness determination woulds likely require a supporting evidentiary record and questioning of the proffered expert during voir dire." Id. at *11 (citing Renna v. Schadt, 64 A.3d 658, 666 (Pa. Super. Ct. 2013)).

**The Pennsylvania Supreme Court, in Bisher v. Lehigh Valley Health Network, Inc., 2021 Pa. LEXIS 4291 (Pa. Dec. 22, 2021), found that the Superior Court erred by adopting the trial court's finding that plaintiff's certificates of merits were deficient on the grounds that plaintiff's expert did not practice in the same subspecialty. Id. at *86 – 87. The trial court held that plaintiff's expert's resume did not provide sufficient evidence to demonstrate that he was proficient in the subspecialty of adult gastroenterology, given that his practice focused exclusively on pediatric gastroenterology. Id. at *84. The Supreme Court held that, because plaintiff's expert was board certified in adult gastroenterology, because plaintiff's expert specifically averred that there was no significant difference between the treatment of a GI bleed in adult versus pediatric populations, and because there was an absence of any challenge to that statement by defendant, plaintiff's expert was qualified to offer testimony. Id. at 85 -86.**

**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…[o]nce 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. (internal citations omitted). 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 can meet their burden of establishing the alternative "school of thought" with expert testimony alone. Id.; see also Thomas v. Evans, No. 2220 EDA 2016, 2018 Pa. Super. Unpub. LEXIS 469, at *31 (Feb. 14, 2018), app. denied, 189 A.3d 988 (Pa. 2018) (upholding denial of motion in *limine* to preclude expert testimony regarding a subjective standard of care for defendant physician's judgment where the "two schools of thought" doctrine applies to expert testimony regarding the physician's exercise of his judgment if two or more courses of treatment are available and competent medical authority is divided as to the proper course).

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 was appropriate given plaintiff's obesity and medical history. Id. at 240. Based on conflicting expert testimony as to whether the surgery was contraindicated, the trial court ruled that the "two schools of thought doctrine" applied. Id. at 241. The Superior Court disagreed, however, stating that the doctrine did not apply because both parties' experts agreed that the procedure was not appropriate for a patient who is extremely obese, and it was disputed whether the 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. Because the doctrine did not apply, the "two schools" jury instruction was improper, requiring a new trial. Id.

In Reger v. A.I. duPont Hosp. for Children of the Nemours Found., 259 F. App's 499 (3d Cir. 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 502. 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. Ct. Com. Pl. 2011) aff'd, 32 A.3d 280 (Pa. 2011), plaintiff contended that the foundational requirement for a "two schools of thought" instruction had not been met. Citing Jones, the court stated: "[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 (quoting Jones, 610 A.2d at 969).

The Pennsylvania Superior Court in Tillery v. Children's Hosp. of Phila., 156 A.3d 1233, 1242-43 (Pa. Super. Ct. 2017) reiterated the holding in Levine v. Rosen, 616 A.2d 623, 627 (Pa. 1992), emphasizing that the "two schools of thought doctrine" does not apply to cases in which the issue concerns the defendant's failure to diagnose. The Superior Court affirmed the trial court's denial of defendant's request for a new trial, claiming the trial court failed 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. The Superior Court disagreed, reasoning that the case concerned the failure to diagnose the bacterial meningitis rather than competing 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 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); 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).

Importantly, under Neal v. Lu, 530 A.2d 103, 109-10 (Pa. Super. Ct. 1987), 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 Neal 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 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).

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. 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.

The Superior Court in Adams v. Vaughn, No. 1383 MDA 2016, 2017 Pa. Super. Unpub. LEXIS 1280, at *6 (Apr. 6, 2017), app. denied, 172 A.3d 1117 (Pa. 2017), 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. After reviewing plaintiff's 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 the holding of the trial court and entered judgment in favor of the defendant. Id.

The Superior Court in Rolon v. Davies, 232 A.3d 773, 783 (Pa. Super. Ct. 2020) recently reserved the trial court's entry of nonsuit in favor of defendant physician, holding that decedent's liability expert rendered his trial testimony to a reasonable degree of medical certainty. The trial court granted defendants' request for nonsuit after decedent's liability expert used conditional language when discussing the possibility that anticoagulation would have helped prevent DVT and subsequent death. Id. at 776. Specifically, plaintiff's expert testified that it was "more likely than not" that decedent would have survived had she had been treated. Id. at 782. He also testified that her death was "much, much, much less likely" had she been treated appropriately. Id. At trial, defendants relied upon the isolated statements to argue that the expert failed to render his opinion to the requisite certainty. Id. The Superior Court, reviewing decedent's expert's trial

testimony in its entirety, reasoned that his expert testimony evidenced a breach of the applicable standard of care that increased the risk of harm to the decedent. Id. The Superior Court held that the expert provided a detailed analysis of the facts he believed supported his opinion and that he expressed his opinion with certainty despite the use of the conditional language. Id. Decedent's expert testified that he uses the phrase "more likely than not" because that is the legal terminology used in his home state of Massachusetts. Id. He asserted that he considered "more likely than not" to be synonymous to "within a reasonable degree of medical certainty" and the Superior Court relied on this testimony to conclude that decedent's expert was certain of his opinion. Id. **see also Mazzie v. Lehigh Valley Hosp. - Muhlenberg, 257 A.3d 80, 89 (Pa. Super. Ct. 2021) (citing Rolon v. Davies and further holding that plaintiff's medical expert rendered his opinions to the requisite degree of medical certainty despite using the phrase "more likey than not" on cross-examination).**

**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).

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. At trial, plaintiff's experts 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. 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. In light of this standard, the court held that Plaintiff succeeded in establishing causation. Id. at 793; see also Qeisi v. Patel, CIVIL ACTION No. 02-8211, 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. U.S., 571 F. Supp. 2d 615, 641 (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 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 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 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.

The Superior Court in Bradley v. Thomas Jefferson Health Sys., No. 2915 EDA 2017, 2018 Pa. Super. Unpub. LEXIS 2535, at *11 (Pa. Super. Ct. July 17, 2018) affirmed the trial court's decision that plaintiff failed to raise a genuine issue of fact for the jury to decide that plaintiff's pressure sores increased the risk of harm of death. Specifically, plaintiff relied upon her expert's opinion that "negligence was at root of [decedent's] downward spiral." Id. at *10. Plaintiff also relied upon literature indicating that pressure wounds "present a 'serious problem that can lead to sepsis or death.'" Id. The Superior Court held that the causal connection from bedsores to sepsis is not so self-evident that expert testimony was not required. Id. Similarly, the court held that plaintiff could not simply rely on the literature indication bedsores could result in sepsis and lead to death as a substitute for a *proper expert opinion* that the negligent treatment of the bedsores increased the risk of sepsis or death. Id. at *11 (emphasis added).

**Informed Consent – Medical Malpractice**

The Pennsylvania Supreme Court has upheld the intentional tort battery theory underlying the doctrine of informed consent. See, e.g., Montgomery v. Bazaz-Sehgal, 798 A.2d 742, 748 (Pa. 2002); Morgan v. MacPhail, 704 A.2d 617, 619 (Pa. 1997). 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 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 § 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. (citing 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.; see also Mitchell v. Shikora, 209 A.3d 307, 316 (Pa. 2019) (explaining that an action for lack of informed consent is different than a cause of action for medical negligence; thus, individual's consent to undergo surgery is not evidence of consent to a physician acting below the accepted standard of care).

**PA SB 425, a bill amending the MCARE Act, 40 P.S. § 1303.504 ("MCARE"), Signed into law by Governor Wolf, provided much-needed clarity for Pennsylvania's health care providers by expanding the types of practitioners that can obtain informed consent.**

**SB 425 addresses an issue that has challenged health care providers since the Pennsylvania Supreme Court decision in Shinal v. Toms, 162 A.3d 429 (Pa. 2017).**

**SB 425 expressly authorizes a physician to delegate the task of obtaining informed consent that the physician, or a "qualified practitioner," will perform to another physician or "qualified practitioner." A "qualified practitioner" includes a PA, CRNP, midwife or nurse-midwife, or registered nurse provided the registered nurse is either authorized to perform the procedure under the nurse's scope of practice as delegated by the physician or to administer anesthesia. The term also includes another physician, and a physician participating in a medical residency or fellowship program. SB 425 permits a patient, or the patient's authorized representative, to request that the physician performing the procedure answer a question or provide information about the procedure, in which case the physician is required to obtain the informed consent.**

**Expert Testimony Required**

Pennsylvania law mandates that a plaintiff must file a certificate of merit supporting a claim for lack of informed consent. Pa.R.C.P. 1042.3. Additionally, 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 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.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.

However, expert testimony is not required 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, 792 (Pa. 2002). For example, in Hartenstine v. Daneshoost, the plaintiff alleged that consent to surgery was obtained following the physician's misrepresentation of the surgical procedure to be performed. NO: 2005-C-2059V, 2008 Pa. D. & C. Dec. LEXIS 60, at *1-2 (Pa. Ct. Com. Pl. Jan. 16, 2008). The trial court held that when misrepresentation of the surgical procedure to be performed occurs, expert testimony is not required to support a claim based on medical battery. Id.

**The MCARE Act**

Under the MCARE Act, a physician is required 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).

Under MCARE, 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. 40 P.S. § 1303.504; see also Shinal, 162 A.3d at 454. 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, 9961 A.2d 1229, 1237 (Pa. 2008). Rather, the patient must be advised of the 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 an informed consent claim, 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 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. Id. § 1303.504(c). Under MCARE, a plaintiff must establish the element of causation to set forth a viable claim for lack of informed consent. Id. § 1303.504(d). A physician is liable for failure to obtain informed consent 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 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 effectively overrules Duttry v. Patterson, 771 A.2d 1255, 1259 (Pa. 2001), which held that "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, 805 A.2d at 1237). 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. C.f. Leaphart v. Prison Health Servs., CIVIL NO. 3:10-CV-1019, 2010 U.S. Dist. LEXIS 135435, at *37 (M.D. Pa. Nov. 22, 2010) (citing Pollock, and noting, "Pennsylvania case law 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 the applicability of Medicare regulations to an informed consent claim against the hospital. Id. at 930. The Superior Court examined Friter v. Iolab Corp., 607 A.2d 1111 (Pa. Super. Ct. 1999), where it 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. Id. at 930.

In addition, 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.

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. See Fitzpatrick, 961 A.2d at 1247.[1] Id. In Fitzpatrick, 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. Plaintiff's husband testified that he and

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[1] 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.

plaintiff made all medical decisions jointly, and that had all risks associated with plaintiff's surgery been disclosed, plaintiff would have opted against surgery. Id. at 1234. Plaintiff-patient did not testify despite being 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 the decision to undergo 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 because it would mislead the jury. Specifically, the court reasoned:

> 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).

On appeal to the Supreme Court, the sole issue was whether 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 physician that would vitiate his duty to provide treatment according to the 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 trial court admitted a decedent's medical consent and release forms. No. 120900560, 2016 Phila. Ct. Com. Pl. LEXIS 194, at *8 (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).

The Pennsylvania Supreme Court reaffirmed that there are two discrete categories of evidence: (1) informed-consent evidence; and (2) risks and complications evidence. Mitchell v. Shikora, 209 A.3d 307, 317 (Pa. 2019). The Supreme Court noted in light of the legal distinction between lack of informed consent and medical malpractice claims, evidence of a patient's informed-consent, i.e. manifestations of a patient's actual, affirmative consent to surgery and the risks thereof, is irrelevant to the question of negligence. Id. 317. However, the Supreme Court reversed the decision of the Superior Court in Shikora that created a bright line rule that all risks of a procedure are barred from evidence. Id. at 318. The Supreme Court reasoned that risks and complications evidence may assist the jury in determining whether the harm suffered was more or less likely to be the result of negligence. Id. The Supreme Court held that the trial court properly distinguished between informed-consent evidence, which it did not admit, and surgical risks and complications evidence, which it properly admitted. Id. at 323.

On June 23, 2020, the Supreme Court granted a Petition for Allowance of Appeal to address whether the holding in Kirksey v. Children's Hosp. of Pittsburgh of UPMC, No. 421 WDA 2018, 2019 Pa. Super. Unpub. LEXIS 3807 (Oct. 9, 2019), directly conflicted with the holding in Shikora, which plaintiff-appellant argued instructs that when evidence of general risks and complications is admitted in a medical negligence claim to establish the applicable standard of care, a limiting instruction is warranted. See Kirksey, 236 A.3d 1046 (Pa. 2020). The Superior Court held that the trial court did not abuse its discretion rejecting plaintiff-appellant's request to give a jury instruction that assumption of the risk was not an applicable defense. Kirskey, 2019 Pa. Super. Unpub. LEXIS at *11-12. The Superior Court reasoned that the evidence pertaining to the risk of adverse effects was introduced to show defendant-appellee's own awareness of the potential side effects of combining the prescribed medicine. Id. The Superior Court held that neither party introduced evidence regarding plaintiff-appellant's consent to treatment. Id. On December 10, 2020, the Supreme Court dismissed the appeal as "having been granted improvidently" without any further opinion. Kirksey, 243 A.3d 4 (Pa. 2020). Justice Wecht filed a concurring statement noting that a timely, specific objection must be made on the record which did not occur in the lower court. Id. at 4. Judge Wecht wrote that it is not sufficient for an attorney to get a ruling and file a post-trial motion without making the proposed point for charge part of the record. Id. Therefore, the Court dismissed the case based on procedural grounds rather than take an opportunity to address the merits of the question certified for appeal. Id.

**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 that agency principles should 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. Id. 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.

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. On appeal, the Pennsylvania Supreme Court considered "[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." Toney, 973 A.2d 415, 416 (Pa. 2009). In a divided opinion, the Court

affirmed the Superior Court, and Justice Baer, who wrote the lead opinion in support of affirmance, wrote:[2]

> [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.

Toney, 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.[3]

Importantly, 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. Id.; see also Denmark 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.").

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[2] Justice Todd joined in Justice Baer's opinion, but wrote separately, noting 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. Toney, 36 A.3d at 100.

[3] 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 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 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 unidentified agents on the verdict sheet because after the lower court struck the negligence claims against the 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, 93 A.3d at 866). 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 – ostensible agency. 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. (emphasis added).

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. See e.g., Stipp v. Kim, 874 F. Supp. 663, 665 (E.D. Pa. 1995); Morales v. Guarini, 57 F. Supp. 2d 150, 154 (E.D. Pa. 1999).

In Yacoub v. Lehigh Valley Med. Assocs., P.C., 805 A.2d 579, 591 (Pa. Super. Ct. 2002), the Superior Court upheld the trial court's decision to preclude evidence that the defendant radiologists were ostensible agents of the hospital with respect to their interpretation of two radiological studies. The Court, citing Goldberg v. Isdaner, 780 A.2d 654, 660 (Pa. Super. Ct. 2001), held that given the facts of this case, to impute liability on the hospital, Plaintiff would have had to show that the radiologists were negligent in reading the films at issue, and 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, plaintiff was precluded from establishing that the radiologists could have affected the jury's determination as to causation. Id.

In Green v. Pa. Hosp., 123 A.3d 310, 323 (Pa. 2015) the question on appeal concerned whether the hospital's liability for the negligence of a non-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**

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). Evidence that a physician holds staff privileges at a hospital shall be insufficient to establish vicarious liability through principles of ostensible agency. Id. § 1303.516(b). 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 Pittas v. Healthcare & Ret. Corp. of Am., No. 2009-C-5561, 2012 Pa. D.&C. Dec. LEXIS 681, at *5 (Pa. Ct. Com. Pl. July 31, 2012), plaintiff brought a claim against a skilled nursing facility alleging negligent management of 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. 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 Pennsylvania Commonwealth Court recently reviewed the MCARE Fund's denial of a third-party defendant hospital's request for Section 715 extended claims status[4] for a radiologists' services to third-party plaintiff during the four-year period before filing of the third-party action. Montgomery Hosp. & Med. Ctr. v. Bureau of MCARE Fund, 201 A.3d 909, 912 (Pa. Commw. Ct. 2019). The third-party defendant contended that there was no genuine issue of material fact that radiologists were independent contractors and not hospital employees and that the radiologists' services to the third-party plaintiff in the four-year period preceding the third-party action could not be attributed to the hospital for purposes of denying Section 715 status. Id. The hospital further contended that any claim by third-party plaintiff that radiologists were ostensible agents of the third-party defendant hospital was irrelevant to Section 715 status. Id. The Court disagreed with the contention that ostensible agency is irrelevant for determining Section 715 status, reasoning that the MCARE Act specifically provides for vicarious liability through the principle of ostensible agency. Id. at 914; see also 40 P.S. § 1303.516. Third-party defendant argued that Section 516 addresses only the patient's belief convening ostensible agency serving the sole purpose of protecting patients, and therefore, does not shield the MCARE Fund from its responsibility to provide defense costs. Id. The Court held that there is nothing in the plain language of Section 516 limiting its applicability solely to the protection of patients, and that there is no reason to conclude that Section 516 serves different interests from Section 715 or the MCARE Act generally. Id. at 915. Because the record did not demonstrate the absence of any issue of material fact concerning the hospital's ostensible agency, the Court concluded that the hospital could be held vicariously liable for radiologists' alleged negligent treatment during the four-year period preceding commencement of the action. Id.

The Superior Court in Charlton v. Troy, 236 A.3d 22, 23 (Pa. Super. Ct. 2020), **appeal denied, 251 A.3d 772 (Pa. 2021),** affirmed the trial court's denial of defendant-appellant's JNOV request that plaintiff failed to establish that defendant doctor was an ostensible agent of the hospital. The Superior Court reasoned that the plaintiff satisfied her burden of establishing the elements set forth in the MCARE Act, 40 P.S. § 1303.516. Id. The Superior Court agreed that the following facts established the burden that plaintiff could have reasonably believed that defendant doctor worked for the hospital: (1) plaintiff had been seeing defendant doctor for yearly OB/GYN appointments at her office in the hospital since 2008; (2) she continued to see her physician at that office during her pregnancy with twins; (3) defendant doctor's suite number appeared in the hospital directory next to the building's elevators; and (4) plaintiff was told that she could only deliver her twins at the hospital and that all perinatal testing would be conducted at the hospital. Id.

**EMTALA Cases**

In Torretti v Main Line Hosp., Inc., 580 F.3d 168, 170 (3d. Cir. 2009), plaintiff was referred to Paoli Hospital Perinatal Testing Center ("Paoli") for monitoring of her high risk

[4] Pursuant to Section 715 of MCARE, the MCARE Fund acts as a primary insurer, providing legal defense and first-dollar indemnity to medical providers for qualifying third-party claims asserted *more* than four years after an alleged negligent act, but still within the applicable statute of limitations. 40 P.S. § 1303.715. The MCARE Act deems a third-party claim to have been brought *less* than four years after the negligent act where the defendant medical provider rendered "multiple treatments or consultations" to the third-party plaintiff patient within the four year period. 40 P.S. § 1303.715(a).

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 C-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 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 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 analyzed the substance of plaintiff's EMTALA claim related to the 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 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 an 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 EMTALA, as well as state law claims for breach of contract. In response to 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.

The 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 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 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, CIVIL ACTION NO. 07-CV-5043, 2010 U.S. Dist. LEXIS 29036, at *4 (E.D. Pa. March 25, 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. 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 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. at *10. 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, CIVIL ACTION NO. 4:14-CV-2393, 2015 U.S. Dist. LEXIS 21118, at *4 (M.D. Pa. Feb. 23, 2015), plaintiffs alleged that the medical team 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 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." 2015 U.S. Dist. LEXIS at *20. 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.'" Id. (citing Smith v. Albert Einstein Med. Ctr., 378 F. App'x 154, 157 (3d Cir. 2010)).

In Hollinger v. Reading Health Sys., the Eastern District addressed when EMTALA's stabilization requirement ends. CIVIL ACTION NO. 15-5249, 2016 U.S. Dist. LEXIS 91393, at

*11 (E.D. Pa. July 7, 2016). Plaintiff encouraged the Court to adopt the Sixth Circuit's extension of 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 held that 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 "observation" differs from "inpatient" such that EMTALA's stabilization requirements apply. Id.

The District Court agreed, relying upon CMS regulations interpreting EMTALA. Id. The District Court noted that the CMS regulations provide a limited exception to EMTALA's obligations, "only in the event that a hospital 'admits [an] individual *as an inpatient*.'" Id. (emphasis in original). 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.

Similarly, in Gilmore v. Holland, No. 4:17-cv-01781, 2018 U.S. Dist. LEXIS 32750, at *23-26 (M.D. Pa. Feb. 28, 2018), aff'd, 756 F. App'x 147 (3d Cir. 2018), the Middle District of Pennsylvania held that Plaintiffs' complaint failed to state a claim pursuant to EMTALA. Plaintiffs filed a medical malpractice complaint against defendants, including defendant hospital, after plaintiff experienced medical complications following an ablation procedure. Id. at *2. The Middle District, relying upon the same CMS Final Rule and cases such as Dicioccio, reasoned that the plaintiff presented to the hospital for a prescheduled cardiac ablation, and only began to experience neurological issues after the pre-scheduled procedure had been performed while he was an inpatient. Id. at *25. The court held that "'Congress did not intend [for] EMTALA to cover [such] individuals every time they come to the hospital for their appointments, even though they suffer from serious medical conditions that risk becoming emergent.'" Id. (quoting Torretti, 580 F.3d at 172-73). see also, Pasitano v. Geisinger-GMC, Civil No. 3:18-CV-190, 2018 U.S. Dist. LEXIS 76012, at *11-12 (M.D. Pa. May 2, 2018 (dismissing plaintiff's EMTALA claim related to his cardiac catheterization procedure without prejudice to permit plaintiff to plead facts to supports his EMTALA claim that his procedure was an emergency, as opposed to a non-emergent scheduled medical procedure)

**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., 174 A.3d 1066, 1090 (Pa. Super. Ct. 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." (quoting 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. Plaintiff asserted 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, 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, 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, the Superior Court expanded on Scampone, *supra*, holding that "[w]e read Scampone 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.

93 A.3d 856, 870 (Pa. Super. Ct. 2014). Failure of a trial court to consider these five factors, in addition to Thompson, in actions involving skilled nursing facilities, is reversible error. Id. at 871. Again, 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. 2012), the family of a deceased nursing home resident brought suit against the facility. The court reiterated Scampone'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.

The Superior Court, relying on Edwards, recently affirmed the entry of nonsuit against defendant hospital on a corporate liability claim holding that plaintiff failed to present any evidence that defendant had actual or constructive notice of any defects or procedure that created harm to the decedent. Sonnenfeld v. Meadows at Shannondell Raffi G. Megarian, No. 1988 EDA 2019, 2020 Pa. Super. Unpub. LEXIS 1073, at *15-16 (March 27, 2020). The Superior Court emphasized that plaintiff's expert admitted that he did not know the policies and procedures at the hospital and did not explain the standard of care as it pertains to policies and procedures related to the evaluation and work-up of decedent's congestive heart failure while in the emergency room for treatment for a fall. Id. Therefore, the Superior Court held that nonsuit was properly granted in favor of the hopsital because plaintiff failed to present the necessary elements of the corporate negligence claim. Id. at *17.

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 against a hospital. 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 a 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 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 confessed to killing 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. In affirming the trial court's decision to deny summary judgment, the Superior Court addressed the sufficiency of the 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 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 concerns went ignored by hospital supervisors, supported the application of constructive notice. Id.; see also Tong-Summerford v. Abington Mem. Hosp. & Radiology Grp., 190 A.3d 631, 660

(Pa. Super. Ct. 2018) (finding corporate negligence under Thompson where evidence demonstrated that hospital failed to formulate, adopt, and enforce policies and procedures regarding performance of chest x-rays and that the failure to do so was a factual cause of harm).

**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. In Cangemi v. Cone, 774 A.2d 1262, 1266 (Pa. Super. Ct. 2001), the Superior Court held that "the duty to formulate and adopt adequate rules and policies surrounding the delivery of x-rays and radiologist's reports are not beyond that of the average lay person" such that expert testimony was not necessary in the particular case. Id.; see also Macosky v. Udoski, No. 1682 MDA 2018, 2019 Pa. Super. Unpub. LEXIS 2756, at *18-19 (July 19, 2019) (relying on Congemi when affirming the trial court's denial of a JNOV request for failure to present expert testimony where the hospital had procedure for ensuring that the appropriate physician timely completed an EKG report and that the appropriate physician receive the EKG report and those procedures were not followed).

**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; Rostock v. Anzalone, 904 A.2d 943, 945 (Pa. Super. Ct. 2006). 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.; see also Stroud v. Abington Mem. Hosp., 546 F. Supp. 2d 238, 247-48 (E.D. Pa. 2008) (holding a certificate of merit alleging direct corporate negligence must be filed in support of corporate negligence claim).

Of note, in Everett v. Donate, CIVIL NO. 3:CV-08-1243, 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, CIVIL ACTION NO. 03-CV-04347, 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 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, 805 A.2d at 1234-35, 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 Supreme Court 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. at 1237. The Court noted, however, that in distinct factual circumstances, the hospital may assume the duty to obtain informed consent, and that under those circumstance, it will be subject to direct liability. Id. at 1237; see also Friter, 607 A.2d at 1113-16 (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. 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.

**Sovereign Immunity**

In Moser v. Heistand, 681 A.2d 1322, 1326 (Pa. 1996), the Pennsylvania Supreme Court held that a plaintiff cannot proceed with a corporate liability claim against a state-owned medical facility. 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 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, finding that the sovereign immunity statute immunizes Commonwealth-run medical facilities from liability for their own "institutional,

administrative negligence." Id. See also Byrne v. Comm., No. 561 C.D. 2018, 2019 Pa. Commw. Unpub. LEXIS 142, at *9-11 (Pa. Commw. Ct. Mar. 19, 2019) (restating the holding in Moser and holding that while Commonwealth medical facilities can be held liable for the negligence of their health care employees under a theory of respondeat superior, the waiver of immunity provided by the medical-professional liability exception does not extend to the Commonwealth-owned medical facility itself).

**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., CIVIL ACTION NO. 06-3561, 2006 U.S. Dist. LEXIS 69119, at *3-4 (E.D. Pa. Sept. 25, 2006), the District Court denied defendants' motion to dismiss a 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; see also, McClure v. Parvis, 294 F. Supp. 3d 318, 328 (E.D. Pa. 2018) (plaintiff was entitled to develop a factual record to support the applicability of the corporate negligence theory against an alleged parent corporation of either her primary physician's office or the emergency department she was later taken by ambulance).

In Hyrcza 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. One argument involved whether the jury should have been charged on the issue of corporate negligence with respect to the professional corporation. Id. at 981-84. The corporation argued that it was 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 McNulty, the court concluded that the trial court did not err in charging the jury on corporate negligence. Id. at 984.

It is important to note that the Pennsylvania Supreme Court in Scampone, *supra*, criticized the reasoning of Shannon, Sutherland, and Hyrcza holding that there is no bright line rule as to whether a medical corporation assumes the role of a comprehensive health center. 7 A. 3d at 584. Whether a duty of care is owed by a medical corporation to a patient is a function of the specific relationship between the entity and the patient at issue. The test for corporate liability in the medical context is the relationship between the patient and the corporate defendant as outlined in Section 323 of the Restatement and the factors set forth in Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000) ("(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."). Therefore, the Pennsylvania Supreme Court has left the door open for corporate negligence claims to survive motions to dismiss pending a development of the facts about the relationship between the patient and the defendant medical corporation.

Recently, the Middle District of Pennsylvania relied heavily upon the reasoning in Scampone when it denied defendant orthopedic group's motion to dismiss corporate liability claims against the physician practice group. Johnson v. Lutton, 466 F. Supp. 3d 472, 474-77 (M.D. Pa. 2020). The sole issue before the court was whether plaintiff's corporate negligence claims against a physician practice group were "inconsistent with" Pennsylvania law. Id. at 474. The defendant orthopedic group argued that Pennsylvania courts have long refused to apply corporate negligence claims against physician practice groups that have not "assumed the role of a comprehensive health center". Id. at 475. Defendant relied upon the Pennsylvania Superior Court holding in Sutherland which the Middle District quickly stated was "rejected by the Pennsylvania Supreme Court." Id. at 476-77(citing Scampone, 57 A.3d at 600-06). The Middle District held that the orthopedic group failed to analyze how the Althaus factors or Section 323 of the Restatement support dismissal of plaintiff's corporate liability claim. Id. at 477. Therefore, the court denied defendant's motion to dismiss stating that it was not compelled to make arguments on defendant's behalf and found the matter waived. Id. As a result, plaintiff was permitted to continue her case against the orthopedic group.

**HMO Liability**

In Shannon v. McNulty, the Superior Court considered whether the corporate negligence doctrine extends to a Health Maintenance Organization ("HMO"). 718 A.2d at 836. 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 the 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, CIVIL ACTION No. 08-4905, 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. Plaintiff 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 moved 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 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.

**Peer Review Protection Act ("PRPA")**

The PRPA was enacted to serve the "legitimate purpose of maintaining high professional standards in the medical practice for the protection of patients and the general public." Troescher v. Grody, 869 A.2d 1014, 1021 (Pa. Super. Ct. 2005) (citing Cooper v. Del. Valley Med. Ctr, 630 A.2d 1, 7 (Pa. Super. Ct. 1993)). The PRPA "represents a determination by the Legislature that, because of the expertise and level of skill required in the practice of medicine, the medical profession itself is in the best position to police its own activities." Id.

The PRPA contains a confidentiality provision excluding certain documents from discovery. 63 P.S. § 425.4. The purpose of the confidentiality provision of the PRPA is to "facilitate self-policing in the health care industry." Yocabet v. UPMC Presbyterian, 119 A.3d 1012, 1019 (Pa. Super. Ct. 2015). As expressed by the Pennsylvania Superior Court:

> The medical profession exercises self-regulation. The most common form of such regulation in the health care industry is the peer review organization. Hospital peer review organizations are usually composed of physicians who review and evaluate other physicians' credentials and medical practices. The medical profession exercises self-regulation. The most common form of such regulation in the health care industry is the peer review organization. Hospital peer review

> organizations are usually composed of physicians who review and evaluate other physicians' credentials and medical practices. Generally, hospital peer review findings and records are protected from public scrutiny either legislatively, or by court decision. The purpose for such protection is to encourage increased peer review activity which will result, it is hoped, in improved health care.

Id. (citing Sanderson v. Frank S. Bryan, 522 A.2d 1138, 1139 (Pa. Super. Ct. 1987)); see also Lindsay v. Bosta, NO. GD95-3789, 1999 Pa. D.&C. Dec. LEXIS 222, at *17 (Pa. Ct. Com. Pl. Mar. 18, 1999) (holding that the privilege's purpose is to prevent a party from obtaining information that would help its litigation if this disclosure of information could discourage medical care providers from conducting peer review activities). Following this vein, the PRPA's confidentiality provision states in plain language:

> The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof….

63 P.S. § 425.4.

To maintain the confidentiality of peer review proceedings, Pennsylvania courts historically adopted "a relatively strict interpretation of the Act." Troescher, 869 A.2d at 1021 (citing Young v. Western Pa. Hosp., 722 A.2d 153, 156 (Pa. Super. Ct. 1998)). However, as discussed more fully below, Pennsylvania appellate courts have recently attempted to erode the protections of the PRPA and narrow its scope and application. See Reginelli v. Boggs, 181 A.3d 293, 303 (Pa. 2018) (holding that the PRPA privilege did not apply to committees within a hospital that review the professional qualification or activities of its medical staff or its applicants, i.e., credentialing review activities are not privileged under the PRPA).; but see, **Leadbitter v. Keystone Anesthesia Consultants, Ltd., 256 A.3d 1164, 1177 (Pa. 2021) (holding that a committee which performs a peer-review function, although it may not be specifically entitled a "peer review committee," constitutes a review committee whose proceedings and records are protected under Section 4 of the act)**. Morrissey v. GCMC Geisinger Cmty. Med. Ctr., 3:19-CV-894, 2020 U.S. Dist. LEXIS 219391, at *7 (M.D. Pa. Nov. 23, 2020) (Data Bank information contained in physician's credentialing file is subject to the protections of the PRPA).

**HMO Issues**

In McClellan v. Health Maintenance Org., 686 A.2d 801 (Pa. 1996), the executors of the estate of a patient sued decedent's doctor and HMO for negligence, breach of contract, and misrepresentation. McClellan, 686 A.2d at 807 n.1. 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. 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. 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 *ejusdem 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 and was abrogated by Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Bd., 83 A.3d 488, 513-14 (Pa. Commw. Ct. 2014). In Tri-County, the Commonwealth Court noted a 2010 Supreme Court decision, Dechert, LLP v. Comm., 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. 83 A.3d at 511-12; but see Yocabet, 119 A.3d at 1022-23 (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**

Prior to the Supreme Court's decision in Reginelli, Pennsylvania courts had interpreted the protections of the PRPA broadly to limit the discovery of hospital files. In Piroli v LoDico, 909 A.2d 846, 847 (Pa. Super. Ct. 2006), plaintiff sued a physician and his practice after his wife died following a transforaminal epidural steroid injection. At issue was whether information gathered during a peer review was discoverable under the PRPA given that individuals other than health care providers (including a billing manager) were present during the peer review session. Id. at 847. 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 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. C.S. § 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. C.S. § 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, 869 A.2d at 1020-21). 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 Reginelli, the Pennsylvania Supreme Court narrowed the scope of the PRPA against contracted provided for hospital based services. See 181 A.3d at 303. Specifically, the Supreme Court held that the evidentiary privilege does not apply to contract based hospital services such as physician services groups, hospitalist services, anesthesiology, radiology, emergency medicine laboratory medicine, and other service providers. Id. The Court held that to qualify for privilege pursuant to PRPA, the entity conducting the peer review must be a "professional healthcare provider" as strictly defined by the language of the PRPA. Id. The PRPA defines a professional healthcare provider as "individuals who are licensed or otherwise regulated to practice or to operate in the healthcare field under the laws of the Commonwealth of Pennsylvania." Id. The Court held that the physician group was not a professional health care provider as defined by the PRPA, despite the fact that it was comprised of hundreds of professional health care providers, because the group is "unregulated and unlicensed." Id. Additionally, the Court went beyond the question presented on appeal and held that hospital credentialing review activities are not privileged under the PRPA. Id. at 305. Again, strictly analyzing the construction of the PRPA, the Court held that the PRPA privilege did not apply to committees within a hospital that review the professional qualifications or activities of its medical staff or its applicants because such activities are not a review of quality of services "ordered." Id. The Court reasoned that review of a physician's credentials "for purposes of membership (or continued membership) on a hospital's medical staff is markedly different from

reviewing the 'quality and efficiency of service ordered or performed….'" Id. (quoting 63 Pa. C.S. § 425.2).

The Pennsylvania Superior Court relied upon the *dicta* in Reginelli in addressing whether the PRPA extends its grant of an evidentiary privilege to materials generated and maintained by entities reviewing the professional qualifications or activities of medical staff. See Krappa v. Lyons, 211 A.3d 869, 873-75 (Pa. Super. Ct. 2019). Upon an emergency motion by plaintiffs to compel the personnel files of defendant-physicians, defendant community medical center objected noting that the personal files were generated for quality improvement purposes and maintained exclusively by its credentialing committee. Id. at 872. The defendant community medical center objected stating that the Supreme Court's discussion regarding credentialing committees in Reginelli amount to nothing more than non-precedential *dicta*. Id. The Superior Court affirmed the lower court's analysis after an *in camera* review of the files at issue, finding that the files "consist entirely of credentialing materials…." Id. at 875. The Superior Court reasoned that the materials in the defendant physicians'' personnel files are generated and maintained by the defendant community medical center's credentialing committee. Id. Relying on Reginelli, the Superior Court specifically held that the PRPA's protections do not extend to the credentialing committees' materials because the credentialing committee is not a "review committee" as defined by the PRPA. Id. Thus, the Superior Court affirmed the trial court's ruling holding that the documents were discoverable. Id.; see also Ungurian v. Beyzman, 232 A.3d 786, 800 (Pa. Super. Ct. 2020) (citing Krappa and holding that credentialing committees are not review committees under the PRPA).

**The Pennsylvania Supreme Court in Leadbitter v. Keystone Anesthesia Consultants, Ltd., however, recently reinforced the traditional interpretation of the PRPA protections concerning hospital files. 256 A.3d 1164, 1177 (Pa. 2021). First, the Supreme Court held that that the Superior Court erred in ordering discovery of the national practitioner data bank (NPDB) query responses because the Federal Health Care Quality Improvement Act expressly protected from disclosure the responses given by the NPDB to queries submitted to it. Id. at 1180-81.Next, and most important, the Pennsylvania Supreme Court vacated the ruling in the Superior Court, Leadbitter v. Keystone Anesthesia Consultants, Ltd., 229 A.3d 292 (Pa. Super. Ct. 2020), and held that the PRPA protections extended to the hospital's credentialing file to the extent that the credentials committee qualified as a "review committee" for purposes of § 4 of the Pennsylvania Peer Review Protection Act, 63 Pa. Stat. Ann. § 425.4. Id. Thus, a committee which performs a peer-review function (i.e., evaluation of the "quality and efficiency of services ordered or performed" by a professional health provider) despite the fact that it may not be specifically entitled a "peer review committee," constitutes a review committee whose proceedings and records are protected under the PRPA. 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. C.S. § 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. C.S. § 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).

## 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. C.S. § 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. at § 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 Ctr. for Human Dev., Inc., 720 A.2d 1032 (Pa. 1998), 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. Id. 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 of gross negligence, failure to warn and NIED. 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 trial 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 Cnty., 636 F. Supp. 2d 368, 386-87 (M.D. Pa. 2009) (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). But see Bayer

v. Monroe Cnty. Children and Youth Servs., 577 F.3d 186, 191 (3d. Cir. 2009) (employees of a youth center were entitled to qualified immunity in a case where, after a minor child's removal was ordered at a hearing, said minor was held in custody for more than seventy-two hours while necessary paperwork from the hearing was filed and processed because qualified immunity protects government officials from liability where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.) (internal quotations omitted).

In Dean v. Bowling Green-Brandywine, 192 A.3d 1177 (Pa. Super. Ct. 2018), the Superior Court wrestled with "novel" issues regarding application of the MHPA qualified immunity standard to physicians and healthcare facilities. Dean, 192 A.3d at 1184. Decedent voluntarily applied for admission to Bowling Green Brandywine Treatment Center. Id. at 1181. He was suffering from addition to opiates and benzodiazepines. Id. He later died at the hospital. Id. The question was whether the various defendants should receive the immunity provided by the gross negligence standard.

The court found that the physician who provided a psychiatric evaluation was covered by the MHPA's qualified immunity. Id. at 1184. As to two ER physicians, the record was unclear as to whether they had diagnosed and treated the decedent for mental illness. Id. at 1185. These doctors did not treat for mental illness or propose any diagnosis of mental illness, and their care occurred prior to the psychiatric evaluation. Id. Therefore, the trial court erred in applying limited immunity under the MHPA to the claims against the ER physicians. Id. This also meant that the court was required to reinstate the vicarious liability claim against Chester County Emergency Room Associates. Id. at 1186. As to another physician and Brandywine, who treated the decedent for substance abuse before and after the psychiatric consult, the Court held that actions after the psychiatric consult were covered by the limited immunity provisions of the MHPA. Id. at 1187. In rendering its decision, the court analyzed and distinguished Allen v. Montgomery Hosp., 696 A.2d 1175 (Pa. 1997), which interpreted the broad definition of "treatment" under the MHPA to include "medical care coincident to mental health care." Allen, 696 A.2d at 1179.

The Superior Court in Maas v. UPMC Presbyterian Shadyside, 192 A.3d 1139 (Pa. Super. Ct. 2018), expanded upon the rule in Emerich to hold that a "duty to warn exists where the target is identifiable, not just identified by name, [but] that the mental health professional must use of reasonable efforts. . . ." Id. at 1147. In Maas, a plaintiff mother, as the Administratrix of her daughter's estate, filed a wrongful death and survival action against defendant hospital for negligent failure to warn her deceased daughter of the risk presented by her neighbor, a psychiatric patient who had been under their care. Id. at 1143. Although the patient did not specifically identify the deceased, the patient did communicate to the defendant that he intended to kill his neighbor and his next-door neighbor, a communication which became more frequent and specific over time. Id. at 1147, 1149. Accordingly, the court in Maas found that defendant did owe a duty to the plaintiff. Id. at 1149.

On appeal, the Pennsylvania Supreme Court agreed. 234 A.2d 427 (Pa. 2020). The court found that "[t]he trial court and the Superior Court . . . properly determined the duty to warn applies

not only when a specific threat is made against a single readily identifiable individual, but also when the potential targets are readily identifiable because they are members of a specific and identified group — in this case, 'neighbors' residing in the patient's apartment building." Id. at 429. Importantly, the Pennsylvania Supreme Court opined that "[i]n these circumstances, the potential targets are not a large amorphous group of the public in general, but a smaller, finite, and relatively homogenous group united by a common circumstance." Id.

In Walters v. UPMC Presbyterian Shadyside, 144 A.3d 104 (Pa. Super. Ct. 2016), aff'd, 187 A.2d 214 (Pa. 2018), the court reiterated "'that a mental health care professional, under certain limited circumstances, owes a duty to warn a third party of threats of harm against that third party.'" 187 A.2d at 224 (quoting Emerich, 720 A.2d at 1036). In Walters, an employee was terminated after the defendant hospital learned that he had, on multiple occasions, injected himself with patients' syringes containing fentanyl, refilled the syringe with saline or another substance, and, thereafter, returned the now-contaminated syringe to be injected into the patient. Id. at 220. The Superior Court applied the Althaus factors and found a duty owed to the patient by the hospital because it was highly foreseeable that, if left unreported, the employee would seek new employment to continue this criminal act. Id. at 114. Furthermore, a duty was owed because the defendant had a special relationship with the employee that created a duty, by law, to report his behavior to the DEA or other enforcement agencies. Id. at 114, 119. The Supreme Court, though, noted that while complying with federal reporting obligations would be sufficient to discharge the duty, an analogous action may also suffice. Id. at 241 (Pa. 2018).

**Other Developments**

Contrarily, courts have opined that a duty may not attach where the practitioner does not owe a specialized standard of care. In Thierfelder v. Wolfert, 52 A.3d 1251 (Pa. 2012) (also dealt with, *supra*), 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 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. However, 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 properly dismissed her suit because 50 Pa. C.S. § 7114(a) required proof that defendants were grossly negligent. Id. at 6. The facts alleged demonstrated no more than ordinary carelessness and did not indicate behavior that grossly deviated from the required standard of care. Id. at 8. Therefore, the Superior Court affirmed the order granting summary judgment in favor of defendants. Id. at 9-10.

In Bell v. Mayview State Hosp., 853 A.2d 1058 (Pa. Super. Ct. 2004), the trial court dismissed an inmate's 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 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, and falsely 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 appealed an 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.), the Pennsylvania Alcohol and Drug Abuse Act (71 P.S. § 1690.101, et seq.), and 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 court held that the privilege did not apply and concluded that "[Plaintiff] directly placed her mental condition at issue….Absent other considerations militating against disclosure, the records are discoverable." Id. at 1206.

Following Gormley, the court in Octave v. Walker, 103 A.3d 1255 (Pa. 2014) examined "whether [plaintiff] waived the mental health records privilege under the MHPA, . . ., by filing a negligence suit to recover for physical injuries." Id. at 1256. Plaintiff sustained his injuries after being struck by a tractor-trailer driven by defendant. Id. Eyewitness reports, however, claimed that plaintiff was attempting to commit suicide by jumping under the tractor-trailer. Id. These reports were put in the police report. Id. Being such, defendant sought plaintiff's mental health records during discovery. Id. at 1257. The court in Octave interpreted the language of the MHPA and evidentiary privilege policy considerations to hold that "a patient waives his confidentiality protections under the MHPA where, judged by an objective standard, he knew or reasonably should have known his mental health would be placed directly at issue by filing the lawsuit." Id. at 1262. Accordingly, the court found that plaintiff did waive his records privilege under MHPA because the police report stated that plaintiff was attempting suicide, and so, the plaintiff was put on notice that defendant would likely argue a suicide defense and use plaintiff's mental health history to support said defense. Id. at 1263.

## 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. 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. C.S. § 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), app. 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 Int'l 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), app. 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" 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.

**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 did not administer the plaintiff-mother with an injection during her pregnancy in 1998, the result of which was that the mother could have problems with future pregnancies. Matharu, 29 A.3d at 378. The Plaintiff-mother became pregnant again, treated again with Dr. Muir, and had no issues. Id.

In March 2003, the defendant sent a letter to the mother, ending the treatment and relationship. Id. at 379. Then, in 2005, the mother again became pregnant, and this time did not treat with the defendant. Id. The child was delivered early by C-section and died two days later. Id. The Plaintiffs sued claiming that Dr. the doctor and other defendants failed to administer the injection, which in turn caused the issues with the last pregnancy. Id. at 380. The plaintiffs filed their Complaint 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 or his date of death. Id. at 384. Thus, the survival action was brought within the statute of limitations. Id. As to the wrongful death action, the plaintiffs did not suffer any pecuniary loss caused by the child's death until at least the date of death. 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 Ctr., 881 F. Supp. 2d 663 (E.D. Pa. 2012), a nursing home resident choked on June 24, 2007 and then died on July 17, 2007. Massey, 881 F. Supp. 2d at 665. Plaintiffs brought suit under 42 U.S.C. § 1983 on July 16, 2009. Id. The Complaint also 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), plaintiff filed a writ of summons against defendant physician and hospital in October of 2003. Wilson, 964 A.2d at 356. The subsequent complaint alleged that the physician negligently lacerated the plaintiff's radial nerve during surgical procedures on her wrist and hand in May and August of 2000. Id. Defendants sought summary judgment, claiming that plaintiff filed her claim beyond the two year statute of limitations. Id. Plaintiff 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. Plaintiff noted that, prior to finding out that she was injured, she was treating with defendant-physician and another orthopedic surgeon for approximately thirteen months, and was always told by defendant-physician that there was nothing wrong, even though evidence suggested that the other orthopedic surgeon notified defendant-physician that plaintiff's complications could have been caused by a laceration of the radial nerve. Id. at 358.

The trial court awarded summary judgment and explained that the cause of action arose after the second surgery in August of 2000, when plaintiff experienced constant, persistent, and excruciating pain. Id. at 356. The Superior Court affirmed, but the 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, however:

> [He] believe[d] 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.

Id. at 370 (Baer, J., concurring and dissenting). See also Nicolaou v. Martin, 195 A.3d 880, 893 (Pa. 2018) ("[T]he objective reasonable diligence standard is sufficiently flexible . . . to take into account the differences between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question, and, as such, is to be applied with reference to individual characteristics.") (internal quotations omitted).

In Byrne v. The Cleveland Clinic, 684 F. Supp. 2d 641 (E.D. Pa. 2010), aff'd, 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 contract claim. Byrne, 684 F. Supp. 2d at 645. Defendants moved to dismiss on multiple grounds, including 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 Pennsylvania Supreme Court 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 patients raised the discovery rule and the doctrine of fraudulent concealment. Id. at 853-54. The Supreme Court ruled that the dentist-defendants were not entitled to summary judgment and issued two important holdings. See id. at 854.

In both cases, the plaintiffs experienced numbness and tingling after removal of their wisdom teeth, but were reassured for a significant amount of time that the symptoms would resolve. Id. at 854-55. Plaintiffs subsequently commenced suit, and the dentists moved for summary judgment on the basis that the matter was time-barred. Id. at 855. Plaintiffs 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. In the first case, the trial court denied the dentist's motion, and the dentist appealed after trial resulted in a verdict in favor of plaintiff. Id. The Superior Court reversed, ruling that the limitations period began to run on the date of surgery (not during the period of reassurance) and that the action, therefore, was barred. Id. In the second case, the trial court granted the motion, and the Superior Court remanded 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 Court reviewed the settled aspects of the discovery rule and 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. at 857-59. To adopt an alternate position, the Supreme Court reasoned, could lead in many instances to unreasonable and arbitrary results. Id. at 860. The 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, the 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. Thus, 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 a neck infection at a federally subsidized health care clinic. Santos, 523 F. Supp. 2d at 436-37. 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 Minors 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. 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. Id. 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.

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. 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 Third Circuit reversed and remanded, 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 further 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 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. at 200. The court 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. Also, 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 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 court 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 Ctr., 463 F.3d 266 (3d Cir. 2006), the decedent was a severely handicapped 64-year-old man with the mental age of a four-year-old child. Miller, 463 F.3d at 268. The decedent resided in a community living home, during which time the defendant-physicians provided psychiatric treatment and prescribed psychiatric medications. Id. at 268-69. On October 4, 1995, the decedent was admitted to Frankford Hospital with a serious condition characterized by muscle breakdown. Id. at 269-70. While the decedent was in the hospital, the plaintiff (decedent's sister), discovered from the attending physician that decedent's condition was caused by an adverse reaction to the combination of medications prescribed and administered by the defendant-physicians. Id. at 269. Over the next two years, decedent's condition deteriorated, and he died on September 24, 1997. Id. Plaintiff subsequently brought a survival action against the defendants, alleging that the defendant-physicians negligently prescribed excessive doses of psychiatric medications. Id.

Defendants argued that the plaintiff's claims were time-barred because they were brought more than two years after she learned the diagnosis was caused by the improper medication regimen. Id. at 270. 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 tolled the statute of limitations until the decedent's death, because a plaintiff exercising reasonable diligence could not have discovered the injury until that time. Id. at 276. The Third Circuit based its decision on Fine, *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 handicapped, a "narrow equitable exception" should be carved out under federal law for purposes of determining when an injury is "discoverable" and when the statute of limitations should be tolled. Id. at 275.

In Miller v. Ginsberg, 874 A.2d 93 (Pa. Super. Ct. 2005), the plaintiff 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. Plaintiff had had many prior surgeries, resulting in scar tissue and adhesions to the bowel. Id. The surgeries were determined to have caused injuries to the bladder and kidney. Id. She commenced suit in June 1998. Id.

A first trial resulted in defense verdict, 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 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 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 was truncated and omitted reference to plaintiff's burden of proof. Id.

The Superior Court disagreed and 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 court emphasized the trial court's finding that, while the plaintiff may have known her ureter was cut at the time of the 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 court thus held that there was no clear error of law, that the trial court had not abused its discretion in its jury instruction, and that the statute of limitations did not bar the claim. Id.

In Chaney v. Meadville Med. Ctr., 912 A.2d 300 (Pa. Super. Ct. 2006), the plaintiff brought a malpractice action against defendant facility and a physician after her daughter died following a bout of pneumonia and severe hypoxia. Chaney, 912 A.2d at 302. The trial court granted defendants' motion to strike certain allegations from the complaint, and the plaintiff subsequently filed a petition for rule to amend the complaint. Id. at 303. The trial court denied the 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 the doctor, but reversed 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.

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 statute of limitations in a case involving a plaintiff who lapsed into a coma. Williams, 199 F. Supp. 3d at 921. Plaintiff was an inmate who suffered from multiple medical conditions and received treatment from physician employed by the defendant. Id. at 919. According to the complaint, the physician prescribed 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 the physician who "yelled at" her and refused to answer her questions about the antibiotics that he had prescribed. 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 plaintiff also had a lesion on his liver. Id. at *2. According to the

medical records, plaintiff 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, plaintiff underwent a PET-CT scan that showed the cancer had metastasized to his liver. Id. at *3.

Plaintiff 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, plaintiff 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 plaintiff'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 plaintiff had acted with reasonable diligence in investigating his claim and asserting his rights. Id. at *18-19.

Additionally, in Nicolaou v. Martin, 195 A.3d 880 (Pa. 2018), the Pennsylvania Supreme Court reversed affirmance of the trial court's order granting summary judgment in favor of appellees. The issue involved application of the discovery rule and whether appellants filed suit within the two-year statute of limitations from when she first learned that her injuries were caused by the doctors who failed to diagnose her Lyme's disease. Id. at 882. Both the trial court and the Superior Court had found that reasonable minds could not differ that, as early as July of 2009 and through September of 2009, plaintiff knew or should have known that she suffered from Lyme's disease and that her health problems were caused by defendants' failure to diagnose it. Id. at 887. The lower courts were persuaded in part by plaintiffs' Facebook posts and subsequent comments showing that plaintiff was on notice that she had Lyme disease. Id. The factual history was also complicated by plaintiff's seemingly voluntary delay in taking a test that ultimately proved she had Lyme's disease. Id. at 895. The Court analyzed the reasonable diligence standard applicable to the discovery rule and found that it is fact intensive and ordinarily a question for the jury. Id. at 893. The Court held that plaintiff's exercise of reasonable diligence was a jury question and remanded the case to the trial court. Id. at 895.

On November 30, 2019, both the Pennsylvania Supreme Court and Third Circuit Court of Appeals issued opinions regarding the scope of the discovery rule in Pennsylvania, respectively, Saksek v. Janssen Pharm., Inc. (In re Risperal Litig.), 223 A.3d 633, 642 (Pa. 2019) and Adams v. Zimmer US, Inc., 943 F.3d 159 (3d Cir. 2019). **See also Rice v. Diocese of Altoona-Johnstown, 255 A.3d 237, 254 (Pa. 2021); Pitney Rd. Partners, LLC v. Lazun, 226 A.3d 630 (Pa. Super. Ct. 2020); Yelinek v. Johnson & Johnson, Civil Action No. 20-799, 2021 U.S. Dist. LEXIS 200823, at *27 (W.D. Pa. Oct. 19, 2021);** Russell v. Ethicon, Inc., No. 4:20-CV-00405, 2020 U.S. Dist. LEXIS 187523, at *10 (M.D. Pa. Oct. 9, 2020).

In In re Risperdal, the Pennsylvania Supreme Court found that a plaintiff's understanding of their physical symptoms—male breast growth—did not equate to knowledge of the actual injury—gynecomastia. 223 A.3d 633, 641 (citing Wilson, 964 A.2d at 365). Defendant argued, however, that Appellants were aware of their injuries in 1998 and 2001-2002, respectively, when

Appellants had first noticed breast development and weight gain. Id. at 640-41. The Court held that neither of the Appellants knew specifically that they had developed gynecomastia, and that the Superior Court "fail[ed] to distinguish between knowledge of the **physical condition** of large breasts and the critical knowledge of an **injury**, gynecomastia." Id. at 642 (emphasis in original). The court noted that laypersons cannot be expected to understand a link between symptoms and injury absent instruction from a treating doctor. Id. at 643, n. 6 (citing Nicolaou v. Martin, 195 A.3d 880, 893 (Pa. 2018) (while inquiry notice does not require knowledge of the "full extent of the injury," nevertheless "a layperson is only charged with the knowledge communicated to him or her by the medical professionals who provided treatment and diagnosis")). Importantly, there was no record evidence indicating Appellants' physical appearance or explaining their deformations, or medical records concerning interactions between Appellants and their treating doctors. Id. Additionally, neither of Appellants' doctors diagnosed them with gynecomastia until at least 2013. Id. The court accordingly remanded the case for a jury to determine, under the discovery rule, when the statute of limitations began to run. Id. at 652.

That same day, the Third Circuit handed down a very similar opinion regarding the discovery rule in Adams v. Zimmer US, Inc., supra, a case involving defective hip implants. In Adams, the court emphasized what it describes as the limited medical knowledge of laypersons, and that notice of a medical diagnosis does not necessarily link an injury to another's conduct, as required by the discovery rule. Id. at 165. In *Adams*, plaintiff went for a pre-operative visit on January 30, 2015. Id. at 162. Records from the visit indicate that Adams was suffering from "right total hip metallosis"—"metal wear that then causes a reaction to the surrounding tissue." Id. Adams testified that she did not recall hearing about the metallosis. Id. On February 12, 2015, Adams underwent the revision surgery. Id. During surgery, however, Dr. Ververeli discovered metal debris and a psuedotumor in the area. Id. Dr. Ververeli "replaced all of the main components of the implant hip, which had been discharging excessive and potentially toxic metals." Id. at 164. Adams continued to experience hip pain. Id. On February 10, 2017, Adams brought a products liability suit against Zimmer. Id.

The Adams court began by analyzing the statute of limitations rule: "the statute of limitations . . . begins to run when the plaintiff knew, or exercising reasonable diligence, should have known (1) he or she was injured and (2) that the injury was caused by another." Id. at 163 (citing Coleman v. Wyeth Pharms., 6 A.3d 502, 510-11 (Pa. Super. Ct. 2010)). Looking at the reasonable diligence requirement, the court relied on Fine v. Checcio, 870 A.2d 850, 861 (Pa. 2005) in which the plaintiff was not barred by the statute of limitations because, although he experienced facial numbness after a wisdom tooth extraction outside of the two year window, this numbness was "indicative of two distinct phenomena"—temporary side effect or permanent injury. Id. at 164. The court concluded based on Fine that, here, a jury could conclude that Adams did not know the nature of her injury—the implant deterioration—until the revision surgery on February 12, 2015. Id. at 164-65.

Further, the Court reiterated that "a lay person is only to be charged with the knowledge communicated to him or her by the medical professions who provided treatment and diagnosis." Id. at 165 (citing Nicolaou v. Martin, 195 A.3d 880 (Pa. 2018)). Here, the circuit court found that

Dr. Ververeli did not know of the nature of Adam's injury until he was in the middle of the revision surgery. Id. at 166.

Defendant Zimmer argued, first, that Adams had actual or constructive notice that the Zimmer metal piece caused her injury because she wanted the Zimmer piece to be replaced with another brand, and she accordingly testified during a deposition that "it just seemed that something was wrong [. . .] It had to come out." Id. However, the Third Circuit concluded that "a plaintiff's after-the-fact recollection of general suspicions does not start the statutory clock as a matter of law." Id. (citing Nicolaou, 195 A.3d at 884-85, 894) (finding that even though plaintiff was diagnosed with probable Lyme disease in July 2009, a reasonable jury could find that she did not discover her injury until she received a positive Lyme disease test in February 2020)). See also Wilson, 964 A.2d at 358 (plaintiff's after-the-fact testimony that she knew at an earlier point that "something is wrong here[, s]omething is really wrong" did not start the statutory clock as a matter of law). The court in Adams found other reasons why Adams wanted the device to come out without linking her pain to a problem caused by the device itself, i.e. she was under much duress over the situation; she considered getting the implant out in late 2012 when the pain was from the supposed infection. Id. at 167.

Defendant Zimmer argued, second, that on January 30, 2015, and February 9, 2015, Dr. Ververeli, his staff, and various documents provided to Adams notified her that she was suffering from metallosis. However, the court found that because Dr. Ververeli did not know Adams had an injury caused by the implant until the revision surgery, his metallosis diagnosis could not have communicated to Adams that she was, in fact, injured by the implant and that he could not have provided information sufficient to begin the running of the statute of limitation until after he notified her of such after the revision surgery. Id.

Judge Greenaway dissented, finding that Adams knew of the right hip pain and knew of its connection to the allegedly defective device. Id. at 168. Judge Greenaway initially noted that the discovery rule is meant to be narrow and places a heavy burden on the injured party invoking the rule. Id. at 169 (citing Wilson, 964 A.2d at 364). Judge Greenaway then categorically described the majority's missteps: A) oversight of undisputed material facts; B) misapplication of the appropriate legal standard; and C) reliance on inapposite cases.

Under section A, oversight of undisputed material facts, Judge Greenaway noted that: plaintiff knew by January 30, 2015 that her injury was casually linked to the Zimmer device when stating that "it just seemed that something was wrong. [The Zimmer Device] had to come out. . . . It was a problem." Id. at 170 (citing Gleason, 15 A.3d at 484 (requiring only knowledge of "some form . . . of a factual cause linked to another's conduct, without necessity of notice of the . . . precise cause")); Dr. Ververeli informed Adams of the metallosis diagnosis which he described as "metal wear that then causes a reaction to the surrounding tissues" and that she was suffering from "adverse local tissue reaction from wear and fretting to the Zimmer Device," which would necessitate "revision surgery and changing the Zimmer Device to a prosthesis with a ceramic head" to "correct the problem." Id. at 171. While the revision surgery uncovered more erosion than expected, Dr. Ververeli's initial diagnosis was nonetheless accurate. Id.

Under section B, misapplication of the appropriate legal standard, Judge Greenaway noted that the Majority heightened the statute of limitations standard and that rather: an injured party (1) need only know about some form of significant harm, not the full extent of her injury; and (2) need only know about a causal link between her injury and another's conduct, not misconduct. Id. Judge Greenaway opined that much of the Majority's opinion rests on Dr. Ververeli not appreciating the full extent of the deterioration until he was in the middle of surgery, however, his discovery only confirmed his prior diagnosis causally connected to the Zimmer device. Id. at 172-73.

Under section C, reliance on inapposite cases, Judge Greenaway pointed out that those cases relied on, namely, Fine, Nicolaou, and Wilson, involved (1) multiple or uncertain cases or (2) incorrect diagnoses, whereas, here, there was a single, correct diagnosis given.

**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. C.S. §§ 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 § 513(d) of the MCARE Act. See Dubose v. Quinlan, 173 A.3d 634 (Pa. 2017). In Dubose, the decedent was admitted to the hospital after she fell at home and sustained serious head injuries. Id. at 635. She was later transferred to a nursing home. Id. Between 2005 and 2007, decedent suffered from numerous bedsores that ultimately culminated in her death. Id. at 635-36.

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. 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 637. The trial court explained that the survival action was timely pursuant to § 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 638.

Defendants appealed and the Superior Court affirmed the trial court's rejection of the statute of limitations argument based on § 513(d). Id. at 640. 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 643-48. 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 647. In view of this, the Court affirmed the lower courts and held that plaintiffs' claims were timely. Id. at 648.

Following Debose, the Superior Court in Reibenstein v. Barax, 236 A.3d 1162 (Pa. Super. Ct. 2020) was faced with the question of defining "affirmative misrepresentation or fraudulent concealment of the cause of death." Id.; see also Section 513(d). In Reibenstein, the plaintiff-decedent's primary care physician, Dr. Conaboy, sent plaintiff to undergo a CT scan, which was reviewed by Dr. Barax. Id. at 1163. Dr. Barax noted in his report of the CT scan that plaintiff-decedent had an aneurysm that was "poorly visualized" on the study. Id. Dr. Barax contacted Dr. Conaboy with the results of such study. Id. Plaintiff-decedent died five days after said CT scan—plaintiff died in 2010. Id. One year after plaintiff's death, the administratrix of decedent's estate initiated an action against Dr. Barax and his employer. Id. Dr. Barax with deposed in 2015. Id. at 1164. During Dr. Barax's deposition, it was revealed that when Dr. Barax spoke to Dr. Conaboy about the results of the CT scan in 2010, Dr. Barax testified that he told Dr. Conaboy that because he could not visualize the aneurysm well, he could neither confirm nor deny bleeding or rupturing of the aneurysm. Id. Upon learning this information, in 2016, the administratrix of decedent's estate initiated a second action against Dr. Conaboy. Id.

Dr. Conaboy moved for summary judgment, citing to the two-year statute of limitations in wrong death and survival actions. Id. In looking to the language of the statute, the trial court found no issues of material fact, finding no issues as to the cause of death since plaintiff's medical cause of death—a ruptured aneurysm—was correctly identified on plaintiff's death certificate. Id. The trial court granted defendants summary judgment motion. Id.

On appeal, the Superior Court underwent a deep analysis into Section 513(d), while guided by the Statutory Construction Act to effectuate the intention of the General Assembly. See 1 Pa.C.S.A. § 1921(a). Plaintiff's argued that Dr. Barax's concealment of his communicates with Dr. Conaway barred the tolling of the wrongful death statute. Id. at 1165. Specifically, plaintiff argued that the term "cause of death" in Section 513(d) is ambiguous, and that the concealment of "cause of death" should include the chain of causation leading to a patient's death, rather than a limitation to simply a defendant's failure to record the correct cause of death. Id. Conversely, Dr. Conaboy asserted that the term "cause of death" is unambiguous, and that because the medical cause of death matches the cause of death on her death certificate, there was no fraudulent concealment. Id. The Superior Court opined that MCARE did not define "cause of

death" and no other controlling authority shed light onto whether "'cause of death' as used in subsection 1303.513(d) means the immediate, medical cause of death, such as is ordinarily listed on the decedent's death certificate, or includes conduct leading to the decedent's death but that is not the immediate, medical cause of the death." Id. Therefore, the Superior Court found that "cause of death" in the statute is ambiguous. Id. The Superior Court further analyzed Debose and stated:

> Clearly, the General Assembly included the equitable tolling provision to protect patients who have pursued their rights, and despite this, extraordinary circumstance precents them from bringing a timely action. In such extraordinary circumstances, the restriction imposed by the statute of limitations does not further the statutes purpose.

Id. at 1166 (quoting Dubose, 173 A.3d at 645) (internal quotations omitted). Accordingly, the Superior Court in Reibenstein held that "'affirmative misrepresentation or fraudulent concealment of the cause of death'" means affirmative misrepresentations about or fraudulent concealment of conduct the plaintiff alleges led to the decedent's death." Id. **See also Reibenstein v. Barax, 236 A.3d 1162, 1164 (Pa. Super. 2020) (reversing the trial court below and finding that plaintiff's claim for wrongful death and a survival action were not time barred because of affirmative mispresentations).**

## 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. §§1303.101-1303.1115 (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.[5] 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**

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." Id. § 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;

[5] 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 December 7, 2018).

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 C-section, despite the plaintiff's refusal to consent to this procedure. Id. at 185. 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).

Plaintiffs contended that this instruction was an improper 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 must prove the defendant 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 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 clearly and adequately set forth the law, finding that a plain reading of the charge refuted the argument that the instruction required proof that defendant performed the C-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. at

192. 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 (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, was killed when the device allegedly malfunctioned after implantation. Id. at *10. Plaintiff, the decedent's widow, bought suit against the defendant-physicians for failure to obtain informed consent pursuant to 40 P.S. § 1303.504. Id. at *8.

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[6] governing informed consent. Id. at *13-16. Plaintiff contended that removal was inappropriate since her claim solely involved state statutory and common law (under MCARE). Id. at *13.

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

[6] 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.

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 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 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 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 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.

"A medical facility ordinarily 'cannot be held liable for a physician's failure to obtain informed consent' or the resulting medical battery because it is the physician's duty to obtain informed consent and 'a medical facility lacks the control over the [way] the physician performs [that] duty.'" Bilinski v. Wills Eye Hosp., No. 16-02728, 2019 U.S. Dist. LEXIS 163689, at *6 (E.D. Pa. Sep. 24, 2019) (citing Shinal, 162 A.3d at 453 (internal citation omitted)). See also Valles v. Albert Einstein Med. Ctr., 805 A.2d 1232 (Pa. 2002) (battery that results from lack of informed consent is not type of action that occurs within scope of employment for purposes of vicarious liability); **Lutz v. Heckman, 248 A.3d 467 (Pa. Super. Ct. 2021) ("To the extent that [Plaintiff] Lutz alleges battery (lack of informed consent) against Defendants . . . we recognize that our Court has held that a medical facility cannot be held vicariously liable for the failure of its physicians to obtain a patient's informed consent.").**

However, in Bilinski, the court opined that, where defendant allegedly committed a medical battery by performing laser eye surgery without consent, "the hospital may have had a duty to control [defendant] and ensure that he obtained [plaintiff]'s informed consent," if said defendant was a trainee or student of the hospital. Id. at *6 (citing Wills Eye Hosp. v. Pa. Labor Relations Bd., 328 A.2d 539, 541 (Pa. 1974) (characterizing "residents and clinical fellows" as trainees or students rather than ordinary employees); Haskins v. Temple Univ. Health Scis. Ctr., 829 F.2d 437, 438-39 (3d Cir. 1987) (same)).

**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).

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 an obstructed bowel, amounted to negligence at most and, therefore, did not support punitive damages. Id. at 241-42. As such, the defendants moved to dismiss the plaintiff's punitive damages claim.[7] Id. at 241. Plaintiff countered that his pleading was sufficient to support a claim for punitive damages. Id. 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 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 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 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 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 court dismissed the plaintiff's claim for punitive damages premised on the theory the defendants acted to cover up their prior negligence. Id. at 259. See also Mulik v. Moravian Vill. of Bethlehem, 2011 Pa. Dist. & Cnty. Dec. LEXIS 841, *11-12 (Pa. Ct. Comm. Pl. 2011) ("Pennsylvania law does not recognize a claim for punitive damages for conduct of this nature, which occurred after the underlying allegedly negligent conduct. A 'defendant's

[7] 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.

falsification of relevant records […] to conceal his wrongdoing, while reprehensible, is insufficient to establish the culpable mental state of recklessness necessary to impose punitive damages because it does not support the conclusion that the defendant consciously appreciated the risk of the harm he caused.'") (citing Stroud, supra).

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, 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. 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. Defendant-hospital then moved 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 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 physician in Lasavage v. Smith, 23 Pa. D.&C.5th 334 (Pa. C.P. 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. 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) (plaintiff's allegations against health care principal were insufficient to support claim for punitive damages because 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. D.&C. Dec. LEXIS 172 (Pa. C.P. 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.

In Estate of Goldberg v. Nimoityn, 193 F. Supp. 3d 482 (E.D. Pa. 2016), the defendant sought summary judgment regarding plaintiff's claim for punitive damages. Goldberg, 193 F. Supp. 3d at 494. 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. The federal district court disagreed, finding that the record that the defendant's conduct did not "amount[] to more than professional negligence." Id. As a result, the court dismissed plaintiff's punitive damages claim. Id. at 495.

**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). See also Yanakos v. UPMC, 655 Pa. 615, 666, 218 A.3d 1214, 1246 (2019) ("[T]he MCARE Act eliminated, inter alia, the collateral source rule, 40 P.S. § 1303.508.").

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 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 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. "One 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 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 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 (Pa. C.P. Jan. 18, 2012). In Dieffenbach, the plaintiffs moved to introduce the full amount of the plaintiff'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 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 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, to comply with 40 P.S. § 1303.508(a) and because of the risk of jury confusion, the trial court 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 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.

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 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 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), app. denied, 54 A.3d 349 (Pa. 2012), the jury 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.

In Tillery v. Children's Hosp. of Philadelphia, 156 A.3d 1233 (Pa. Super. Ct. 2017), the
In Tillery v. Children's Hosp. of Philadelphia, 156 A.3d 1233 (Pa. Super. Ct. 2017), the Superior Court affirmed the trial court's interpretation of § 509 of the MCARE Act "to require that future medical expenses are only to be reduced to present value for the purpose of calculating attorney fees and costs." Id. at 1249 (citing Bulebosh v. Flannery, 91 A.3d 1241, 1243 (Pa. Super. Ct. 2014)); see also Shiflett v. Lehigh Valley Health Network, Inc., 237 A.3d 418 (Pa. Super. Ct. 2020) (following Tillery and concluding that § 509 of the MCARE Act requires that future medical expenses be reduced to present value only for the purpose of calculating attorney fees and costs).

**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 is 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 in Bugieda v. Univ. of Pennsylvania Hosp., No. 005216, 2007 Phila. Ct. Com. Pl. LEXIS 36 (Feb. 6, 2007), aff'd, 951 A.2d 1203 (Pa. Super. Ct. 2008). In this case, the defendant-hospital argued that, pursuant to 40 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), app. 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.

The Pennsylvania Superior court further explained this case in Lacattiva v. Hazelton Gen. Hosp., 222 A.2d 814 (Pa. Super. Ct. 2019) and highlighted that found in Bugieda by stating:

> Under section 1303.511 of the MCARE Act, effective to cases pending as of May 19, 2002, the patient's chart must be created simultaneously with the rendering of treatment or as soon as practically possible. Any subsequent additions must clearly identify the time and date of their entry. If a provider violates this provision, his medical license may be suspended or revoked. If a plaintiff can show an intentional alteration or destruction of records, a jury may be instructed that such alteration or destruction allows a negative interference. However, in Bugieda v. HUP, 2007 Phila. Ct. Com. Pl. LEXIS 36 (Phila. C.P. 2007), a Common Pleas Court judge held that this provision was not exclusive and that an adverse inference instruction may be provided against a medical provider pursuant to pre-existing common law where the plaintiff need only show that the defendant lacked "satisfactory explanation" of why it failed to produce the missing document. Bugieda was affirmed by this Court in 2008.

Id. at fn 7 (citing Bugieda, 951 A.2d 1203).

## Expert Qualifications

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, 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 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, No. 09 - 02,033, 2012 Pa. D.&C. Dec. LEXIS 580 (Pa. Ct. Com. Pl. Sept. 28, 2012), the defendant filed a motion *in limine*, seeking to preclude the plaintiff's expert from testifying based upon his alleged failure to be engaged in or retired within the previous five years from active clinical practice or training, in contravention of 40 P.S. § 1303.512(b)(2). The court observed that, according to his deposition transcript, the expert 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 also noted 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 the expert 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 the expert'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.

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 (Pa. Ct. Com. Pl. Dec. 20, 2011), the defendant-hospital challenged the qualifications of the plaintiff's pathology expert under 40 P.S. § 1303.512. The case involved implantation of a device during a hip replacement surgery, and the defendant-hospital contended that the pathologist was not qualified to render opinions regarding orthopedic implants because she was not certified by any specialty orthopedic medicine board. 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 the pathologist 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 the pathologist'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 the pathologist 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 trial court 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 biomedical engineering expert should be barred from offering causation testimony, as 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 § 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. Therefore, the court found that the engineering expert was sufficiently qualified to testify that a device component caused increased stress shielding and resulted in bone remodeling and loss of cortical bone in the plaintiff. In so holding, the court waived the requirements that the expert possess a medical license and be currently or recently engaged in practice or teaching, as permitted by 40 P.S. § 1303.512(b), because he was otherwise competent to testify about the issues by virtue of his education, training and experience. The court, however, barred the expert 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, 661 (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. 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. at 661. The trial court disagreed, and denied the summary judgment motion, finding that both experts were qualified under § 512(e) given that their fields of medical practice were related to the specific care at issue. Id.

At the ensuing trial, the plaintiff was permitted to introduce testimony of a pathologist and oncologist regarding the standard of care applicable to the surgeon, and the jury returned a verdict in favor of the plaintiff. Id. at 662-63. On appeal, the defendant-surgeon argued that the trial court 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, as both experts were 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. See also Shober v. St. Joseph Med. Ctr., 236 A.3d 1130 (Pa. Super. Ct. 2020).

In McFeeley v. Shah, 226 A.3d 582 (Pa. Super Ct. 2020), the plaintiff alleged the defendant radiologist failed to detect ovarian cancer in a CT scan which led to plaintiff's death. The jury determined that although defendant was negligent, his actions did not cause the patient's death. On appeal, plaintiff argued that one of the defense expert witnesses was not qualified to opine on the issue of causation or how the alleged negligence caused the patient's death. The

Superior Court held that the defense radiologist was not testifying outside the scope of his expertise and had based his testimony on decades of experience as a radiologist who has performed thousands of colon X-ray exams known as "barium enemas." **See also Cowher v. Kodali, 2021 Pa. Super. Unpub. LEXIS 338 (Pa. Super Ct. 2021).**

In Goldberg v. Nimoityn, No. 14-980, 2016 U.S. Dist. LEXIS 79021, at *9 (E.D. Pa. June 17, 2016), the defendant contended that plaintiff's expert was not competent to testify under MCARE because he was not board certified. Because plaintiff's expert was in the process of being recertified, the court assumed that he was not board certified. Id. at *11. The threshold inquiry involved a determination of whether MCARE's § 512 applied in federal court where matters of expert qualification were ordinarily determined by Fed. Rule of Evidence 702. Id. In ruling that § 512 was applicable, the federal 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 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 § 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.

In Deleon v. Wise, 175 A.3d 383 (Pa. Super. Ct. 2017) (TABLE), plaintiff alleged that the defendant physician negligently prescribed an antibiotic 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, who was a pharmacist and not an OB/GYN, should be excluded on the eve of trial because he did not meet the standards set by the MCARE Act. Id. at *2. 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 of the plaintiff's suit, 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. Ct. 2017), the Superior Court affirmed the trial court's denial of the defendants' 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 or empirical evidence. Id. The Superior Court held that the trial court properly observed that the plaintiff's expert testimony was provided within a reasonably degree of certainty. Id.

Plaintiff had presented multiple experts that relied on hospital record, peer review journals, and pediatric textbooks. Id. at 1241. See also Glasgow v. Ducan, No. 2384 EDA 2016, 2018 Pa. Super. Unpub. LEXIS 3595, at *22 (Sept. 25, 2018).

**Statute of Repose**

Prior to 2019, a seven-year statute of repose generally applied to medical malpractice claims. 40 P.S. § 1303.513(a). This provision barred 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 affected the influenced of the "discovery rule," which tolled 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.

Pennsylvania Courts had applied the statute of repose in numerous medical malpractice claims. See Matharu v. Muir, 29 A.3d 375 (Pa. Super. Ct. 2011), vacated on other grounds, 73 A.3d 576 (Pa. 2013); Osborne v. Lewis, 59 A.3d 1109 (Pa. Super. Ct. 2012), app. denied, 70 A.3d 812 (Pa. 2013); Bulebosh v. Flannery, 91 A.3d 1241 (Pa. Super. Ct. 2014), app. denied, 105 A.3d, 734 (Pa. 2014); Dubose v. Quinlan, 173 A.3d 634 (Pa. 2017).

In Yanakos v. UPMC, 218, A.3d 1214 (Pa. 2019), the Pennsylvania Supreme Court held the MCARE statute of repose violated the Pennsylvania Constitution.

In Yanakos, the plaintiff son donated a lobe of his liver to his plaintiff mother in 2003. Id. at *3. The plaintiffs claimed that the 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. Id. 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. Id. The defendants sought summary judgment since suit was brought after the seven-year State of Repose. Id. at *4. 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. Id. at *4. The court noted it did not intend to expand any duty upon doctors that was not formally legislated or previously outline by the courts. Id. at *4.

On appeal, the Superior Court affirmed that the plaintiff could not proceed with his lawsuit against UPMC over a liver transplant that occurred 13 years before he filed suit. Yanakos v. UPMC, 175 A.3d 418 (Pa. Super. Ct. 2017) (TABLE). 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 discovered 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.

The Pennsylvania Supreme Court granted allocator in Yanakos v. UPMC to address the issue of whether the MCARE Statute of Repose violates the Open Courts guarantee of the

Pennsylvania Constitution Article I, §11, where it arbitrarily and capriciously deprives some patients of access to courts, but permits actions by similarly situated patients.

On October 31, 2019, the Pennsylvania Supreme Court ruled the MCARE Statute of Repose violated the Pennsylvania Constitution's guarantee to open access to the courts. The Court held that the intermediate scrutiny standard applied and defendants in the case needed to show that the General Assembly's enactment of the MCARE statute of repose was "substantially or closely related to an important government interest." Id. at *15. The Court held the defendants failed to meet that burden.

The Court held, "There was no evidence to show the initially proposed four-year statute of repose would provide actuarial certainty, except that it 'seemed like a reasonable resolution' to 'provide some stability and predictability' to insurers," Id. at *23-24. Along with citing the lack of evidence about how the statute of repose would affect insurance costs, the Court held the law still does not provide a definite date for when no cases could be brought, since the statute allows for certain exceptions. Id. at 24. "Therefore, the seven-year statute of repose, with exceptions for foreign objects cases and minors, is not substantially related to controlling the cost of malpractice insurance rates by providing actuarial predictability to insurers." Id.

Justice Wecht, dissenting disagreed with the Majority's application of the intermediate scrutiny standard and argued that even if the application of intermediate scrutiny standard was appropriate, the statute of repose should still be deemed constitutional. Id. at *60. The dissent asserted that because the statute advances the underlying objective of reducing the cost of malpractice insurance, it would withstand intermediate scrutiny. Id. at *63.

The dissent also cautioned that it is not the court's role to upend duly enacted legislation simply because such legislation may be deemed as imperfect or unwise. Id. at *64. The dissent recognized the legislature's important interest in ensuring physician access to affordable professional liability insurance so that citizens have access to affordable medical care. Id.

**Venue**

Section 5101.1 of the MCARE Act relates to venue in medical malpractice actions. 42 P.S. § 5101.1. While previous venue principles permitted an action to be filed in a county in which any defendant conducted business or had sufficient contacts, § 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 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 Amendatory 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 Supreme Court of Pennsylvania Civil Procedural Rules Committee recently proposed an amendment to Section 5101.1 of the MCARE Act. The proposed change to Section 5101.1 would rescind the portion of the rule which limits venue in medical professional liability actions to the county in which the action arose. The explanatory comment to the proposed amendment notes the current rule provides special treatment to a particular class of defendants, which no longer appears warranted. The comment cites to data which indicates there has been a reduction in medical professional liability filings for the past years and that this reduction has resulted in a decrease in the amount of claim payments. This reduction has resulted fewer compensated victims of medical negligence. Therefore, the comment notes the proposed change to the rule will restore fairness to the procedure for determining venue regardless of the type of defendant. The Supreme Court of Pennsylvania Civil Procedural Rules Committee agreed to delay any decision so that a bipartisan legislative study could be completed by the end of 2019.

In Bilotti-Kerrick v. St. Luke's Hosp., 873 A.2d 728 (Pa. Super. Ct. 2005), the court applied the amended venue rule regarding medical malpractice actions and held that the trial court did not abuse its discretion in transferring venue to the county where the cause of action arose. The patient at issue had been taken to a hospital where the doctor recommended transfer to St. Luke's Hospital for immediate cardiac catheterization. Id. at 729. 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 arrival and perform the needed procedure by 6 a.m. Id. 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. Id. After the catheterization and surgery, the patient died. Id. 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. Id.

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. Id. As such, St. Luke's was the location of the negligent act or omission, even hough the cardiologist had given orders over the phone from his Northampton County home. Id. Those orders were to be carried out in Lehigh County, so venue was only proper, therefore, in Lehigh County. Id. **See also Showell v. Abington Mem'l Hosp., 2021 Pa. Super. Unpub. LEXIS 2037 (Pa. Super. Ct. 2021).**

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. 901 A.2d

at 550. 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. Id. at 553.

After joinder was granted, the physician objected to venue, arguing that the case should be transferred from 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. Id. at 550. The trial court granted the physician's motion and transferred the case to Montgomery County pursuant to Rule 1006(A.1), and 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. Id. at 551.

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]." Id. 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 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 Sys., 849 A.2d 1214 (Pa. Super. Ct. 2004), app. denied, 864 A.2d 530 (Pa. 2004), the plaintiff appealed an order sustaining preliminary objections filed by the defendants, corporate health care providers and a doctor, regarding venue, which transferred the case to Montgomery County for trial. The Plaintiff's mammogram had been taken and read by a doctor in Montgomery County. Id. at 1215. A cancerous lesion was missed in this reading, resulting in a much more serious cancer when finally diagnosed, and the plaintiff sued the doctor for malpractice. Id. 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. Id. The patient had received no treatment in Philadelphia County. All treatment occurred in Montgomery County. Id.

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. Id. at 1216. In so holding, the Superior Court examined Rule 1006, and also looked at the MCARE Act, which defines "medical professional liability claim," in part, as "resulting from the furnishing of health care services." Id. (internal 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, No. 1401, 2007 Phila. Ct. Com. Pl. LEXIS 265 (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), app. denied, 871 A.2d 192 (Pa. 2005), the parties all resided in Pennsylvania, but the surgical procedure at issue 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. Id. at 87. The trial court denied this motion. Id. On appeal, the defendant-physician contended that the trial court erred in failing to dismiss the action pursuant to Rule 1006(a.1). Id. at 87. 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. Id. at 895. 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. Id. The Plaintiff filed suit in Luzerne County, and defendant-physicians then filed a petition to transfer venue to Montour County where they argued the cause of action arose. Id. The trial court found that venue in Luzerne County was improper, but transferred the case to Columbia County, where Plaintiff had suffered the injury. Id.

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 correct county for venue is the county where the alleged negligence occurred and ordered the case transferred to Montour County. Id. at 900.

In Friedman v. Manor, 159 A.3d 40 (Pa. Super. Ct. 2016) (TABLE), 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 from Philadelphia County to Chester County. The plaintiff alleged decedent was given incorrect medication, worsening the condition of her disease and accelerating her death, while being treated at a nursing facility in Chester County. Id. at *2. The plaintiff 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 his emotional distress occurred in Philadelphia County. Id. The Superior Court ruled that Pennsylvania Rule 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)(2) requires these claims to be brought in the county where the claim 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, No. 1508-4185, 2016 Phila. Ct. Com. Pl. LEXIS 314 (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. On appeal, the Superior Court reversed, holding that transfer of venue was improper. Wentzel v. Cammarano, 166 A.3d 1265, 1266 (Pa. Super. Ct. 2017). The case involved the alleged negligent failure of a resident cardiologist at Philadelphia's St. Christopher's to timely provide the plaintiff's 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. See also Medley v. Dynamic Therapy Servs., LLC, 183 A.3d 1064 (Pa. Super. Ct. 2018) (holding the MCARE venue rules applied and suit was improperly brought in Philadelphia when alleged negligence took place in Reading).

**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 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 Hosp., 903 A.2 540 (Pa. Super. Ct. 2006) (upholding grant of remittitur under § 1303.515(c)); McManamon v. Washko, 906 A.2 1559 (Pa. Super. Ct. 2006) (holding § 1303.515(c) does not apply to claims of ordinary negligence).

**C. Rules**

**Certificate of Merit**

Pennsylvania Rule 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
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> (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. DOC, 984 A.2d 565 (Pa. Commw. Ct. 2009), app. denied, 742 A.2d 678 (Pa. 2009) (plaintiff bound to certificates of merit indicating that expert testimony was not necessary and as such, 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 § 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, 141 A.3d 593 (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, No. 1696 MDA 2014, 2015 Pa. Super. Unpub. LEXIS 1766 (June 16, 2015) (entering a judgment of *non pros* when *pro se* plaintiff filed a "certificate of qualified expert" and failed to follow procedural rules of Rule 1042.3(e)); Hand v. Dancha, No. 827 MDA 2019, 2019 Pa. Super. Unpub. LEXIS 4238 (Nov. 12, 2019) (court entered judgment of *non pros* when *pro se* plaintiff failed filed a certificate of merit).

**Is it a Professional Negligence Claim**

The preliminary question regarding certificate of merits is, are they needed for this particular cause of action? In Dental Care Assocs., Inc. v. Keller Eng'rs, Inc., 954 A.2d 597 (Pa. Super. Ct. 2008), app. 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." Id. 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.), app. denied, 985 A.2d 972 (Pa. 2009), (certificate of merit was required for allegations against engineering firm where Complaint sounded in professional liability, not breach of contract, because Complaint's averments related to engineering firm's overall exercise of care and professional judgment, not specific contractual duties and obligations.); Paige v. Reed, No. 3989 EDA 2017, 2019 Pa. Super. Unpub. LEXIS 3714 (Oct. 2, 2019) (plaintiff's failure to file a motion prior to the entry of judgment of *non pros* requesting determination of whether a certificate of merit is necessary waived the ability to raise the argument after judgment of *non pros* was entered).

In French v. Commw. Assocs., 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 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. Id. at 629. 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 determine which counts of the complaint sounded in professional negligence.

In Merlini v. Gallitzin Water Auth., 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, and plaintiff alleged that defendants breached a duty to determine the position of any easements and rights-of-way. Id. at 103. Plaintiff did not file a certificate of merit within 60 days of filing the complaint, and a judgment of *non pros* was entered in defendants' favor. Id. at 101-02. The trial court denied Plaintiff's petition to open the judgment of *non pros*, and Plaintiff appealed. Id. at 102.

On appeal, Plaintiff maintained that the trial court erred in refusing to open the judgment of *non pros* because she was asserting an ordinary negligence claim, not professional liability. Id. at 103. 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 Ctr., 684 N.W.2d 864 (Mich. 2004) as follows:

> 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. Id. at 106. The Supreme Court affirmed, and focused on plaintiff's failure to allege that defendants' actions fell below a professional engineering standard. Merlini v. Gallitzin Water Auth., 980 A.2d 502 (Pa. 2009). Plaintiff's allegations essentially constituted ordinary negligence and trespass. Id. at 508. 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, so no certificate of merit was required. Id. See also Grant v. Agarwal, 227 A.3d 440 (Pa Super Ct. 2020).

Krauss v. Claar, 879 A.2d 302 (Pa. Super. Ct. 2005), app. 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. Id. at 304-05. The buyers filed suit when problems arose with the sale and included the sellers' attorney as a defendant. Id. 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. Id. at 303. Plaintiffs filed a motion to strike this praecipe, which the trial court denied. Id. See also Meksin v. Glassman, No. 1174 EDA 2018, 2019 Pa. Super. Unpub. LEXIS 1993 (May 21, 2019).

On appeal, the Superior Court found that the Complaint did not raise any claims concerning the attorney's duties as a licensed professional attorney. Id. at 307. The allegations against him were in connection with claims for negligent misrepresentation, intentional misrepresentation, promissory estoppel and tortious interference with contractual relations. Id. These allegations did not assert that he had deviated from an acceptable professional standard, and so did not set forth a professional liability claim. Id. at 307-08. Consequently, no certificate of merit was required. Id. at 308. The Court also noted that a claim against a lawyer for legal malpractice could be brought only by a client of that lawyer, and the trial court was reversed. Id. See also Quinn Constr., Inc. v. Skanska USA Building, Inc., No. 07-0406, 2008 WL 2389499 (E.D. Pa. June 10, 2008) (court held in a case involving claims of negligent misrepresentation against an architect, that key issue was whether plaintiff alleged the architect deviated from any professional standard, which would mandate filing 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 F. App'x 72 (3d Cir. 2008), plaintiff, while incarcerated, 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, but commenced suit *pro se*, and the attorney never entered an appearance. Id. at *2-4. A summary judgment was filed against the plaintiff, and he forwarded the papers to the attorney, who failed to oppose the motion, and the plaintiff eventually prepared and filed an opposition without the attorney's assistance. Id. The court entered summary judgment against the plaintiff. Id. 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. Id.

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. Id. at *12-17. 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." Id. at *15. 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." Id. at *16. See also Levi v. Lappin, Civil No. 1:CV-07-1839, 2009 U.S. Dist. LEXIS 52227 (M.D. Pa. June 22, 2009) (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., 3:CV-07-0566, 2009 U.S. Dist. LEXIS 27835 (M.D. Pa. Mar. 31, 2009) (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 Stroud v. Abington Mem. Hosp., *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). Stroud, 546 F. Supp. 2d at 254-55. The court found that plaintiff had properly pleaded a claim of corporate negligence against the hospital, but the certificate of merit was filed more than 60 days after the filing of the Complaint and after defendant's motion to dismiss. Id. Yet, failure to timely file the certificate of merit would not result in dismissal if plaintiff could establish a reasonable explanation or legitimate excuse for not timely filing a certificate of merit. Id. Ultimately, 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. Id.

**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**

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*.

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(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.

**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. See also Nagle v. Allegheny Gen. Hosp., No. 1637 WDA 2018, 2019 Pa. Super. Unpub. LEXIS 2660 (July 12, 2019).

**Substantial Compliance**

In Ditch v. Waynesboro Hosp., 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. Id. at 319.

Defendant filed preliminary objections based on lack of specificity and failure to file a certificate of merit. Id. 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. Id. About one week later, plaintiff filed a petition to open this judgment and also filed a certificate of merit. Id. at 320. The trial court denied the petition, finding that the complaint raised a professional negligence claim and so required a certificate of merit. Id.

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. Id. at 321. 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. Id. at 323. 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. Id. 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. Id.

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. Id. at 325-26. 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. Id. at 328. See also Medley, 183 A.3d 1064; Kovalev v. Stepansky, No. 3220 EDA 2018, 2019 Pa. Super. Unpub. LEXIS 4209 (Nov. 8, 2019).

The court noted that, while Womer v. Hilliker, 908 A.2d 269 (Pa. 2006) (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. Id. at 327. Therefore, Rule 126 did not apply. Id. 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. Id. Consequently, the decision of the trial court was affirmed.

The Pennsylvania Supreme Court granted appeal limited to the issues of: (1) whether a certificate of merit must be filed within 60 days of 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 filing of a certificate of merit. See 17 A.3d 310 (Pa. 2011). As indicated above, the Court affirmed the Superior Court, by per curiam order, over the dissent of one Justice. See id. See also Pilchesky v. Rainone, 227 A.3d 424 (Pa. Super. Ct. 2020).

In Weaver v. Univ. of Pittsburgh Med. Ctr., No. 08-411, 2008 U.S. Dist. LEXIS 57988 (W.D. Pa. July 30, 2008), the court examined whether plaintiff substantially complied with the certificate of merit requirement. Defendant moved to dismiss, arguing that the certificate of merit only supported a claim of vicarious liability against the hospital and not a direct claim of corporate negligence. Id. at *13. 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. Id. at *13-16.

Plaintiff made several arguments why the court should not dismiss Plaintiff's corporate negligence claim, including that because the Complaint clearly only set forth a claim of corporate negligence (and not vicarious liability), plaintiff's incorrect certificate of merit was simply a procedural mistake. Id. 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. Id. at *16. 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. Id.

The parties cited Stroud, *supra*, where counsel for plaintiff checked the vicarious liability box on the certificate of merit, not the box for corporate liability. Id. 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. Id. at *24-27. 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. Id.

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." Id. 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. Id. at *28.

In Gudalefsky v. Nipple, *supra*, the Pennsylvania Superior Court addressed whether a plaintiff can file a sufficient substitute to a certificate of merit. There, a *pro se* litigant filed a Complaint against defendant physician, alleging medical malpractice resulting in the death of her mother. 2015 Pa. Super. Unpub. LEXIS 1766, at *1. Plaintiff, however, did not file a certificate of merit, so defendant filed a notice of intention to enter a judgment of *non pros*. Id. In response, plaintiff filed a "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. Id.

Defendant subsequently filed a Praecipe for Entry of Judgment of *Non Pros*, on the basis that Plaintiff had not filed a proper certificate of merit, and the Prothonotary entered judgment in favor of defendant. Id. Plaintiff then filed a Petition to Open Judgment of *Non Pros*, arguing that

she filed a suitable substitute for a certificate of merit, and the trial court denied the Petition. Id. at *1-3.

On appeal, the Pennsylvania Superior Court affirmed, explaining that the requirement to file a certificate of merit is "clear and unambiguous." Id. at *2 (citation and quotation marks omitted). The 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 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 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, but the magistrate judge recommended dismissal for failure to file a certificate of merit. Id. at *1. However, the 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. Sugarman, 659 F.3d 258 (3d Cir. 2011)); see also Harris v. Moser, No. GD 09-4769, 2011 Pa. D.&C. Dec. LEXIS 320, at *5 (Pa. Ct. Com. Pl. Aug. 19, 2011) (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).

**In Bisher v. Lehigh Valley Health Network, Inc., 2021 Pa. LEXIS 4291 (Pa. 2021), the Pennsylvania Supreme Court held that the trial court did not have subject matter jurisdiction over the plaintiffs' claims. Following the death of their son, Brenton Bisher and Carla Bisher sued, without representation by counsel, against eleven defendants comprising both named individuals and corporate entities alleging their medical malpractice resulting in their son's death. Each parent brought their own wrongful death claims, and Carla filed a survival action on behalf of her son's estate. The trial court struck the amended complaint with prejudice because of defects in the Certificates of Merit mandated by Rule 1042.3. On appeal, the Superior Court determined that the Bishers committed two errors that jointly deprived the trial court of subject-matter jurisdiction over all claims: Carla's unauthorized practice of law and the lack of verification of the complaint. The panel concluded that it too lacked jurisdiction and quashed the appeal. The Supreme Court found that neither the unauthorized practice of law in the trial court nor the lack of verification identified by the Superior Court implicated subject-matter jurisdiction and thus could not be raised sua sponte. The Supreme Court also disagreed with the Superior Court's alternative holding that the trial court properly struck the amended complaint because of the defects in the Certificates of Merit. The Court concluded that pleadings unlawfully filed by non-attorneys are not void ab initio because the unauthorized practice of law issue would be ripe for further litigation on remand.**

**Instead, after notice to the offending party and opportunity to cure, the pleadings are voidable in the discretion of the court in which the unauthorized practice of law took place.**

## Applicability of the Rule

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

In Liggon-Redding, 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. 659 F. 3d at 265; see also Cuevas v. U.S., 580 F. App'x 71, 73 (3d Cir. 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, 660 F. App'x 113 (3d Cir. 2016) (holding Pa. R. Civ. P. 1042.3 is a substantive law that must be applied to federal courts); Clemmons v. U.S., No. 17-1886, 2019 U.S. App. LEXIS 32065 (3d Cir. 2019); Bilinski v. Wills Eye Hosp., 760 F. App'x 125 (3d Cir. 2019) (the Court held that dismissal of a patient's medical malpractice claim on the basis that the patient's required Certificate of Merit was inadequate was an error because Pennsylvania law expressly allowed a plaintiff to proceed on the basis of a Certificate of Merit asserting that expert testimony would not be required to prove the claim). **See also Regassa v. Brininger, 2021 U.S. App. LEXIS 30358 (3d Cir. 2021).**

In Everett v. Donate, No. 3:cv-08-1243, 2010 WL 1052944 (M.D. Pa. Mar. 22, 2010), aff'd, 397 F. App'x 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 Abdulhay v. Bethlehem Med. 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 F. App'x 938 (3d Cir. 2007), involved an attorney, who had a psychotic breakdown at work. He was involuntarily committed to a mental health center. Id. at 941. After a brief stay, plaintiff returned to work subject to a work agreement, but was subsequently terminated for violating the agreement. Id. Plaintiff filed suit against multiple defendants, including the mental health center. Id. at 941-42. 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. Id. at 942. On appeal, plaintiff argued that his claim did not invoke Rule 1042.3, and that defendant waived the certificate of merit defense, by failing to raise it in a previous Rule 12(b)(6) motion. Id. at 944.

The Third Circuit affirmed the district court's decision and held that the district court had correctly applied Rule 1042.3 as substantive law. Id. The Third Circuit further held that the decision to involuntary 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." Id. As a result, Rule 1042.3 was applicable. Id. 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. Id. 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. Id. The defense was not “then available” to Defendant under Rule 12(g). Id. Accordingly, defendant was entitled to raise it in a separate motion. Id. Thus, Rule 1042.3 applied and Plaintiff was required to file a certificate of merit. Id. 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, CIVIL NO.3:CV-12-1306, 2016 U.S. Dist. LEXIS 150970 (M.D. Pa. Nov. 1, 2016). (claims brought under the Federal Tort Claims Act for failure to receive proper medical attention in prison triggered the certificate of merit requirement). **See also Doe v. Hosp. of Univ. of Pa., 2021 U.S. Dist. LEXIS 121268 (E.D. Pa. June 29, 2021).**

In D.V. v. Westmoreland Cnty. 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. Id. at *3. 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. Id. at *5. The court explained that the Due Process Clause is not implicated by a negligent act. Id. at *5-6. 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. Id. at *6-7.

The court followed the three step analysis required by §1988, for determining whether Rule 1042.3 is indispensable to the federal scheme of justice. Id. at *8. 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).” Id. 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. Id. at *9-10. See also Guynup v. Lancaster Cnty. Prison, No. 06-4315, 2007 U.S. Dist. LEXIS 63412 (E.D. Pa. Aug. 17, 2007) (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 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, *supra*.

**Certificates of Merits and Expert Testimony**

In Quinn Constr., Inc. v. Skanska USA Building Inc., 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. 2009 U.S. Dist. LEXIS 45247. Plaintiff was a subcontractor who brought claims against the general contractor and architect alleging negligent misrepresentation and breach of contract. Id. at *4. The defense argued that, based upon the comment to Rule 1042.3, Plaintiff cannot present expert testimony at the time of trial. Id. at *5.

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. Id. at *10. 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. Id. at *11. See also McCool, 984 A.2d 565 (dismissing Complaint when certificate of merit stated that expert testimony was not required and noting that the issues were complex and required 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 inmate brought a medical malpractice claim against 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), app. 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 court determined that, based upon the uncontroverted facts, "Pennsylvania law makes clear that [plaintiff] could not sue [defendant] for legal malpractice." Id. Thus, 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 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 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, No. 2:09-cv-00188, 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. Id. at *3. The court stated that expert testimony is often needed with Dragonetti claims, but that the Act itself does not explicitly require expert testimony. Id. at *2. The court explained that the rules governing certificates of merit are sufficiently broad to warrant a reading that Dragonetti claims are included. Id. at *3. 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. Id.

**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.

**In Spencer v. Johnson, No. 2021 WL 1035175 (Pa. Super. Ct. 2021), Plaintiff Keith Spencer filed a personal injury action against Defendants Cleveland Johnson ("Cleveland"), Tina Johnson ("Tina"), and Philadelphia Joint Board Workers United, SEIU ("PJB"). Plaintiff sustained injuries in a 2014 accident where he was struck by a vehicle driven by Defendant Cleveland. The vehicle was owned by PJB and was loaned to PJB's employee and Cleveland Johnson's wife, Tina. The parties did not dispute two facts:**

**(1) Plaintiff Spencer was not at fault, and (2) Defendant Cleveland was negligent in his operation of the vehicle. However, the parties did disagree as to whether Tina was negligent in allowing Cleveland to operate her work vehicle, and whether PJB was negligent under the laws of agency and vicarious liability for the vehicle it provided to Tina.The matter went to trial where a jury found all three defendants liable for a total verdict amount just shy of $13 million. The jury allocated liability as follows: Cleveland (36%), Tina (19%), and PJB (45%).**

**Thereafter, Plaintiff sought to mold the verdict to make PJB jointly and severally liable for the total verdict amount. Plaintiff argued that because PJB was Tina's employer and their combined negligence was greater than 60 percent, PJB should be liable for the entire judgment as to all three defendants under a provision of the Fair Share Act. While the trial court noted the request on the record, Plaintiff's request was denied. Plaintiff filed a post-trial motion seeking, once again, to mold the verdict against PJB. The trial court denied Plaintiff's motion and Plaintiff appealed to the Superior Court.**

**On appeal, Plaintiff claimed that the trial court erred as a matter of law and/or abused its discretion by refusing to mold the verdict where PJB was directly and vicariously liable for a combined 64 percent of the accident, exceeding the 60 percent threshold under the Fair Share Act. In response, Defendants argued that there was no evidence to support a determination that Tina acted within the scope of her employment—vicarious liability was not established—because Plaintiff waived the argument by failing to request that the jury make a factual determination as to whether Tina was acting with the course and scope of her employment and when no such question was presented on the verdict slip.**

**The two-judge panel in Spencer began its analysis by noting that, while the scope of employment is a fact question for the jury, the question of whether the employee acts within that scope is a question for the court. For various reasons, the Superior Court found that when Cleveland took Tina's vehicle, Tina was acting within the scope of her employment. After a lengthy analysis of the prevailing precedent regarding how the Supreme Court of Pennsylvania has addressed ambiguity in terms of the verdict in relation to the verdict slip, the two-judge panel found that, although the verdict slip did not set forth specific findings as to vicarious liability, any ambiguity in the verdict is to be construed in plaintiff's favor as the verdict winner. Thus, any failure by PJB to request a special interrogatory to allocate damages against Tina based on individual or vicarious liability constituted waiver on part of Defendants PJB and Tina. As such, the trial court's holding was reversed and the case was remanded for further proceedings with PJB and Tina as jointly and severally liable to plaintiff.**

**In the Opinion, Judge Panella then went beyond the analysis necessary for disposition of the appeal and opined, "assuming arguendo that the jury's verdict did not demonstrate PJB was vicariously liable, we would have found the court erred in failing to grant the motion to the mold the verdict as the question of whether the Fair Share Act applies to the present matter remains." The panel explained that it would have done so because while the Fair Share Act does bar recovery where a plaintiff's negligence is a**

**greater cause of the claimed injuries than a defendant and the Fair Share Act does bar joint and several liability where a defendant's negligence was less than 60 percent, the plain language of the Fair Share Act does not contemplate scenarios where there is no allegation of plaintiff's own negligence. In the Opinion, Judge Panella also reasoned that there is no indication that the Legislature intended to make universal changes to the concept of joint and several liability outside of cases where a plaintiff has been found to be comparatively negligent. Because the facts in Spencer did not involve a comparatively negligent plaintiff, the Court, as an alternative basis, reasoned that it would have declined to apply the Fair Share Act and concluded that PJB and Tina were jointly and severally liable for the Plaintiff's injuries.s**

**Before being review by any other appellate court, the case was settled.**

### 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." 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 "private" social media content continues to develop, with significant implications for medical malpractice actions. For example, in medical malpractice cases, plaintiffs often claim debilitating injuries, but may post content on-line that suggests otherwise.

Courts have held that social media login information, and copies of private social media postings, are discoverable where the public profile shows that relevant information might be contained in the private profile. See McMillen v. Hummingbird Speedway Inc., No. 113-2010 CD, 2010 Pa. D. & C. Dec. LEXIS 270 (Pa. Ct. Com. Pl. Sept. 9, 2010); Perrone v. Rose City HMA, LLC, No. CI-11-14933, 2013 WL 4011622 (Pa. Ct. Com. Pl. May 3, 2013) (expert permitted to obtain Facebook login based on publicly posted pictures refuting extent of claimed injury); Carter v. Anthony D. Novick & Myriad Corp., No. GD 18-014680, 2020 Pa. D. & C. Dec. LEXIS 2082 (Pa. Ct. Com. Pl. June 16, 2020) (compelling plaintiff to produce copies of social media postings contradicting claims regarding health, fitness, work, and physical status).

Courts have clarified, however, that social media discovery is predicated on a threshold, good-faith showing that public portions of the profile contain relevant information. Hoy v. Holmes, 28 Pa. D. & C.5th 9 (Pa. Ct. Com. Pl. 2013) (citing Trail v. Lesko, No. GD-10-017249, 2012 Pa. D. & C. Dec. LEXIS 194 (Pa. Ct. Com. Pl. July 5, 2012)) (threshold showing of relevance is necessary to permit discovery into non-public portions of social media accounts). A motion to compel social media discovery may be denied where the moving party cannot demonstrate that publicly accessible information controverts the account holders' claims or defenses. See Brogan v. Rosenn, Jenkins & Greenwald, LLP, 28 Pa. D. & C.5th 533, at *1–2 (Pa. Ct. Com. Pl. 2013); Hunter v. PRRC, Inc., No. 2010-SU-3400-71, 2013 WL 9917150, at *4 (Pa. Ct. Com. Pl. Nov. 4, 2013) (there must be a "reasonable probability that relevant information will be found"). Likewise, a motion to compel may be denied where the evidence sought is only collateral to the legal claims at issue. Allen v. Sands Bethworks Gaming, LLC, No. C-0048-CV-2017-2279, 2018 WL 4278941, at *6 (Pa. Ct. Com. Pl. Aug. 6, 2018).

Importantly, courts have determined that because non-public information on a social media account is shared with others, there exists no reasonable privacy expectation in that information. Largent v. Reed, No. 2009-1823, 2011 Pa. D. & C. Dec. LEXIS 612, at *11 (Pa. Ct. Com. Pl. Nov. 8, 2011). The purpose of a Facebook account is to share information with others, nullifying any claim of privilege. Id. at *13; McMillen, 2010 Pa. D. & C. Dec. LEXIS 270, at *5-12 (no privilege between "friends" on social media, and if privilege did exist, it would be waived by posting). Furthermore, there exists no privilege to withhold social media discovery until after the plaintiff's deposition, based on timing alone. See Appleby v. Erie Ins. Exchange, No. 2016 CV 2431 (Pa. Ct. Com. Pl. Sept. 8, 2016) (Dowling, J.); Vinson v. Jackson, No. 2015 CV 05150 CV (Pa. Ct. Com. Pl. Aug. 23, 2016) (Bratten, J.).

Social media discovery may have implications beyond the extent of claimed injuries. For example, in Nicolaou v. Martin, 153 A.3d 383 (Pa. Super. Ct. 2016), the court affirmed an order granting summary judgment in defendants' favor for failure to file suit related to misdiagnosis of Lyme disease within the statute of limitations. Plaintiff's Facebook posts were offered as evidence that she had notice of a potential misdiagnosis prior to the date alleged in the complaint. Id. at 387. The court determined that the posts, among other testimony, indicated that

plaintiff was aware of the possibility that she was suffering from Lyme disease prior to her diagnosis, and therefore, the lawsuit was filed after the expiration of the statute of limitations. Id. at 394-95. This decision was overturned by the Pennsylvania Supreme Court on the basis that notice was a factual issue improperly decided on summary judgment, but the analysis regarding implications of social media discovery remains persuasive. See Nicolaou v. Martin, 195 A.3d 880 (Pa. 2018).

**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, 653 (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 arbitration agreement on plaintiff's behalf after admission to the defendant facility. After his death, the plaintiff's children, with the exception of the signatory daughter, brought a wrongful death claim against the facility. Id. The facility moved to dismiss pursuant to the arbitration agreement. Id. The court found that the arbitration agreement was not binding on the decedent's children because wrongful death actions are derivative of the decedent's injuries, but not the decedent's rights. Id. at 660-63. Because one who is not a party to a contract cannot be bound by it, 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 the claims. Id. at 661. See also Lipshutz v. St. Monica Manor, No. 614, 2013 Phila. Ct. Com. Pl. LEXIS 396, at *2 (Nov. 12, 2013), aff'd, 120 A.3d 367 (Pa. Super. Ct. 2015) (survivor claims of signatory decedent-daughter subject to mandatory arbitration, but not wrongful death claims brought in signatory's own right); Fox v. Jeanes Hosp., 209 A.3d 494 (Pa. Super. Ct. 2019) (signatory's wrongful death claims not subject to arbitration).

In Tyler v. Kindred Healthcare Operating, Inc., 34 Pa. D. & C.5th 324, 325 (Pa. Ct. Com. Pl. 2013), defendants Kindred Hospital and St. Francis Country House sought to arbitrate decedent's daughter's claims. 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 she was disoriented and incapacitated. Id. at 326-29. With respect to St. Francis Country House, there was no evidence that the decedent authorized the daughter to make legal decisions or sign the agreement on her behalf. Id. at 329-30. A familial relationship alone was insufficient to create an agency relationship, and the Court refused to compel arbitration. Id. at 330-31. See also Clementson v. Evangelical Manor, 188 A.3d 587 (Pa. Super. Ct. 2018) (arbitration agreement unenforceable where decedent's family member did not sign pursuant to power of attorney or agency relationship); Gross v. Genesis Healthcare, Inc., 192 A.3d 282 (Pa. Super. Ct. 2018) (same); Washburn v. N. Health Facilities, Inc., 121 A.3d 1008 (Pa. Super. Ct. 2015), app. denied, 641 Pa. 252 (2017) (same); Davis v. 2507 Chestnut St. Ops., LLC, No. 1048 EDA 2018, 2019 Pa. Super. Unpub. LEXIS 3541 (Sept. 16, 2019) (same); Lovett v. HCR ManorCare, Inc., No. 564 EDA 2020, 2020 PA. Super. Unpub. LEXIS 3585 (Nov. 18, 2020) (same).

On the other hand, in Christopher v. Golden Gate Nat'l Senior Care, LLC, No. 864 WDA 2017, 2019 Pa. Super. Unpub. LEXIS 34, at *10-12 (Jan. 4, 2019), app. denied, 216 A.3d 1016

(Pa. 2019), the Superior Court found that a husband had executed an arbitration agreement with express authority after the facility presented and explained the agreement to both husband and wife, and the wife, who understood the nature of the document, expressly instructed her husband to sign the agreement.

In Wert v. Manorcare of Carlisle PA, LLC, 124 A.3d 1248, 1251 (Pa. 2015), cert. denied, 136 S. Ct. 1201 (2016), the defendant facility sought to enforce an arbitration agreement signed by the decedent's daughter. The trial court found the agreement itself unenforceable, as it relied upon National Arbitration Forum ("NAF") procedures that were void. 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 Supreme Court affirmed. Id. at 1252. Because the parties agreed that any disputes would be resolved exclusively by binding arbitration in accordance with NAF, the provision was integral and non-severable, and the contract was unenforceable. Id. at 1263.

In MacPherson v. Magee Mem. Hosp. for Convalescence, 128 A.3d 1209, 1212 (Pa. Super. Ct. 2015), app. denied, 161 A.3d 789 (Pa. 2016), cert. denied, 198 L.Ed. 2d 756 (2017), the Superior Court reversed an order overruling preliminary objections seeking to enforce an arbitration agreement. 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; the evidence indicated that the decedent suffered from physical, not mental ailments. Id. at 1220-21. But see Davis, 2019 Pa. Super. Unpub. LEXIS 3541, at *19-23 (clear evidence supported that decedent lacked capacity to enter into agreement); Peticca v. Chatham Acres Healthcare Grp., Inc., No. 2109 EDA 2018, 2019 Pa. Super. Unpub. LEXIS 3069, at *8-9 (Aug. 14. 2019) (same). Moreover, there was no evidence that the agreement was unconscionable or entered into involuntarily. MacPherson, 128 A.3d at 1221-22. Finally, reference to NAF did not render the agreement unenforceable pursuant to Wert, as Wert was only a plurality decision. Id. at 1223. Furthermore, unlike Wert, the agreement provided that NAF's availability was non-essential, so the use of NAF was not integral to the contract. Therefore, the court remanded the case for referral to arbitration. Id. at 1227**.** See also Davis v. 1245 Church Rd. Ops., LLC, No. 3539 EDA 2018, 2020 Pa. Super. Unpub. LEXIS 1298, at *14-17 (Apr. 16, 2020) (severing unconscionable language from otherwise enforceable arbitration agreement).

In Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490 (Pa. 2016), the Supreme Court found that the FAA, which provides for the enforceability of arbitration agreements, preempts Pa. R.C.P. 213(e), which requires joinder of survival and wrongful death claims. If the contract at issue had been valid, arbitration of the survival claim would have been required pursuant to the agreement, but the wrongful death claim was not subject to arbitration pursuant to Pisano. Id. at 498, 512-13. "[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. See also Bauer v. Golden Gate Nat'l Senior Care, LLC, No. 1252 WDA 2015, 2016 Pa. Super. Unpub. LEXIS 4044 (Nov. 7, 2016) (FAA requires bifurcation, and existence of wrongful death claim does not require trial in a court of law as to entire action). Pennsylvania courts vacated or reversed multiple cases in accordance with Taylor. See, e.g., Collins v. Manor Care of Lancaster, PA, LLC, 160 A.3d 796 (Pa. 2016). **See also Gollick v. Sycamore Creek Healthcare Grp., Inc.,**

**2021 Pa. Super. Unpub. LEXIS 2021, at *13 (July 29, 2021) (holding that the trial court should have submitted the survival claim to binding arbitration pursuant to Taylor where agreement was signed by decedent's power of attorney).**

In Davis v. Ctr Mgmt. Grp., LLC, 192 A.3d 173, 181 (Pa. Super. Ct. 2018) the Superior Court confirmed that arbitrability may be raised in preliminary objections, and an order overruling preliminary objections seeking to compel arbitration is immediately appealable. When faced with preliminary objections of this type, a court must determine whether the parties have a valid agreement to arbitrate, including consideration of "evidence by deposition or otherwise." Id. at 183 (citing Pa. R.C.P. 1028(c)(2)). The court further explained that continuing to engage in the judicial process after objecting to the court's jurisdiction by raising preliminary objections does not waive the arbitrability argument. Id. at 181.

"[R]eview of a claim that the trial court improperly denied preliminary objections in the nature of a petition to compel arbitration is limited to determining whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion in denying the petition." 1245 Church Rd. Ops,, 2020 Pa. Super. Unpub. LEXIS 1298, at *7 (quoting Cardinal v. Kindred Healthcare, Inc., 155 A.3d 46, 49-50 (Pa. Super. Ct. 2017)). Pennsylvania courts will employ a two-part test to determine whether arbitration should have been compelled: "1) whether a valid agreement to arbitrate exists, and 2) whether the dispute is within the scope of the agreement." Id. (quoting Washburn, 121 A.3d at 1012).

In Kohlman v. Grane Healthcare Co., 228 A.3d 920 (Pa. Super. Ct. 2020) the nursing home defendant filed a preliminary objection seeking to compel arbitration. The trial court had overruled the objection on the basis that the arbitration agreement was unconscionable. Id. at 926. Relying on Taylor, the Superior Court remanded to allow for development of the record as to the unconscionability defense.

**Similarly, in Shotwell v. Valley Crest Nursing, Inc., No. 223 MDA 2020, 2021 Pa. Super. Unpub. LEXIS 2082 (Aug. 5, 2021), the Superior Court recently remanded the trial court's decision to sustain preliminary objections and refer the survival action to arbitration, as the Court determined that it was necessary to develop the record through discovery on the issue of whether the decedent had the requisite mental capacity to enter into the arbitration agreement at issue.**

In Del Ciotto v. Pa. Hosp. of the Univ. of Penn Health Sys., 177 A.3d 335 (Pa. Super. Ct. 2017), app. denied, 2018 Pa. LEXIS 5760 (Nov. 5, 2018), the court discussed the impact of compelling arbitration upon co-defendants. The plaintiff's claims against one defendant, ManorCare, were resolved in ManorCare's favor after arbitration. Id. at 346. Co-defendant, Testa, was not a party to the arbitration agreement. Id. at 350. On appeal, Testa sought to attack the arbitration award given the potential that the decision would harm its ability to assert a cross-claim against ManorCare. Id. at 350-51. ManorCare argued that Testa did not have standing to do so. Id. The court acknowledged that Supreme Court precedent regarding the preclusive effect of judicial proceedings involving cross-claims is unsettled. Id. at 351. However, given the potential adverse effect on Testa, especially if the award were deemed improper, the court found that Testa had standing to contest the validity of the judgment. Id. at 352, 358.

In Burkett v. St. Francis Country House, No. 02585, 2018 Phila Ct. Com. Pl. LEXIS 45, at *1 (Aug. 1, 2018), the court invalidated an arbitration clause in a nursing home agreement. The court determined that the clause was procedurally unconscionable because it was in ordinary font buried in a 27-page agreement, and the incapacitated decedent was not involved in any decisions surrounding the necessary admission. Id. at *34-48. Furthermore, the clause was substantively unconscionable because it required the patient to pay half the costs of arbitration, but gave the nursing home the right to choose the venue and arbitrator. Id. at *49-53. See also Niewswiadomy v. Saber Healthcare Grp., LLC, No. 30002 2014, 2019 WL 1320708 (Pa. Ct. Com. Pl. Feb. 4, 2019) (finding arbitration agreement unconscionable). **Lomax v. Care One, LLC, No. 344 WDA 2020, 2021 Pa. Super. Unpub. LEXIS 630 (Mar. 5, 2021) (same).**

In Christopher, however, the Superior Court found the trial court's conclusion that the ADR clause was unconscionable to be conclusory and contrary to Pennsylvania law. 2019 Pa. Super. Unpub. LEXIS 34, at *5. The court determined that the provision was akin to the clauses in Cardinal, and MacPherson, which were not unconscionable because they provided:

> (1) the parties shall pay their own fees and costs, similar to civil litigation practice in common pleas court;
> (2) a conspicuous, large, bolded notification that the parties, by signing, are waiving the right to a trial before a judge or jury;
> (3) a notification at the top of the agreement, in bold typeface and underlined, that it is voluntary, and if the patient refuses to sign it, the Patient will still be allowed to live in, and receive services at the facility;
> (4) a provision that the facility will pay the arbitrators fees and costs;
> (5) a statement that there are no caps or limits on damages other than those already imposed by state law; and
> (6) a provision allowing the patient to rescind within thirty days.

Id. at 7-8 (quoting MacPherson, 128 A.3d at 1221-22; Cardinal, 155 A.3d at 53-54). See also Fox, 2019 Pa. Super. Unpub. LEXIS 139, at *30-38 (finding arbitration agreement was not unconscionable); Glomb v. St. Barnabas Nursing Home, No. 1724 WDA 2018, 2020 Pa. Super. Unpub. LEXIS 2863 (Sept. 10, 2020) (same).

**In Riley v. Premier Healthcare Mgmt., No. 3538 EDA 2019, 2021 Pa. Super. Unpub. LEXIS 1434 (May 28, 2021), the Superior Court likewise determined that an arbitration clause in a nursing home agreement was not unconscionable. The Court also addressed an argument that the arbitration clause was prohibited by 42 C.F.R. § 483.70(n)(1), which states: "A facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the [long-term care ("LTC")] facility." Id. at *26-27. The Court held that the regulation was not applicable because the rule was issued in the context of the eligibility of long term care facilities to receive federal funding – and not the enforceability of a private contract. Id. at *27. Additionally, another federal court had issued an injunction preventing the rule from going into effect, and CMS also issued a statement directing that the rule would not be enforced. Therefore, the Court upheld the**

**arbitration agreement, with instructions that any argument regarding the capacity to enter into the arbitration agreement could be raised before the arbitrator. Id. at *27-34.**

**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:

> 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).

**Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity**

In Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, the Supreme Court split evenly and affirmed the decision to protect correspondence between counsel and an expert witness as work product. 91 A.3d 680 (Pa. 2014). Prior to the adoption of the newly revised Rule 4003.5, the Superior Court had held:

> [O]ther 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…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….

Barrick, 32 A.3d 800, 813 (Pa. Super. Ct. 2011) (internal citations omitted). In support of affirmance, Justice Baer relied in part on the now adopted, amendment to Rule 4003.5:

> 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…."

Barrick, 91 A.3d at 687 (internal citations omitted).

In St. Luke's Hosp. of Bethlehem v. Vivian, 99 A.3d 534 (Pa. Super. Ct. 2014), the court quoted Barrick in considering—but distinguishing—the issue of discoverability of the plaintiff's attorneys' fees in a Dragonetti action:

> Although the work-product doctrine is not absolute…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.

St. Luke's, 99 A.3 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.

Rule 4003.5 also has practical implications on treating physicians who act as expert witnesses.

In Polett v. Public Communs., Inc., the Supreme Court affirmed a decision to allow a treating surgeon to provide trial testimony, even though he did not provide an expert report. 126 A.3d 895 (Pa. 2015). The inquiry involved whether the causation opinion was "acquired or developed in anticipation of litigation." 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 surgeon developed his opinion during treatment, and not solely in anticipation of litigation. Id. at 925. Consequently, the appellees' were not prejudiced by a lack of a formal report before trial because all treatment records were available during discovery. Id. at 926-27. Therefore, the treating physician was permitted to give trial testimony. Id. at 927-28. See also Crespo v. Hughes, 167 A.3d 168, 182 (Pa. Super. Ct. 2017) (treating physician permitted to offer expert opinion pertaining to diagnosis at time of treatment, and it was permissible to clarify notes that were not made in anticipation of litigation); Thomas v. Evans, No. 2220 EDA 2016, 2018 Pa. Super. Unpub. LEXIS 469, at *34-36 (Feb. 14, 2018), app. denied, 189 A.3d 988 (Pa. 2018)

(pathologist permitted to testify where opinions were not developed in anticipation of litigation); Krolikoski v. Ethicon Womens' Health & Urology, No. 2025 EDA 2018, 2020 Pa. Super. Unpub. LEXIS 2540, at *18 (Aug. 11, 2020) (treating physician permitted to testify as to cause of medical device complications, which were formed during treatment of the plaintiff).

In Mina v. Hua Mei, Inc., No. 2012 – Civ – 7781 (Pa. Ct. Com. Pl. Jan. 19, 2016) (Mazzoni, J.), the treating physician rendered a report before the start of litigation, and defendant served interrogatories regarding his opinion. In determining whether the discovery requests were appropriate, 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 the interrogatories. Id. at ¶ 6.

In Karim v. Reedy, No. 11 CV 4598, 2016 Pa. D. & C. Dec. LEXIS 1159, at *44-45 (Pa. Ct. Com. Pl. Jan. 11, 2016), plaintiffs were permitted to discover the expert opinions of the defendant doctor and nurse, even though defendants stipulated that they would not offer opinion testimony at trial. Despite this stipulation, the court compelled the defendants to answer questions regarding standard of care, standards, protocol, and medical issues, as the information is discoverable, even if not necessarily admissible at trial. Id.

In Cosklo v. Moses Taylor Hosp., No. 07 CV 5484, 2016 WL 5372573, at *1 (Pa. Ct. Com. Pl. Sept. 23, 2016), 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," the plaintiff would be unfairly surprised by trial testimony to that effect, and therefore, two schools of thought testimony was precluded under Rule 4003.5(c).

In Schwalm v. Modi, No. 145 MDA 2016, 2016 Pa. Super. Unpub. LEXIS 4659 (Dec. 22, 2016), app. denied, 169 A.3d 1037 (Pa. 2017), the trial court properly permitted 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 assesses damages, there was no authority to support that an IME expert cannot also testify as to liability. Id. at *21-22.

In Casper v. Halstead, No. 3714 EDA 2015, 2017 Pa. Super. Unpub. LEXIS 833 (Mar. 3, 2017), the court explained that a doctor may serve as 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 the treating physician did not consult with the patient until after discovery closed, and he prepared an expert report using the language: "with a reasonable degree of medical certainty," the physician was properly considered an expert retained for litigation, who was therefore subject to Rule 4003.5. Id. at *6-7. As a result, the court correctly precluded the physician's testimony where the defendant was prejudiced by failure to disclose the opinion in accordance with the case management order. Id. at *7. See also Walker v. Lancaster Gen., 141 A.3d 585 (Pa. Super. Ct. 2016), app. denied, 141 A.3d 482 (Pa. 2016) (physician who was not identified as an expert was not permitted to opine outside his capacity as a treating physician).

In Shiflett v. Lehigh Valley Health Network, Inc., 174 A.3d 1066 (Pa. Super. Ct. 2017), vacated on other grounds by 174 A.3d 1066 (Pa. 2017), the court addressed 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 *1092 (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 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 relied upon in his report, and he did not present a new theory at trial. Id. Therefore, the trial court appropriately allowed him to give expanded testimony, consistent with the report. Id. See also Grizzanti v. Chiavacci, No. 11 CV 5649, 2017 WL 52777 (Pa. Ct. Com. Pl. Jan. 3, 2017) (opinions and knowledge acquired before litigation fall outside Rule 4003.5); Kirksey v. Children's Hosp. of Pittsburgh of UPMC, No. 421 WDA 2018, 2019 Pa. Super. Unpub. LEXIS 3807 (Oct. 9, 2019) (expanded testimony was within fair scope of report and did not cause unfair surprise where opposing party had an opportunity to prepare a response to the potentially unfavorable testimony); Hassel v Franzi, 207 A.3d 939 (Pa. Super. Ct 2019), app. denied, 218 A.3d 862 (Pa. 2019) (testimony within fair scope of report and objection to such testimony not properly raised). **Heddleston v. Obstetrical & Gynecological Assocs. of Pittsburgh, No. 1166 WDA 2020, 2021 Pa. Super. Unpub. LEXIS 3048 (Nov. 17, 2021) (same); Smith v. Cordero, No. 1166 WDA 2018, 2021 Pa. Super. Unpub. LEXIS 913 (Apr. 8, 2021) (testimony within fair scope of report); but see Hopkins v. Compass Pointe Healthcare Sys., No. 3554 EDA 2019, 2021 Pa. Super. Unpub. LEXIS 2100, at *24-30 (Aug. 6, 2021) (finding proffered trial testimony fell outside the fair scope of the pre-trial report).**

In Kornberger v. Lehigh Valley Health Network, Inc., the Superior Court discussed the balancing test for determining whether failure to identify an expert should result in exclusion of testimony. No. 3407 EDA 2016, 2018 Pa. Super. Unpub. LEXIS 2014 (June 11, 2018). In extenuating circumstances, exclusion is not mandatory. Id. at *6 (citing Corrado v. Thomas Jefferson Univ. Hosp., 790 A.2d 1022, 1032 (Pa. Super. Ct. 2001)). The court should consider the prejudice to each party by evaluating: "(1) the ability of the defaulting party to have discovered the witness earlier; (2) the reasonableness of the excuse offered for the default; (3) whether the defaulting party's conduct was willful; (4) whether there was an intent to mislead; (5) the prejudice suffered by the defaulting party if the testimony is excluded; (6) the prejudice to the opposing party caused by the default; (7) the ability to cure any prejudice to the opposing party; (8) the impact of the default on the administration of the court's docket; and (9) whether the defaulting party acted in bad faith." Id. at *6-7 (citing Curran v. Stradley, Ronon, Stevens & Young, 521 A.2d 451, 457 (Pa. Super. Ct. 1987); Corrado, 790 A.2d at 1032). Ultimately, the court held that the trial court correctly weighed these factors and precluded the expert who was not identified due to "gamesmanship." Id. at *7.

The Superior Court recently took a stricter approach to interpreting Rule 4003.5. In Lichtenberger v. Geisinger Cmty. Med. Ctr., No. 142 MDA 2018, 2019 Pa. Super. Unpub. LEXIS 1126, at *5-9 (Mar. 27, 2019), the trial court appropriately precluded an expert from

testifying as to standard of care where the expert opined that the defendant's actions constituted a breach of the standard of care, but did not explicitly define the standard of care in his report.

**Interfering with Your Adversary's Expert**

In Sutch v. Roxborough Mem. Hosp., No. 901, 2015 Phila. Ct. Com. Pl. LEXIS 311 (Oct. 23, 2015), plaintiff moved for sanctions after a defense attorney contacted plaintiff's expert's hospital employer to explain that the expert offered an opinion that could expose the hospital to liability. Id. at *2-3. 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 disqualified counsel from further representing her clients in the case. Id. The court found that the 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 the improper conduct, and the absence of any legally cognizable explanation for such conduct warranted sanctions and disqualification. Id. at *11. The trial court's award of monetary sanctions related to trial conduct, by separate order, was ultimately reversed. See Sutch, 142 A.3d 38 (Pa. Super. Ct. 2016), app. denied, 163 A.3d 399 (Pa. 2016). **See also Raynor v. D'Annunzio, 243 A.3d 41 (Pa. Super. Ct. 2020) (relaying history of sanctions orders, which were ultimately reversed by the Superior Court).**

**Pa. R.C.P. 1036.1 – Reinstatement of a Party to a Negligence Action – A Judicial Mechanism Created to Reinstate 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 rule provides a procedure to reinstate a claim previously dismissed by an affidavit of noninvolvement. Subsequent to dismissal, any other party may file a motion to reinstatement the dismissed party. The motion must set forth facts showing false or inaccurate statements were included in the affidavit of noninvolvement. 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.

**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 vicariously liable, 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 vicariously liable principal. In Maloney, the plaintiff settled with the vicariously liable principal, and the release attempted to

carve out the agent. 984 A.2d at 492. While the trial court granted summary judgment in favor of the agent, the Supreme Court reversed, 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 481-82, 496.

**Tindall v. Friedman, 970 A.2d 1159 (Pa. Super. Ct. 2009)**

In Tindall, the court addressed whether a release that reserves the plaintiff's right to pursue excess insurance coverage applies to the MCARE Fund. The plaintiff agreed to a partial release of one defendant doctor, but reserved the right to pursue the remaining defendants to collect primary and excess coverage. Id. at 1163-65. The court found that the agreement released the doctor personally, but since he continued to possess MCARE coverage 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 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. Com., 32 A.3d 687, 689 (Pa. 2011), the Supreme Court held that Pennsylvania does not recognize a cause of action for negligent spoliation of evidence.

**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."

In Sernovitz v. Dershaw, 127 A.3d 783, 785 (Pa. 2015), the plaintiffs argued that they should be permitted to bring a wrongful death claim, as Act 47, which encompasses § 8305, was allegedly unconstitutional. The court found that the legislation was immune from challenge

given the length of time—22 years—that had passed since enactment, so § 8305 was still applicable. Id. at 794.

**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). Section 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. The Supreme Court has upheld the $500,000 damages cap under § 8553 against the challenge that it is unconstitutional. Zauflik v. Pennsburg Sch. Dist., 104 A.3d 1096 (Pa. 2014).

**Trial Issues**

**I. Jury Selection**

On the issue of jury selection, Cordes v. Assoc. of Internal Med., 87 A.3d 829, 831 (Pa. Super. Ct. 2014), app. 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 jurors. The jury included a husband and daughter of a patient of the defendant doctor, and an employee of the defendant employer's parent company. Id. at 832-33. In a divided opinion, the appellate court found that exclusion was required *per se*, as although a potential juror's relationship with a party 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.

In Blaque v. Chestnut Hill Hosp., No. 2382 EDA 2016, 2017 Pa. Super. Unpub. LEXIS 1226 (Mar. 31, 2017), the court appropriately exercised its discretion to dismiss a juror who visited the emergency room for an issue closely related to the case while the case was proceeding. The court found that while the juror did not intend to have to visit the emergency room, this amounted to a close situational relationship, as contemplated by Cordes. Id. at *13-14.

In DeFrancesco v. Lehigh Valley Health Network, No. 742 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 1481 (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 found 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. 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. 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 an 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, the Court deferred to the trial court judge who had the opportunity to see and hear what the juror said. Id. at 441-42, 450. See also Kirksey, 2019 Pa. Super. Unpub. LEXIS 3807, at *18-19 (objecting party failed to show sufficiently close relationship to a party to the action).

**In Benjamin v. Henderson, No. 715 MDA 2020, 2021 Pa. Super. Unpub. LEXIS 1407 (June 4, 2021), the Superior Court considered whether the trial court erred in refusing to strike three potential jurors where those individuals were ultimately stricken through peremptory challenges. The three individuals each indicated that they had preconceived biases that could potentially impact how they viewed the parties, but, each admitted they would do their best to push their emotions aside and evaluate the evidence with an open mind. Id. at *3-4. Appellant argued that these jurors should have been stricken for cause because they clearly stated they had bias, and Appellant should not have had to use peremptory strikes on these individuals. Id. at *10. The Court concluded that the objection warranted no relief. First, because the jurors were not actually selected, Appellant could not demonstrate a likelihood of prejudice. Id. at *20-21. Additionally, even if Appellant was required to exhaust his peremptory challenges, the trial court did not abuse its discretion because each individual specifically stated he or she would decide the case based on the evidence. Id. Accordingly, the trial court did not abuse its discretion when it declined to disqualify these venirepersons, as all three expressed their "ability and willingness to eliminate the influence of [their] scruples and render a verdict according to the evidence." Id. (quoting Comm. v. Wiggins, No. 1668 EDA 2015, 2019 Pa. Super. Unpub. LEXIS 2768, at *12 (July 19, 2019)).**

In Trigg v. Children's Hosp. of Pittsburgh of UPMC, 187 A.3d 1013, 1015, 1019 (Pa. Super. Ct. 2018), aff'd, No. 1041 WDA 2017, 2020 Pa. Super. Unpub. LEXIS 2916 (Sept. 15, 2020), the Superior Court declined to extend deference to the trial court judge on the issue of juror bias where the judge failed to observe *voir dire* in person. Prior to Trigg, it was not uncommon for judges to weigh strikes for cause on the transcript, as opposed to viewing *voir dire* from the courtroom. The Court's decision implied that deference would not be afforded to a trial judge who is physically absent from the jury selection process. On appeal, the Supreme Court found the issue of whether the trial court erred in not observing *voir dire* in person to be waived where it was not raised prior to or during the *voir dire* process. See Trig, 229 A.3d 260 (Pa. 2020). The Supreme Court remanded the case to address additional issues raised on appeal. **On remand, the Superior Court again noted that counsel failed to raise any objection to the procedure employed during the *voir dire* process. Trigg, No. 1041 WDA 2017, 2020 Pa. Super. Unpub. LEXIS 2916, at *11-12 (Sept. 15, 2020). However, the Court did point out that some of the trial court's procedures were unorthodox, and arguably, could have**

**constitutional ramifications. Id. Nevertheless, the issue was waived for failure to object before or during the *voir dire* process. Id.**

**The same issue arose in Smith v. Cordero, No. 1166 WDA 2018, 2021 Pa. Super. Unpub. LEXIS 913 (Apr. 8, 2021). After a jury found in favor of the defense, the plaintiff filed post-trial motions arguing, in part, that the trial court violated Shinal by denying two jury challenges for cause without personally witnessing the *voir dire* process. Id. at *8-9. In reliance on Trigg, the Court again found the objection waived because the plaintiff failed to raise the issue in pre-trial motions or during *voir dire* proceedings. Id. at *12. Additionally, although the trial judge noted that he could conduct a *voir dire* of the jurors, plaintiff's counsel did not ask him to do so. Id. Therefore, the challenge was waived.**

It is important to note that failure to make a timely and specific objection during the jury selection process may result in waiver of the issue of juror bias. See Walker v. Lancaster Gen., No. 2036 MDA 2014, 2016 Pa. Super. Unpub. LEXIS 322 (Feb. 3, 2016), app. denied, 141 A.3d 482 (Pa. 2016) (juror bias issue not properly preserved for appeal); Rhoads v. Hoops, No. 245 MDA 2018, 2019 Pa. Super. Unpub. LEXIS 240 (Jan. 23, 2019), app. denied, 2017 A.3d 803 (Pa. 2019) (citing Tindall, 9701 A.2d at 1174) (same); **Perez v. Maroon, No. 184 WDA 2019, No. 211 WDA 2019, 2020 PA. Super. Unpub. LEXIS 1920 (June 10, 2020), app. denied, 249 A.3d 496 (Pa. 2021) (same)**.

## II. Error in Judgment Jury Instruction

In Pringle v. Rapaport, 980 A.2d 159 (Pa. Super. Ct. 2009), app. denied, 987 A.2d 162 (Pa. 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. In Passarello v. Grumbine, 87 A.3d 285, 304-05 (Pa. 2012), the Supreme Court reaffirmed that error in judgment instructions should not be used in medical malpractice cases. The Passerello Court also held that the lower court properly exercised its discretion to apply Pringle 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.

## III. Verdict Sheets

In Hyrcza v. W. Penn Allegheny Health Sys., Inc., 978 A.2d 961, 968 (Pa. Super. Ct. 2009), app. denied, 987 A.2d 161 (Pa. 2009), the court held that a settling defendant may be included on a verdict slip if the evidence presented at trial is sufficient to meet the *prima facie* burden of proving that the settling defendant is liable. See also Taylor v. Tenet, Inc., No. 3013 EDA 2018, 2020 Pa. Super. Unpub. LEXIS 1606 (May 13, 2020).

In order for a settling defendant to be included on a verdict slip, the evidence must establish a *prima facie* case of negligence against the settling defendant. Hyrcza, 978 A.2d at 969; see also Ball v. Johns-Manville Corp., 625 A.2d 650 (Pa. Super. Ct. 1993); Davis v. Miller, 123 A.2d 422 (Pa. 1956); Hamil v. Bashline, 392 A.2d 1280, 1283-86 (Pa. 1978); c.f. Herbert v. Parkview Hosp., 854 A.2d 1285 (Pa. Super. Ct. 2004) (including a settling defendant on the verdict sheet where

plaintiff's expert apportioned liability at trial against all defendants). Therefore, if evidence is insufficient to support a *prima facie* case against a settling co-defendant then the law makes clear that the co-defendant may be left off of the verdict sheet. *Id*.

In professional liability actions that criticize how a medical provider should act when presented with a particular patient, and where there is no "obvious causal relationship" between the injury and the alleged negligence, expert testimony is required to establish a *prima facie* case of negligence. See Grossman v. Barke, 868 A.2d 561, 566 (Pa. Super. Ct. 2005) (explaining that in most cases, expert testimony "may be necessary to elucidate complex medical issues to a jury of laypersons."). A "plaintiff must present medical expert testimony to establish that the care and treatment of the plaintiff by the defendant fell short of the required standard of care and that the breach proximately caused the plaintiff's injury." Id. (citing Toogood v. Owen J. Rogal, D.D. S.,P. C., 824 A.2d 1140, 1145 (Pa. 2003)).

In Deeds v. Univ. of Pa. Med. Ctr., 110 A.3d 1009, 1011 (Pa. Super. Ct. 2015), app. dismissed, 128 A.3d 764 (Pa. 2015), the court ordered a new trial where a non-active defendant was permitted to have separate counsel present a defense, even though only the hospital defendant was listed on the verdict sheet. The inactive defendant had not been formally dismissed, but was not listed on the verdict sheet. Id. In holding that it was an abuse of discretion to allow separate attorneys to represent the non-active defendant, the court relied 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. Id. at 1016-17. The court found persuasive that the defendants faced identical claims, had no cross-claims, shared expert witnesses, and belonged to the same group of parties. Id. Accordingly, the trial court erred in allowing the defendants to effectively "tag team" plaintiff while representing the same interest. Id. at 1017.

Drusko v. UPMC Northwest, No. 1144 WDA 2015, 2017 Pa. Super. Unpub. LEXIS 799 (Mar. 1, 2017), app. denied, 169 A.3d 1040 (Pa. 2017), distinguished Deeds in affirming a decision to include a settling defendant on the verdict sheet where the record contained *prima facie* evidence of malpractice against the defendant, and placement on the verdict slip was proper for purposes of apportionment. A crossclaim for contribution was not a prerequisite to include the settling defendant on the verdict sheet. Id. at *25. Furthermore, any alleged error was harmless, since the jury did not apportion any liability to the settling defendant. Id.

In Seels v. Tenet Health Sys. Hahnemann, LLC, 167 A.3d 190, 207-08 (Pa. Super. Ct. 2017), app. denied, 220 A.3d 533 (Pa. 2019), the court held that it was appropriate to omit non-party agents from the verdict sheet, even where the claims involved vicarious liability, as the case did not involve evidence specific to those individuals. However, it was proper to allow the verdict sheet to refer to two non-party physicians, as the vicarious liability claims were based on the care of those providers.

Note that failure to request a special interrogatory on a verdict sheet regarding allocation of damages will result in waiver of a new trial on damages. See Shiflett v. Lehigh Valley Health Network, Inc., 2017 A.3d 225 (Pa. 2019).

## LEGAL MALPRACTICE

**Elements of a Cause of Action for Legal Malpractice – Negligence**

In Kituskie v. Corbman, 714 A.2d 1027, 1029 (Pa. 1998), the Supreme Court reiterated the elements of a negligence-based legal malpractice cause of action as follows: (1) employment of the attorney or other basis for a duty; (2) failure to exercise ordinary skill and knowledge; and (3) proximate causation. Plaintiffs must also prove that they have a viable underlying cause of action, and that their attorney was negligent in prosecuting or defending that case. Id. at 1030. Thus, plaintiffs must prove "a case within a case," as they must 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.

In Barcola v. Hourigan, Kluger & Quinn, 82 Pa. D. & C.4th 394, 395 (Pa. Ct. Com. Pl. 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. The plaintiffs moved to compel the attorneys to admit the extent of plaintiffs' injuries based on the assertions made in the medical malpractice case. Id. at 395, 402. In denying the 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 plaintiffs prove a "case within the case" often defeats a legal malpractice claim. See, e.g., Cohen v. Gold-Bikin, No. 552 EDA 2017, 2018 Pa. Super. Unpub. LEXIS 366 (Feb. 7, 2018); Majorsky v. Lieber, No. 798 WDA 2017, 2019 Pa. Super. Unpub. LEXIS 821 (Mar. 8, 2019), app. denied, 2019 Pa. LEXIS 50012 (Sept. 4, 2019).

Typically, the "case within the case" refers to prior litigation. The Pennsylvania Superior Court recently affirmed that a trial court may consider the record from the underlying case on preliminary objections, even where those documents were not attached to the complaint. **See Carafa v. Tinari, No. 2596, 2020 Pa. Super. Unpub. LEXIS 1342, at *6 (Apr. 20, 2020). A court is not required to consider the averments of the complaint in isolation where the claim is based on the prior litigation. See id.**

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, e.g., 412 N. Front St. Assocs. v. Specter Gadon & Rosen, P.C., 151 A.3d 646 (Pa. Super. Ct. 2016). Absent expert testimony, plaintiffs may not be able to establish the merits of their legal malpractice claims. See, e.g., Cruickshank-Wallace v. CNA Fin. Corp., No. 2403 EDA 2016, 2017 Pa. Super. Unpub. LEXIS 3562 (Sept. 25, 2017), app. denied, 187 A.3d 907 (Pa. 2018). However, expert

testimony is not necessary where the issue is simple and within the ordinary comprehension of a layperson. Index Realty, Inc. v. Gargano, No. 02844, 2018 Phila. Ct. Com. Pl. LEXIS 93 (June 3, 2018), aff'd, 2002 A.3d 591 (Pa. Super. Ct. 2018).

Venue principles also apply in legal malpractice cases. In Zarenkiewicz v. Lefkowitz, No. 1387, 2014 Phila. Ct. Com. Pl. LEXIS 255 (July 17, 2014), aff'd, 121 A.3d 1125 (Pa. Super. Ct. 2015), venue was not proper in Philadelphia, as the underlying action was brought in Bucks County, and no transactions or occurrences transpired in Philadelphia. Id. at *4-6 (citing Pa. R.C.P. 1006(a)). The defendant attorney did not regularly conduct business in Philadelphia, aside from occasional client meetings, which 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, No. 02491, 2017 Phila. Ct. Com. Pl. LEXIS 139 (Mar. 21, 2017), aff'd, 183 A.3d 1072 (Pa. Super. Ct. 2018) (preliminary objections to venue sustained).

The occurrence rule is used to determine the accrual date of a legal malpractice action. See Commc'ns Network Int'l v. Mullineaux, 187 A.3d 951, 960 (Pa. Super. Ct. 2018), app. denied, 203 A.3d 214 (Pa. 2019). For statute of limitations purposes, the claim accrues when the breach occurs, not when the loss is realized. Id.; see also Johnson v. Schatz, No. 2554, 2019 Phila. Ct. Com. Pl. LEXIS 17, at *11 (Feb. 21, 2019) (attorney's knowledge regarding existence of motion papers is imputed to the client). The statute of limitations is strictly applied, and may only be tolled "when the client, despite the exercise of due diligence, cannot discover the injury or its cause." Mullineaux, 187 A.3d at 960 (quoting Wachovia Bank, N.A. v. Feretti, 935 A.2d 565, 572-73 (Pa. Super. Ct. 2007)). This is an objective test. See Clark v. Stover, No. 1474 MDA 2018, 2019 Pa. Super. Unpub. LEXIS 2910, at *18 (Aug. 1, 2019) (citing Gleason v. Borough of Moosic, 15 A.3d 479, 485-86 (Pa. 2011)). Even equitable principles will not relieve a claimant of his or her duty of due diligence. Mullineaux, 187 A.3d at 963-64. But see Heldring v. Lundy, Beldecos & Milby, P.C., No. 1731 EDA 2017, 2018 Pa. Super. Unpub. LEXIS 1315, at *10 (Apr. 27, 2018) (plaintiff set forth facts which could, if proven, satisfy the discovery rule and render its claims timely). While the question of due diligence is normally one for a jury, a court may resolve the issue where reasonable minds could not differ, and therefore, the discovery rule cannot apply as a matter of law. Clark, 2019 Pa. Super. Unpub. LEXIS 2910, at *18.

**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, and can arise where "the attorney agrees to provide his or her best efforts and fails to do so." Id. at 213; see also Red Bell Brewing Co. v. Buchanan Ingersoll, P.C., 51 Pa. D. & C.4th 129 (Pa. Ct. Com. Pl. 2001) (complaint alleged facts that would establish breach of contract to deliver "quality legal services" and to handle plaintiff's account "with the utmost of professionalism and proficiency"); Burns v. Drier, 12 Pa. D. & C.5th 479 (Pa. C.P. 2010) ("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 reiterated the elements of a legal malpractice claim based on breach of contract: (1) the existence of a contract; (2) 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. Conversely, in Liberatore v. Winterhalter, No. 1887, 2016 Phila. Ct. Com. Pl. LEXIS 237 (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. **Note that expert testimony may be required, regardless of whether the case sounds in negligence or contract. See Mickman v. White & Williams, LLP, 251 A.3d 1212 (Pa. Super. Ct. 2021).**

Importantly, there exists no contractually-based legal malpractice claim against court-appointed counsel or guardian ad litems. See Stovall v. Kallenbach, No. 1683 WDA 2018, 2019 Pa. Super. Unpub. LEXIS 2570 at *8, n.1 (July 2, 2019); **J.A.M. v. Lagenbach, Case No. 200300399, 2020 Phila. Ct. Com. Pl. LEXIS 17 (July 8, 2020).**

While a plaintiff may combine tort and contract theories in one complaint by asserting that defendants breached specific contractual terms and the attorney's general duty of care, see Jackson v. Ferrera, No. 01-5365, 2002 U.S. Dist. LEXIS 12731, at *17-18 (E.D. Pa. Apr. 16, 2002), the gist of the action doctrine may dictate whether the legal malpractice claims truly sound in tort or contract. See, e.g., Gen. Food Servs., LLC v. Lipsky, No. 1738, 2019 Phila Ct. Com. Pl. LEXIS 41 (Mar. 29, 2019) (citing Seidner v. Finkelman, 195 A.3d 1048 (Pa. Super. Ct. 2018)); **Johnstone v. Raffaele, No. 2581 EDA 2019, 2020 Pa. Super. Unpub. LEXIS 3433 (Oct. 30, 2020)**

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; Wachovia Bank, N.A. v. Ferretti, No. 2005-C-2457, 2006 Pa. D. & C. Dec. LEXIS 653 (July 14, 2006). C.f. Seidner v. Finkelman, No. 716 EDA 2017, No. 808 EDA 2017, 2018 Pa. Super. Unpub. LEXIS 3249 (Aug. 31, 2018) (where claim sounds in tort as opposed to contract, two years statute of limitations applies). **Litigants often attempt to convert their negligence case into one for breach of contract when there is a statute of limitations issue. The Court is prohibited from reading a contract claim into a complaint where only negligence has been raised. See Schmidt v. Rosin, No. 1310 EDA 2019, 2021 Pa. Super. Unpub. LEXIS 1555 (June 10, 2021) (citing Steiner v. Markel, 968 A.2d 1253 (Pa. 2009)). However, deference is given to *pro se* litigants, and where the existence of a contract and contractual obligations are referenced in the complaint, a court may find a breach of contract claim has adequately been preserved. See Sibley v. Barr & McGoney, No. 1523 EDA 2018, 2021 Pa. Super. Unpub. LEXIS 1841 (July 9, 2021).**

### The "Increased Risk of Harm" Standard Does Not Apply To Legal Malpractice Actions

In Myers v. Seigle, 751 A.2d 1182, 1185 (Pa. Super. Ct. 2000), app. denied, 795 A.2d 978 (Pa. 2000), the court held that the increased risk of harm standard, defined by RESTATEMENT (SECOND) OF TORTS § 323, was inapplicable to legal malpractice actions. Rather, proof of actual loss is required. 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., Brown v. Dugan, No. 37 C.D. 2017, 2017 Pa. Commw. Unpub. LEXIS 929, at *13 (Dec. 15, 2017).

**Settlement**

In Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, the Supreme Court decided: it "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." 587 A.2d 1346, 1348 (Pa. 1991), cert. denied, 502 U.S. 867 (1991). See also Banks v. Jerome Taylor & Associates, 700 A.2d 1329 (Pa. Super. Ct. 1997) (absent fraud, negligence action may not be maintained against an attorney on the grounds that the settlement amount is too small); Flanagan v. Hand, No. 1010 EDA 2018, 2019 Pa. Super. Unpub. LEXIS 1260 (Apr. 8, 2019) (same).

In Wassall v. DeCaro, 91 F.3d 443 (3d Cir. 1996), the court allowed plaintiffs to maintain their legal malpractice action, 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 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.

In McMahon v. Shea, 688 A.2d 1179, 1181-82 (Pa. 1997), the Supreme Court distinguished Muhammad, finding that Muhammad was not applicable where the 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.

In Piluso v. Cohen, 764 A.2d 549 (Pa. Super. Ct. 2000), the court affirmed summary judgment in attorney-defendant's favor. In the underlying action, the attorney settled claims against some defendants, and proceeded to trial against a remaining defendant, who was relieved of liability at trial. Id. at 550. Plaintiff was aware of the settlement, although, it occurred outside her presence. Id. at 551. Plaintiff alleged that she did not consent to the settlement, but the court held that plaintiff ratified her attorney's actions by failing to promptly repudiate them. 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 to defend claims against them. Id. See also Palmer v. Kenney, No. 2512, 2012 Phila. Ct. Com. Pl. LEXIS 294 (Oct. 1, 2012) (whether action would have resulted in recovery greater than settlement amount was mere speculation); Flanagan, 2019 Pa. Super. Unpub. LEXIS 1260, at *24 (speculative damages do not support a legal malpractice claim).

In Red Bell, *supra*, the court applied McMahon, not Muhammad, and found plaintiff's action against his former attorneys was not barred where he 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. 51 Pa. D. & C.4th at 138-39. See also Kilmer v. Sposito, 146 A.3d 1275 (Pa. Super. Ct. 2016) (case permitted to proceed where allegations stemmed from attorney's advice rather than settlement amount); Rupert v. King, No. 1309 WDA 2017, 2018 Pa. Super. Unpub. LEXIS 1951 (June 4, 2018) (same); Index Realty, 2018 Phila. Ct. Com. Pl. LEXIS 93, at *20-22 (claim viable where

allegations involved conduct were connected to settlement, but did not have to do with dissatisfaction over settlement terms).

In 2017, the Pennsylvania Supreme Court granted an allowance of appeal to determine whether Muhammad should be overturned, but the case was discontinued prior to a ruling. See McGuire v. Russo, 169 A.3d 567 (Pa. 2017). **However, another appeal was recently raised in Khalil v. Williams, No. 24 EAP 2021, which remains pending before the Pennsylvania Supreme Court.**

**Damages**

An essential element of a legal malpractice claim is proof of actual loss, rather than nominal damages, speculative harm, or the threat of future harm. Kituskie, 714 A.2d at 1030. See also Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863 (3d Cir. 1997). Conclusory and speculative allegations regarding damages are insufficient. See Stacey v. Hermitage, 2:02-cv-1911, 2008 U.S. Dist. LEXIS 29359, at *16-18 (W.D. Pa. Apr. 7, 2008) (dismissing complaint where the only reference to harm was an alleged injury to plaintiffs caused by the attorney's "actions and omissions."); Cook v. Gelman, No. 3528, 2017 Phila. Ct. Com. Pl. LEXIS 31 (Jan. 24, 2017), aff'd, 185 A.3d 1134 (Pa. Super. Ct. 2018) (TABLE) (granting summary judgment where damage claim was speculative). 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)). Courts have found that no damages arise where the attorney successfully achieves the client's objective, even in some cases involving appeals. See, e.g., Coley v. Rocco, No. 2083 EDA 2018, 2019 Pa. Super. Unpub. LEXIS 4466 (Dec. 3, 2019) (no damages where attorney achieved objection of drafting petition in trial court, despite petition being overturned on appeal on unrelated grounds).

In Ammon v. McCloskey, 655 A.2d 549 (Pa. Super. Ct. 1995), the court held that plaintiff could prove economic harm simply by showing that judgment had been entered against him in the underlying case. In such a case, losses may be "measured by the judgment the plaintiff lost in the underlying action." Kituskie, 714 A.2d at 1030. Under Rizzo, where 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. 555 A.2d at 68-69.

In Giesler v. 1531 Pine St. Ass'n, L.P., No. 4301, 2010 Phila. Ct. Com. Pl. LEXIS 152 (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.

In GNC v. Gardere Wynne Sewell, LLP., 727 F. Supp. 2d 377 (W.D. Pa. 2010), plaintiff alleged that he 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. See also J.W. Hall, Inc. v. Nalli, No. 771 WDA 2016, 2017 Pa. Super. Unpub. LEXIS 595 (Feb. 15, 2017) (no loss where affiliated, but separate, entity suffered loss).

In Coleman v. Duane Morris, LLP, 58 A.3d 833 (Pa. Super. Ct. 2012), the court held 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. Bailey's application was considered in Lodato v. Silvestro, No. 12-1130, 2013 U.S. Dist. LEXIS 6174, at *10 (E.D. Pa. Jan. 15, 2013), which found that there are substantial differences between civil and criminal proceedings, and held that Bailey does not apply in non-criminal legal malpractice proceedings.

In Theise v. Carroll, No. 3:10cv1715, 2011 U.S. Dist. LEXIS 45723 (M.D. Pa. Apr. 27, 2011), the court noted that punitive damages may be available in legal malpractice cases. 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, counsel 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 attorneys 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. See also Perez v. Mathis, No. 1769 CIVIL 2018, 2018 Pa. D. & C. Dec. LEXIS 2185 (Pa. Ct. Com. Pl. Sept. 6, 2018) (permitting punitive damages in a legal malpractice case).

In Kirschner v. K & L Gates LLP, 46 A.3d 737 (Pa. Super. Ct. 2011), the Superior Court reversed the trial court's order dismissing a claim for lack of compensable damages. Although the bankruptcy 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 (Oct. 7, 2014), damages were awarded in the amount of the loss of an interest payment deduction, but the court found that disgorgement of fees was not appropriate absent a showing of breach of fiduciary duties. Id. at *6. See also Tod Gordon & Carver W. Reed & Co. v. Herman, No. 1961 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 1691 (June 9, 2015) (damages awarded where there was credible evidence that failure to perform as instructed resulted in an inability to claim interest payment deductions on tax forms).

In Cohen v. Gold-Bikin, No. 2663, 2017 Phila. Ct. Com. Pl. LEXIS 98, at *2-3 (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.

In Wagner v. Gould, the Superior Court reaffirmed that loss of property rights under a contract will suffice to establish an injury in a legal malpractice claim. 2019 Pa. Super. Unpub.

LEXIS 2371, at *16 (June 19, 2019) (citing Curran, 521 A.2d at 457). Thus, where collateral secured by a transaction was rendered valueless due to failure to ensure that the transaction was properly secured, the plaintiff's actual damages amounted to the lost value of that collateral. Id.

**The "one-satisfaction rule" applies in legal malpractice cases to prevent double recoveries. In Young v. Lippl, 251 A.3d 405 (Pa. Super. Ct. 2021) the Court explained that a plaintiff was barred from recovering damages from an attorney-defendant that were already recovered from a third party. Id. at 422. Therefore, the verdict against the defendant-attorney was reduced by the amount already recovered against the third party, even though the issue of the third party's liability was not before the jury in the legal malpractice case. Id.**

**Collectability**

In Kituskie, the Supreme Court recognized the affirmative defense of non-collectability in legal malpractice actions. The defendant-lawyer bears the burden of proving non-collectability by a preponderance of the evidence. 714 A.2d at 1030. The court further 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. The court also 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 (Mar. 11, 2009), the court found that an attorney forfeited his right to assert non-collectability of damages where he failed to answer the complaint, allowing the court to enter a default judgment against him.

**Privity**

In Cost v. Cost, 677 A.2d 1250, 1254 (Pa. Super. Ct. 1996), app. denied, 689 A.2d 233 (Pa. 1997), the court found that plaintiff's complaint failed to allege that the plaintiff sought legal assistance that defendants expressly or impliedly agreed to render. Consequently, since the requisite element of privity was missing, plaintiff failed to aver facts sufficient to establish grounds for a legal malpractice suit. Id.

In Erwin v. Clark, 38 Pa. D. & C. 4th 170, 173-74 (Pa. Ct. Com. Pl. 1997), the court 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 not champertous and, therefore, it was 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 implied 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. v. Hunt, 847 A.2d 75, 83 (Pa. Super. Ct. 2003), app. denied, 827 A.2d 1202 (Pa. 2003) (citing Minnich v. Yost, 817 A.2d 538, 542 (Pa. Super. Ct. 2003)); See also Wagner, 2019 Pa. Super. Unpub. LEXIS 2371, at *16 (a contract for legal services may be implied).

In Capital Care, the 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. The court found that while the attorney had withdrawn from representation, he continued to provide legal services with respect to other matters of corporate governance. 847 A.2d at 83. Because he continued to assist with other corporate legal matters, it was reasonable for plaintiff to believe he was still representing the corporation at the time of the incident at issue in the complaint. Id.

In Capitol Surg. 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 manufacturer's agreement with a corporation, and representatives for 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 representatives' subjective belief that an attorney-client relationship existed was not sufficient to establish privity. Id. at 509. See also Conley v. Stockey, No. 548 WDA 2015, 2016 Pa. Super. Unpub. LEXIS 1356 (Apr. 26, 2016) (despite a prior relationship, plaintiff's subjective belief that attorney represented interest in present matter was insufficient to establish attorney-client relationship).

In Kirschner, the defendant law firm was hired to provide advice to a special committee created by a company's board of directors to investigate allegations regarding the accuracy of sales figures, but the defendant failed to timely uncover fraud committed by the company's CEO. 46 A.3d at 743. The engagement letter stated that the attorney was representing the Special Committee. Id. After the fraud was uncovered, an action was initiated against the defendant on behalf of the company. Id. at 746. The court held that an implied attorney-client relationship existed between the defendant and the company, even though the retention letter identified the client as the Special Committee because: (1) the corporation, through its board and Special Committee, sought defendant's legal advice in investigating fraud and making recommendations for the Board; (2) the investigation and recommendations were within the professional competence of defendant; (3) defendant agreed to render 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 and making 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 legal malpractice against an attorney who prepared a will for the plaintiffs' grandmother. The will did not name the plaintiffs as beneficiaries. Id. at *1-2. The

court found that no attorney-client relationship existed between the plaintiffs and the defendant, as the third-party beneficiary must be named in the will to state a claim for legal malpractice. Id. at *5-7. See also Brychczynski v. Robbins, No. 306 MDA 2015, 2016 Pa. Super. Unpub. LEXIS 634 (Feb. 29, 2016) (no privity between attorney and plaintiff who brought underlying claim on behalf of a decedent); Estate of Agnew v. Ross, 152 A.3d 247 (Pa. 2017) (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); but see Schmidt v. Rosin, No. 1310 EDA 2019, 2020 Pa. Super. Unpub. LEXIS 2165 (July 8, 2020) (executed documents suggested intent to benefit third party beneficiary)

In Grimm v. Grimm, 149 A.3d 77 (Pa. Super. Ct. 2016), the court found an exception to the general privity rules in estate matters where 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 is notably an extremely narrow circumstance. Id. at 88.

In Greenwalt v. Stanley Law Offices, LLP, No. 1018 WDA 2019, 2020 Pa. Super. Unpub. LEXIS 2004 (June 22, 2020), although the court affirmed a grant of summary judgment on other grounds, the court noted that a genuine issue of material fact did exist as to whether the defendant attorney owed a duty in connection with advice given in declining to pursue a case. The defendant-attorney referred the case to a Pennsylvania lawyer based upon the belief that New York did not have jurisdiction over the claim. Id. at *15-20. After the plaintiff pursued the claim in Pennsylvania, the Pennsylvania court determined that it lacked jurisdiction, and that the claim was in fact properly venued in New York. Id. However, the statute of limitations ran during that time. Id. Notably, the court determined that the defendant-lawyer may have provided legal advice in counseling plaintiff to pursue the action in Pennsylvania, even though he was not explicitly retained to provide legal services on that issue. Id.

**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
>
> ***
>
> (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.
>
> ***

**§ 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:

> ***
>
> (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 Supreme Court considered whether the Dragonetti Act infringes on the Court's power to regulate the practice of law, insofar as wrongful-use actions may be advanced against attorneys. 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. The Court concluded that appellee failed to establish that the Dragonetti Act violated the Pennsylvania Constitution, as evidenced by the Legislature's prerogative to enact the 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 2019, the Supreme Court agreed to consider whether punitive damages, as provided for by the Dragonetti Act, are an unconstitutional infringement upon the Court's power to regulate attorney conduct. Rupert v. King, 2019 Pa. LEXIS 1142 (Feb. 21, 2019). However, the case was settled prior to a ruling.

In Miller v. St. Luke's Univ. Health Network, 142 A.3d 884 (Pa. Super. Ct. 2016), plaintiffs brought and subsequently dismissed a wrongful death action against defendant hospital. The hospital filed suit against plaintiffs, their attorneys, and their medical expert for, *inter alia*, wrongful use of civil proceedings, but dismissed the plaintiffs after depositions. Id. at 888. Plaintiffs later sued the hospital and its attorneys under the Dragonetti Act. Id. The jury found that the hospital lacked probable cause to bring its action against plaintiffs, but awarded no damages. Id. at 889. On appeal, plaintiffs argued that a violation of the Dragonetti Act presumes damages. Id. 889-90. They claimed the trial court erred in instructing the jury that a plaintiff who proves wrongful use still carries the burden of proving resultant damages. Id. The Superior Court affirmed the trial court's ruling, holding that the plain language of § 8354 modifies the enumerated damages provision (§ 8353), and that the overall statutory scheme requires plaintiffs to prove damages by a preponderance of the evidence. Id. at 893-894. To presume damages would render § 8354 superfluous, and the rules of statutory construction would not permit the court to invalidate the clearly expressed intent of the statute. Id.

The Pennsylvania Supreme Court agreed to consider two questions relevant to the Sutch case discussed, *supra*, and subsequent claims brought under the Dragonetti Act: (1) "Whether a request for contempt/sanctions against counsel…contained within a motion for post-trial relief constitutes "civil proceedings" actionable under the Dragonetti Act?" and (2) Whether "the Superior Court attempt[ed] to create new Pennsylvania law — in contravention of a number of appellate decisions — giving [respondent], a disqualified attorney, standing to assert a cause of action under the Dragonetti Act when she was not a party to the underlying action?" Raynor v. D'Annunzio, 2019 Pa. LEXIS 6254 (Nov. 6, 2019). The case remains pending.

**The Pennsylvania Supreme Court recently considered questions relevant to the Sutch case discussed, *supra*, and subsequent claims brought under the Dragonetti Act by defense counsel. Raynor v. D'Annunzio, 243 A.3d 41 (Pa. 2020). Through consolidated appeals, the Court examined whether the Superior Court properly determined a request for contempt sanctions against counsel raised in a post-trial motion, where neither counsel was a named party, constitutes actionable "civil proceedings" under the Dragonetti Act. Id. at 43. The Supreme Court reversed, holding that intra-case filings, such as the post-trial motion for contempt and/or sanctions, did not constitute the procurement, initiation, or continuation of civil proceedings under the Dragonetti Act. Id. at 55.**

**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. 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, 743 (Pa. Super. Ct. 1996), plaintiffs sued their attorney for legal malpractice based on a fee agreement that required the attorney to diligently handle an appeal. The court held that the agreement also required defendant-attorney to notify the client of the results of the appeal. Id. However, the fee agrsffeement 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 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), app. denied, 701 A.2d 577 (Pa. 1997). In Sherman Indus., Inc. v. Goldhammer, 683 F. Supp. 502 (E.D. Pa. 1988), the court explained, "[a] malpractice plaintiff may not sidestep the two-year limitation on tort actions by pleading tort claims as breaches of contract." Id. at 506.

The Pennsylvania Supreme Court held in Steiner v. Markel, 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**.** See also Briggs v. Southwestern Energy Prod. Co., 224 A.3d 334 (Pa. 2020).

Similarly, in Javaid v. Weiss, No. 4:11-CV-1084, 2011 U.S. Dist. LEXIS 145513, at *5 (M.D. Pa. Dec. 19, 2011), plaintiff's complaint couched his legal malpractice 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. Accordingly, because the complaint lacked any distinct factual allegations to support a claim for breach of contract, the two year statute of limitations applied. Id. at *5, *7. See also Knopick v. Downey, 963 F. Supp. 2d 378 (M.D. Pa. 2013) (denying plaintiff's motion for reconsideration to apply four year statute of limitations to plaintiff's claim because the allegations set forth in the complaint failed to allege a breach of contract against defendants); NYCMI v. Margolis Edelstein, 637 F. App'x 70 (3d Cir. 2016) (dismissing action based on finding that two-year statute of limitations for tort actions applied, as opposed to contract, in accordance with the gist of the action doctrine); First Nonprofit Ins. Co. v. Meenan Oil LLC, 462 F. Supp 3d 537, 544 (E.D. Pa. 2020) (dismissing contract claim as one that was grounded in tort based on the gist of the action doctrine); Nkansah v. Kleinbard LLC, 2020 U.S. Dist. LEXIS 33094 (E.D. Pa. Feb. 26, 2020) (same). **But see Sibley v. Barr & McGogney, 260 A.3d 132, fn. 4 (Pa. Super. Ct. 2021) ("Gist of the action doctrine is difficult to apply in this case where Appellant has alleged facts that may support both contract and**

**tort claims. Accordingly, we do not believe gist of the action doctrine offers an alternate basis for affirmance in this case.").**

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, No. 99-CV-6313, 2000 U.S. Dist. LEXIS 5276 (E.D. Pa. Apr. 24, 2000) (cause of action for legal malpractice accrues on the date the harm is suffered and not on the date the attorney-client relationship ends); Tower Invs., Inc. v. Rawle & Henderson, LLP, No. 3291, 2009 Phila. Ct. Com. Pl. LEXIS 18 (Apr. 7, 2009) ("[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"); Knopick v. Connelly, 639 F.3d 600 (3d Cir. 2011) (application of the occurrence rule was a fact question for the jury to determine whether harm was caused on the date of the underlying hearing).

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, 839 A.2d 437, 441-42 (Pa. Super. Ct. 2003), aff'd, 881 A.2d 1266 (Pa. 2005); see also Johnson v. Schatz, No. 2554, 2019 Phila. Ct. Com. Pl. (Feb. 21, 2019) (refusing to apply continuous representation rule).

On December 22, 2020, the Pennsylvania Supreme Court refused to adopt the so-called "continuous representation rule," a doctrine that tolls the limitations period for a legal malpractice claim until an attorney ceases representing a client. Clark v. Stover, 242 A.3d 1253 (Pa. 2020). Attorney Jeffrey Stover initiated litigation involving a contested will and estate back in 2008 on behalf of his client, David Clark. Id. at 1254.

Two years later, Stover also filed a complaint on behalf of Monica Clark, the testator's mother. Id. In 2015, after the claims in both lawsuits failed, the Clarks filed this legal malpractice suit against Stover and his law firm. Defendants successfully moved for summary judgment. Id. The trial court found that plaintiffs were aware of the alleged negligence and alleged breach more than four years before they filed their malpractice suit. Thus, their claims were time-barred by the two-year statute of limitations applicable to the negligence claim and the four-year limitations period applicable to the contract claim. Id.

The Pennsylvania Supreme Court allowed for this discretionary appeal to consider whether to adopt the continuous representation rule. Id. According to plaintiffs, the rule should be adopted in Pennsylvania to permit statutes of limitations for causes of action sounding in legal malpractice to be "tolled until the attorney's ongoing representation is complete." Id. at 1255. Defendants and their amicus, the Pennsylvania Bar Association, opposed adoption of the continuous representation rule. Id. Such an approach is in irreconcilable tension with the salutary purposes underlying statutes of limitations, i.e., to expedite litigation and thus discourage delay and the presentation of stale claims that may greatly prejudice the defense of such claims, they

argued. Id. Defendants and their amicus noted that the high court rejected a continuous representation approach in Moore v. Juvenal. Id.

The Court agreed with defendants and amicus and rejected plaintiffs' policy-driven argument. The statutes of limitations are legislative in character. Id. at 1256. "Indeed, the Pennsylvania Constitution specifically recognizes the historical and central role of the General Assembly in establishing limitations periods by forbidding this court from suspending or altering any statute of limitations or of repose via rulemaking," the court wrote in its opinion denying plaintiffs relief. Id.

If the discovery rule applies, the statutory period commences at the time the alleged malpractice is discovered. Davis v. Grimaldi, Haley & Frangiosa, P.C., No. 97-CV-4816, 1998 U.S. Dist. LEXIS 15681 (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 *6 (citing Dalrymple v. Brown, 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 Sampathkumar v. Chase Home Fin., LLC, 241 A.3d 1122 (Pa. Super Ct. 2020); Blackmon v. Moore, 227 A.3d 393 (Pa. Super. Ct. 2020); Radman v. Gaujot, 53 F. App'x 606 (3d Cir. 2002) (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, CIVIL ACTION No. 03-5407, 2004 U.S. Dist. LEXIS 2128 (E.D. Pa. Feb. 2, 2004) (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); Edwards v. Duane, Morris & Heckscher, LLP, CIVIL ACTION NO. 01-4798, 2002 U.S. Dist. LEXIS 16301, at *17 (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").

In Johnson v. Schatz, the trial court held that the discovery rule focuses on the breach and the injured party's awareness of the breach, not knowledge of the damage resulting from the breach. 2019 Phila. Ct. Com. Pl. LEXIS 17. The plaintiff alleged that his attorney failed to argue that the bench warrant for his arrest was not validly executed. Id. at *4. The court held that the discovery rule did not apply because the plaintiff had knowledge of the potential breach by the attorney and filed his lawsuit after the statute of limitations had expired. Id. at *10. Specifically, the court pointed to the plaintiff's deposition where he read the court's opinion and asked his

attorney where the information about the bench warrant was. Id. Thus, the court held that the plaintiff had knowledge of the "breach" and bore the responsibility to ensure that his claim was instituted in a timely manner. Id. See also Commc'n Network Int'l. v. Mullineaux, 187 A.3d 951 (Pa. Super. Ct. 2018) (legal malpractice case was not tolled under the doctrine of equitable estoppel when plaintiff failed to exercise due diligence in managing company's litigation when receiving but failing to read court opinions that would have revealed alleged breach).

In McDonald v. McCreesh, No. 1128 EA 2018, 2018 Pa. Super. LEXIS 4850 (Dec. 27, 2018), the Pennsylvania Superior Court held that the statute of limitations in a legal malpractice action began to run when damages were identifiable and not speculative. In McDonald, the plaintiff-administrator of an estate filed a legal malpractice suit against his attorneys alleging that the attorneys failed to properly carry out their duties when preparing the estate's tax returns. Id. at *4. The plaintiff argued that the statute of limitations should not have started to run until after the Orphan's Court entered a declaratory judgment finding that certain assets should have been found as sole assets of the estate rather than joint property, as this was when the damages were no longer speculative. Id. at *9. The court disagreed, finding that the plaintiff knew of the alleged injury when he filed the petition for the declaratory judgment. Id. at *10 (citing Wachovia Bank, N.A. v. Ferretti, 935 A.2d 565, 570 (Pa. Super. Ct. 2007)). The McDonald Court held that damages were only speculative if there were concerns as to "the fact of damages rather than the amount." Id. at *11 (citing Wachovia, 935 A.2d at 572). Thus, because the issue in McDonald was the amount of assets that would be declared as a part of the estate rather than if any assets would be declared as a part of the estate, the statute of limitations began to run when the petition was filed, not when the judgment was entered. Id. at *14.

Courts are willing to permit the fact finder to determine whether the discovery rule applies in legal malpractice cases. See Lefta Assocs. v. Hurley, 902 F. Supp. 2d 559 (M.D. Pa. 2012).

Issues involving the statute of limitations in medical malpractice cases are discussed in prior sections of this publication.

**Contributory Negligence Defense**

In the seminal case, Gorski v. Smith, 812 A.2d 683 (Pa. Super. Ct. 2002), app. denied, 856 A.2d 834 (Pa. 2004), the Superior Court adopted the rule that a plaintiff/client's contributory negligence may bar recovery in a legal malpractice case. In Gorski, plaintiffs brought an action against defendant/attorney and his law firm for professional negligence and breach of contract in the preparation and negotiation of a land sales agreement. Id. at 688-90. 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 JNOV, 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 that the trial court improperly entered JNOV on the negligence claims 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 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.

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." Id. 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." Id. 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 lacobucci'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.

More recently, in N.J. Mfr.'s Ins. Co. v. Brady, 2017 WL 264457 (M.D. Pa. Jan. 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. Id. at *2. 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. Id. 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. Id. at *3. In his answer to plaintiff's complaint, Brady pled that plaintiff's bad faith conduct was contributory negligence. Id. at *1.

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). Id. However, the court determined that evidence of bad faith conduct was relevant to damages and that Brady may still conduct discovery on this issue. Id. 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**

The Pennsylvania Supreme Court in Poole v. Workers' Comp. App. Bd. (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. C.S. § 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. at 1184.

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. Pittsburgh, 11 A.3d 960, 961 (Pa. 2011). In Oliver, 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 argued that the amendments to the Workers' Compensation Act implemented via § 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 § 25(b) repealed § 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. See also Pa. State Police v. Workers' Comp. Appeal Bd. (Bushta), 184 A.3d 958, 969 (Pa. 2018) (finding that because the benefits received by the Claimant were Heart and Lung benefits, and not WCA benefits, pursuant to the MVFRL, defendant did not have a right of subrogation against Claimant's settlement with the third-party tortfeasors).

**Venue**

In Zampana-Barry v. Donaghue, 921 A.2d 500 (Pa. Super. Ct. 2007), app. denied, 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. Defendants had filed preliminary objections, arguing that venue was improper under Pennsylvania Rules of Civil Procedure 1006(b) and 2179(a)(2), which pertain to venue over a corporation or similar entity. Id. at 501. The trial court determined that defendants regularly conducted business in Philadelphia and overruled the objections. Id. at 502.

On appeal, the court applied the required qualitative/quantitative analysis. Id. at 503. 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 and state courts in

Philadelphia. Id. at 504. The firm also submitted an affidavit stating that for the past two years no more than three to five percent of the firm's gross revenue was generated by Philadelphia cases. Id. 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. Id.

In a case involving qualitative/quantitative analysis, Kappe v. Lentz, Cantor & Massey, Ltd., 39 A.3d 1008 (Pa. Super. Ct. 2012), the Superior Court reversed the trial court's finding that 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. In a concurring decision, citing to the Superior Court's holding, Judge Strassburger noted, "under our current rules and case law, [defendant], 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." Id. at 1009.

Courts are still bound by standard jurisdictional principles in determining venue in legal malpractice cases. In Lay v. Bumpass, No. 3:11-cv-1543, 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 failure to timely provide notice pursuant to the FTCA's terms, resulting in a violation of the statute of limitations. 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. The court rejected plaintiff's contention that venue was proper in the Middle District, holding that proper venue for a legal malpractice action is not necessarily commensurate with proper venue in the underlying tort claim. Id. at *4. Instead, 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 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. Ct. 2014), app. denied, 104 A.3d 526 (Pa. 2014) (TABLE), 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.

However, the Court determined that in the present matter, the 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 also Dillion McCandless King Coulter & Graham, LLP v. Rupert, 81 A.3d 912 (Pa. Super. Ct. 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). The Bratic Court reversed the Superior Court's order to reverse the trial court's grant of appellants' application for transfer based upon *forum non conveniens*.[8] Id. at 566.

Bratic clarifies what factors a trial court is permitted to consider in assessing petitions to transfer venue for *forum non conveniens* purposes. For instance, 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.* Id. 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 chosen venue is oppressive or vexatious. Id. Further, there is no particular form of proof required to make a showing of entitlement to relief in bringing a petition for *forum non conveniens*:

> 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.

Id. at 9-10 (internal citations and quotations omitted).

By permitting trial courts to consider factors that had earlier been removed from their purview following Cheeseman, the Bratic 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:

> 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.

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[8] 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.

Id. 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. **See also Ficarra v. CONRAIL, 242 A.3d 323 (Pa. Super. Ct. 2020).**

The Pennsylvania Superior Court again addressed the issue of *forum non conveniens* in Wright v. Consolidated Railroad Corp., 215 A.3d 982 (Pa. Super. Ct. 2019). In Wright, plaintiff filed suit in Philadelphia, where the defendant is incorporated, although many of the witnesses relevant to the litigation lived in New York. Id. at 989-90. Defendant filed a motion to transfer venue based on *forum non conveniens* to New York. Id. The trial court, in denying defendant's motion, relied upon Pa.R.C.P. 1006(d) and found that moving venue would be "oppressive and vexatious" to plaintiff. Id. at 990. On appeal, the Superior Court noted that the trial court applied in the improper test. Id. at 992. As explained by the court, when a defendant wishes to transfer venue **intrastate**, it must be asked whether moving venue would be "oppressive and vexatious" to plaintiff under Pa.R.C.P. 1006(d). Id. However, when a defendant wishes to transfer venue **to another state** based on *forum non conveniens*, it is instead asked whether "weight reasons" exist as would overcome the plaintiff's choice of forum pursuant to 42 Pa.C.S. §5322(e). Id. The court noted that "[t]his distinction is significant since a defendant bears a heavier burden under Pa.R.C.P. 1006(d)(1), which permits forum transfers only when the defendant establishes that a plaintiff's chosen forum is oppressive and vexatious for the defendant. Id. (citing Braticc, supra). Accordingly, the case was remanded for further finding. Id. at 996. **See also Sacco v. Penn Cent. Corp., Nos. 3058 EDA 2019, 95 EDA 2020, 2021 Pa. Super. Unpub. LEXIS 2575, at *12 (Sep. 22, 2021).**

Fessler v. Watchtower Bible and Scott v. Menna and WaWa Inc. are consolidated cases, retrievable at 131 A.3d 44 (Pa. Super. Ct. 2015), in which the 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.

**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), app. 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. Defendants successfully moved for judgment of *non pros*, and plaintiffs filed a petition to open and/or strike, which was denied by the trial court. Id. at 266.

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." Id. at 267. In addition, the verification submitted by their attorney constituted substantial compliance because it 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. Id. Moreover, the court asserted that attorney verifications are not sufficient substitutes for certificates of merit, as they can be submitted by any person with sufficient knowledge, information and belief. Id. (citing Pa. R. Civ. P. 1024(c)). Therefore, if verifications were appropriate substitutes, the requirement that the certificate be submitted by an "appropriate licensed professional" would be nullified. Id. See also Stovall v. Kallenbach, 220 A.3d 630 (Pa. Super. Ct. 2019).

In Moore v. John A. Luchsinger, P.C., 862 A.2d 631, 633 (Pa. Super. Ct. 2004), the 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 Eastern District of Pennsylvania, sitting in diversity, declared that Rule 1042.3 was controlling substantive state law. The court further concluded that failure to file a certificate of merit within sixty days of filing the original complaint did not warrant dismissal with prejudice where defendants did not show prejudice from the delay, and plaintiffs responded to defendants' motion to dismiss by filing a proper certificate. Id. at 510. The court found that plaintiff was entitled to relief from entry of judgment for *non pros* and denied defendants' motion to dismiss. Id. at 512. But see Helfrick v. UPMC Shadyside Hosp., 65 Pa. D. & C.4th 420, 424-425 (Pa. C.P. 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 dismissed a legal malpractice case, with prejudice, for failure to file a certificate of merit where 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, at *1, *4 (E.D. Pa. Aug. 6, 2012), aff'd, 2013 U.S. App. LEXIS 5091 (3d Cir. Mar. 14 2013), cert. denied, 134 S. Ct. 176 (2013). But see Robles v. Casey, No. 1:10-cv-2663, 2011 WL 398203 (M.D. Pa. Feb. 3, 2011) (declining to dismiss, despite failure to timely file a certificate of merit, as 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).

In Liggon-Redding, the Third Circuit found Pennsylvania's certificate of merit statute was substantive law. 659 F.3d at 264. 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. Id. at 265. It found the district court erred when it characterized plaintiff's 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). Id. The court further found that a court cannot reject a filing under Rule 1042.3(a)(3) in favor of a filing under 1042.3(a)(1). Id. The court 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, No. 1:06-cv-1468, 2008 WL 2383072 (M.D. Pa. June 9, 2008), aff'd, 304 F. App'x 72 (3d Cir. 2008), 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 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.” Id. at *3. Plaintiff maintained that the attorney-defendant's actions constituted common law fraud, not legal malpractice, and as such no certificate of merit was required. Id. In dismissing the legal malpractice claim, the court reasoned that plaintiff's allegations of fraud could not serve as a ‘reasonable excuse’ for his failure to file a certificate of merit with respect to the legal malpractice claims. Id. See also Snider v. Alvarez, 2020 U.S. Dist. LEXIS 203865, 2020 WL 6395499 (M.D. Pa. Nov. 2, 2020) (“If a plaintiff does not comply with Rule 1042.3, the claims will be dismissed and a judgment of non pros entered upon a motion by the defendant.”); Wilson v. Horowitz, No. 3:18-cv-2237, 2020 U.S. Dist. LEXIS (M.D. Pa. Jan.

6, 2020) ("Failure to file a certificate of merit under Rule 1042.3(A) or a motion for an extension under Rule 1042.3(d) is fatal unless the plaintiff demonstrates that his failure to comply is justified by a "reasonable excuse."). **See also Bisher v. Lehigh Valley Health Network, Inc., No. 22 MAP 2021, 2021 Pa. LEXIS 4291, at *7 (Dec. 22, 2021) ("The Note to this Rule states that a court may extend the time as many times as it wishes, provided that the plaintiff files a timely motion each time and shows cause.").**

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 F. App'x 347 (3d Cir. 2010). It also applies if the Plaintiff if a *pro se* litigant. Scales v. Midland Funding, No. 1:18-CV-1514, 2020 U.S. Dist. LEXIS 201417 (M.D. Pa. Oct. 28, 2020).

In Bruno v. Erie Ins., Co., 106 A.3d 48 (Pa. 2014), the Pennsylvania Supreme 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. In Bruno, the underlying claims stemmed from inadequate services provided by an engineer, who was hired by plaintiffs' homeowners' insurance company after discovering mold while remodeling. Id. at 51. The Brunos filed a complaint against both Erie and the engineer, alleging negligence for failing to recognize the nature and severity of the mold problem. Id. at 52. Defendants argued that the claims should be stricken for failure to file a certificate of merit. Id. at 53. 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…

The Court determined that the language of Rule 1042.1 requires 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." Id. at 74. Accordingly, because the 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. Id. at 75. See also Pilchesky v. Rainone, No. 57 MDA 2019, 2020 Pa. Super. Unpub. LEXIS 584 (Pa. Super. Ct. Feb. 18, 2020) (holding that a claim against a party alleging vicarious liability for the actions of a licensed professional also requires 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 F. App'x 751, 757-58 (3d Cir. 2002) (expert testimony required to show plaintiff would have won underlying case had defendant not been negligent); 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. See, e.g., Antonis v. Liberati, 821 A.2d 666 (Pa. Commw. Ct. 2003), app. 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).

Expert testimony in a legal malpractice case must be based on facts in the record, and may be excluded if it is without proper foundation. Jones v. Wilt, 871 A.2d 210 (Pa. Super. Ct. 2005) (court correctly excluded expert testimony premised on fact for which there was no support in record; order granting summary judgment in favor of lawyer was affirmed).

In Frost v. Fox Rothschild, 18 Pa. D.&C.5th 295 (Nov. 12, 2010), Plaintiff alleged legal malpractice claims of negligence against his divorce attorney, as well as a claim of breach of fiduciary duty. 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 plaintiff's claims to assess the need for an expert. Id. at 302 (quoting Storm v. Golden, 538 A.2d 51, 64 (Pa. 1988)). The court determined that whether: defendant's settlement analysis and recommendation was reasonable, defendant failed to exercise reasonable care in choosing not to obtain a vocational expert, defendant should have filed a post-trial motion, and defendant should have had a personal valuation expert were all issues that required an expert witness. Id. at 304-11. Because plaintiff failed to do so, the court granted summary judgment in defendant's favor on those claims. Id. See also ACC Fin. Corp. v. Law Office of Byck, No. 3871, 2010 Phila. Ct. Com. Pl. LEXIS 415 (Mar. 25, 2010) (expert needed in legal malpractice claim where plaintiff alleged attorneys breached a standard of care by failing to collect on thousands of consumer credit card accounts in collection actions).

In Richard Thomas Walsh, Executor of the Estate of Thomas J. Walsh, Deceased v. BASF Corporation, et al., 234 A.3d 446 (Pa. 2020), the Court emphasized the narrow scope of the trial's court's role.

The decedent, Mr. Walsh, served as a groundskeeper for about forty years at various Pittsburgh area golf courses. Id. at 5. Mr. Walsh's responsibilities included applying various pesticides on the golf courses. Id. Mr. Walsh recorded his activities and the pesticides he used. Id. In 2008, Mr. Walsh developed Acute Myelogenous Leukemia ("AML") and died about four months later. Id. The executor of Mr. Walsh's Estate brought a wrongful death and survival action against the manufacturers of various pesticides Mr. Walsh applied during his career. Id.

Three manufacturers filed a Frye motion to exclude the testimony of the Executor's expert witnesses, alleging that the experts, Dr. Brautbar and Dr. Zambelli-Weiner, failed to apply adequate methodologies generally accepted in the relevant scientific communities. Id. Dr. Brautbar's expert report addressed whether the chemicals in the pesticides Mr. Walsh used could cause AML (general causation) and whether a manufacturers' chemical capable of causing AML actually caused the condition in Mr. Walsh (specific causation). Id. at 5-7. Dr. Zambelli-Weiner's report only discussed general causation. Id. Importantly, Dr. Brautbar based his general causation opinion on an extrapolation: studies relating to a broad class of products would apply to specific products within that broad product class.

The trial court did not conduct a Frye hearing, but ordered depositions and briefs to be submitted. Id. at 11. After reviewing the material and hearing oral argument, the trial court granted the manufacturers' Frye motions. It excluded Dr. Brautbar's analysis because the Court concluded that the reports and studies Dr. Brautbar cited did not support the contention that low level exposures of the chemicals at issue could cause AML. Id. Because it rejected Dr. Brautbar's specific causation analysis, the trial court did not consider Dr. Zambelli-Weiner's expert report, which was offered only for general causation purposes. Id. at 12. Based on the trial court's ruling on the Frye motions, the parties stipulated to summary judgment in favor of the defendants while the Executor reserved his right to appeal. Id.

On appeal, the Pennsylvania Superior Court reversed. It concluded that the trial court, by examining the research relied upon by the experts to support their opinions, "had overstepped its 'gatekeeper' function because that is 'not the proper role of the trial court in a *Frye* inquiry." Id. at 13. The Superior Court also rejected the trial court's determination that the research Dr. Brautbar relied on was not scientifically acceptable because there were contrary studies available. Id. The Superior Court ultimately held that "any conclusion reached by application of generally acceptable methodologies meets the *Frye* test." Id. at 14.

The manufacturers appealed to the Pennsylvania Supreme Court, raising three issues. First, they argued that the Superior Court erred in ruling the trial court was not permitted to act as a gatekeeper to ensure the relevance and reliability of scientific studies by scrutinizing whether those studies actually supported the ultimate opinion. Second, they argued that the Superior Court was wrong in concluding that trial courts may not review experts' opinions extrapolating from broad class of products and injuries to a specific product thereby eliminating plaintiff's burden to show specific causation. Third, they argued that the Superior Court erred by not explaining how the trial court abused its discretion because it never actually stated that the trial court *had* abused its discretion. Id. at 15-16. In essence, the manufacturers' argument was that the Superior Court impermissibly substituted its own judgment for that of the trial court.

Regarding the first issue, the Supreme Court held that "it is the trial court's proper function to ensure that the expert has applied a generally accepted scientific methodology to reach his or her scientific conclusions." Id. at 20. The Court continued on to hold that the trial court may not question the merits of the expert's scientific theories, techniques or conclusions, and "it is not part of the trial court's function to assess whether it considers those theories, techniques and/or conclusions to be accurate or reliable based upon the available facts and data." Id. at 20. The Court explained that judges typically have no specialized training that qualifies them to weigh in on the expert's resolution and, by requiring generally accepted methods, the trial court ensures that the jury receives a scientific opinion based on sound research. Id. at 21.

The Supreme Court also concluded that the trial court's Frye test was overly expansive, citing the trial court's rejection of animal studies and test-tube studies. The Supreme Court, however, went even further. The trial court had rejected studies that included limiting language after reasoning that it was not generally accepted methodology "to select portions of studies that favor a certain outcome while ignoring direct statements against that outcome in the same article." Id. at 20-21. The Supreme Court, however, reiterated that the trial court's role was

limited to determining whether Dr. Brautbar reached his scientific conclusions by applying generally accepted scientific methodologies. Id. at 22. The trial court had not cited any authority or expert depositions to support its conclusion that Dr. Brautbar's methodology was not generally accepted. Id.

Ultimately, the Supreme Court agreed that, by questioning the judgment of Drs. Brautbar and Zambelli-Weiner and the reliability of their scientific conclusions, rather than focusing solely and narrowly on whether the opinions were formed by application of generally accepted methodologies, the trial court abused its discretion. Id. at 26. Taken at face value, this renders the trial court inquiry extraordinarily circumscribed and almost valueless. If reading and reviewing scientific studies is "generally accepted" then under the Court's reasoning experts are immunized from Frye challenge even if the expert directly misstates the studies; relies on unreliable studies or ignores mountains of contrary evidence, presumably because a trial court lacks the proper skills to evaluate the value of the evidence being offered. Instead, the evaluation is left to the wholly untrained jury, presumably aided by cross-examination.

Regarding the second issue on appeal, the Supreme Court disagreed that an expert could not extrapolate from general data to determine general causation, holding that, contrary to the manufacturers' argument, the Superior Court's opinion did not allow for the "unfettered use of extrapolation in a substantial cause analysis and it did not eliminate a plaintiff's burden to show product-specification." Id. at 27. The court held that "virtually every expert opinion on substantial causation will likely contain instances of extrapolation absent a perfectly comparable study that supports a direct causal relationship. Id. at 29. The Supreme Court rejected the manufacturers' argument that the Superior Court's ruling allowing the use of extrapolation to establish a general causal link between AML and long-term exposure to pesticides would render the specific causation requirement of a link between AML and each manufacturer's product moot. Id. at 31. The Court reiterated that there remains a burden on a plaintiff to show product-specific causation as well. Id. at 31-32. The limits of this type of "extrapolation" are unclear. Indeed, one could just as easily describe the process sanctioned by the Supreme Court as "speculation" instead of "extrapolation."

Finally, the Court briefly addressed the manufacturers' argument that the Superior Court failed to identify how the trial court had "abused its discretion" and, instead, substituted its own judgment for that of the trial court. The Court held that it was unnecessary to use any "magic language" when ruling that a lower court abused its discretion. Id. at 32. Additionally, the Walsh Court reasoned that the Superior Court sufficiently laid out instances in which the trial court abused its discretion by pointing out the trial court's inappropriate review of the scientific literature at the "granular level to make its own bald judgments" about whether the Dr. Brautbar's methods were scientifically acceptable, relevant, and/or supportive of his conclusions. Id. Thus, the Court affirmed the Superior Court's decision and remanded the matter back to the trial court. Id. at 33. In doing so, the Supreme Court held that the manufacturers should be afforded the opportunity to renew their Frye motions so the trial court can perform the proper analysis. Id.

Courts will 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, No. 03546, 2011 Phila. Ct. Com. Pl. LEXIS 374 (Dec. 20, 2011), alleged defendant failed to plead and prosecute her claims properly and disclose a conflict of interest in the underlying action. Plaintiff produced an expert, but the court held that the expert's opinion that the abuse of process claim in the underlying action was not properly plead was insufficient to sustain plaintiff's claim because the expert failed to describe what was improperly omitted or misstated, instead making only vague and conclusory statements. Id. at *5-7. Importantly, the court also held that plaintiff was required to offer expert evidence to prove the breach 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. Id. at *8-10. 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. Id. at *13.

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., No. 10cv0704, 2012 U.S. Dist. LEXIS 160518 (W.D. Pa. Nov. 8, 2012) (expert testimony necessary to support breach of fiduciary duty claims because they involved issues beyond the knowledge of the average layperson); ACC Fin. Corp. v. Law Office of Byck, No. 3871, 2010 Phila. Ct. Com. Pl. LEXIS 415 (Mar. 25, 2010) (breach of fiduciary duty claim required the support of expert testimony because claims involved a field which itself required specialized knowledge to understand).

**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 reinstituted. 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]though 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, 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 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 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. See also Meksin v. Glassman, No. 1174 EDA 2018, 2019 Pa. Super. LEXIS 1993 (May 21, 2019) (where allegations of a complaint solely related to the provision of legal services by an attorney, plaintiff failed to state a cause of action under the UTPCPL); Hemphill v. Siegel, No. 12-4004, 2015 Pa. D.&C. Dec. LEXIS 245 (Pa. Ct. Com. Pl. May 29, 2015) (UTPCPL not applicable in claim regarding attorney's conduct in failing to pursue collection efforts against two third parties).

In Strayer v. Bare, No. 1:06cv2068, 2008 U.S. Dist. LEXIS 34503 (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 that the Frankel firm allegedly misappropriated; plaintiff was obtained a $530,000 settlement, which was paid to the Frankel firm, but, never properly paid out. Id. at *3. Plaintiffs brought suit against the Frankel firm and other defendants under the UTPCPL, but the court granted defendants' motion to dismiss the UTPCPL claim, holding 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 alleged that defendants' debt collection practices violated the UTPCPL. Defendants moved to dismiss, arguing attorney immunity from the UTPCPL pursuant to Beyers, *supra*. Id. at 337. 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, 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 Glover v. Udren Law Offices, P.C., 2014 PA Super 82, 92 A.3d 24, 31 (Pa. Super. Ct. 2014); Fratz v. Goldman & Warshaw, P.C., No. 11-cv-02577, 2012 U.S. Dist. LEXIS 148744 (E.D. Pa. Oct. 16, 2012) (UTPCPL applied to law firm because plaintiff challenged debt collection practices and not the adequacy of legal representation); Beckworth v. Law Office of Thomas Landis, LLC, No. 11-7277, 2012 U.S. Dist. LEXIS 55007 (E.D. Pa. Apr. 18, 2012) (Plaintiff identified debt collection attempts as an "act in trade or commerce" within the meaning of the UTPCPL and had properly stated a claim under the UTPCPL); Machles v. McCabe, Weisberg & Conway, P.C., No. 17-1015, 2017 WL 5172516 (E.D. Pa. Nov. 7, 2017) (same); Bronstein v. Bayview Loan Servicing, LLC, No. 18-4223, 2020 U.S. Dist. LEXIS 23865, *16 (E.D. Pa. Feb. 11, 2020) ("Pennsylvania's absolute judicial privilege requires that the immunized statements must be made in the course of practicing law."). But see Wilcox v. Bohmueller, No. 09-11468, 2011 Pa. D.&C. Dec. LEXIS 403 (Nov. 14, 2011) (attorney immune from prosecution under UTPCPL because actions challenged by Plaintiff, namely collection and distribution of settlement proceeds, were part of the practice of law and not 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 Cnty., 93 A.3d 806 (Pa. 2014). The Court held that the UTPCPL is ambiguous as to whether political subdivision agencies constituted persons. Id. at 578. However, based on the Court's consideration of law prior to "the UTPCPL's enactment, the UTPCPL's purpose, and the consequences of a holding that it applies to such agencies," the Court concluded the legislature did not intend for the definition of "person" to include political subdivision agencies. Id. **See also Womack v. Hous. Auth. Of Chester Cty., No. 19-4962 (E.D. Pa. June 23, 2020).**

In Bernstein v. Keaveney Legal Grp., the trial court denied, in part, defendant law firm's motion to dismiss plaintiff's claim for violation of the UTPCPL, concluding that the law firm performed non-attorney actions that could be imputed to it. No. 16-5470, 2017 WL 2180306 (E.D. Pa. May 18, 2017). The defendant law firm claimed that the non-attorney's actions were imputed to the law firm because it was responsible for the nonlawyer's conduct. Id. at *3. However, the court found that, although it was not pleaded, plaintiff's claims can be imputed onto the law firm under the theory of *respondeat superior*. Id. Because the individual who allegedly made false and misleading advertisements was an agent of the law firm, the plaintiff's allegations of the individual's violation of the UTPCPL could be imputed onto the law firm. Id.

**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 the doctrine of collateral estoppel could be applied offensively in a disciplinary matter against an attorney. The ODC's petition alleged that the respondent engaged in fraud by misappropriating family assets, and relied upon the civil verdict previously entered against the respondent in the underlying litigation. Id. at 49. The Board applied the doctrine of collateral estoppel to preclude the attorney from re-litigating whether he had engaged in fraud, and recommended that he be disbarred. Id. at 50. The Supreme ultimately extended ODC v. Duffield, 644 A.2d 1186 (Pa. 1994), which held that collateral estoppel could

be asserted defensively in a disciplinary action, and found that when fairness dictated, there was no prohibition on offensive application of collateral estoppel, either. Id. at 51. 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. Id. (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979)). The Court further concluded that that the facts found in the civil fraud case warranted misconduct, as the lawyer's fraud 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. Id. at 56.

**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 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 (while his Pennsylvania license was still suspended), he 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 ODC. Id. at 525.

The District Court ruled in favor of the attorney, 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. Id. at 522. 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 upheld the District Court's entry of a declaratory judgment, 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 was whether a state law prohibiting an attorney from maintaining a law office was preempted by the exclusive authority vested in the federal court, under federal law, to determine who may practice law before it. Id. at 530. Because the establishment of a law office is necessary for the effective practice of law, the court held that the state law prohibiting an attorney from maintaining a law office in Pennsylvania would effectively prohibit him from practicing before the federal courts, and would thus place "additional conditions," not contemplated by congress, on the federal court's ability to determine who is permitted to practice before it. Id. at 533. Under principles of federalism, the Commonwealth could not wield such power over the United States Congress, and therefore, the Pennsylvania law prohibiting the attorney from establishing a law office in Pennsylvania, under the facts of this case, was preempted by federal law. Id.

**Disqualification of Trial Counsel in Civil Case – Not Immediately Appealable**

In Vaccone v. Syken, 899 A.2d 1103 (Pa. 2006), superseded on other grounds by Dougherty v. Heller, 138 A.3d 611 (Pa. 2016), 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, plaintiffs appealed the court's order to disqualify trial counsel, but the Superior Court quashed the appeal as interlocutory. Id. at 1105. The Supreme Court upheld the decision, explaining that in determining whether the issue 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. Id. The Court explained that the collateral order doctrine allows for immediate appeal of and 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.

Id. at 1106 (citing Pugar v. Greco, 394 A.2d 542, 545 (Pa. 1978)).

The Court noted that an order removing counsel in a criminal case is interlocutory (see Comm. v. Johnson, 705 A.2d 830 (Pa. 1998)), and then analyzed the Pugar factors, concluding that: (1) 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. Therefore, "a trial court order disqualifying counsel in a civil case is an interlocutory order." Id. at 1108; see also Comm. v. Knauss, No. CR-5595-2010, 2012 Pa. D.&C. Dec. LEXIS 65 (Mar. 12, 2012) (noting "[c]laims regarding counsel have been treated as interlocutory and unappealable"); Comm. 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); Newsuan v. Republic Servs., No. 000528, 2018 Phila. Ct. Com. Pl. LEXIS 67 (Sept. 14, 2018) ("Orders disqualifying counsel due to conflicts of interest do not warrant collateral appeal"); Tucker v. Tucker, 170 A.3d 1240 (Pa. Super. Ct. 2017) (same); Sutch v. Roxborough Mem. Hosp., 151 A.3d 241, 254 (Pa. Super. Ct. 2016) (same).

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, 899 A.2d at 1106). For the collateral order doctrine to apply, courts will apply the Pugar factors, as listed above. See, e.g., Rae v. Pa. Funeral Directors Assoc., 977 A.2d 1121, 1126 (Pa. 2009).

In Dougherty, the Superior Court considered whether an order *denying* a motion to disqualify counsel was appealable as a collateral order. In reaching its decision the court referenced Vaccone, but concluded that inasmuch as Dougherty 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. Czmus, 889 A.2d 1197 (Pa. 2005), the Pennsylvania Supreme Court considered the proper disciplinary action for an attorney who lied about his background on his law school and bar applications, and was repeatedly untruthful before the Pennsylvania ODC, the Pennsylvania Board of Bar Examiners, and various entities investigating his background on behalf of the New Jersey Board of Bar Examiners.

Czmus was accepted to law school after failing to disclose on his application that he had previously 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. Id. at 1199-1200. Furthermore, Czmus falsely represented in an application to a law firm that he held medical licenses in California and New York, and failed to include in his bar applications any mention of his medical education, career, or disciplinary proceedings. Id. Czmus passed both bar examinations, and each state's character and fitness evaluation failed to reveal his falsifications. Id. Subsequently, 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 his background, during which, Czmus lied about his past and attributed the discrepancies on his application to confusion. Id. Thereafter, Czmus was diagnosed with various psychiatric disorders, and although Czmus' psychiatrists attributed his falsifications, in part, to his psychiatric disorders, the New Jersey Supreme Court found that Czmus violated two rules of professional conduct, and his license to practice law was revoked for two years. Id.

Subsequently, the Pennsylvania ODC 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. A Hearing Committee recommended that Czmus' license to practice law be suspended for five years, but the ODC rejected the recommendation and held that Czmus' violations "required disbarment." Id. at 1205.

The Supreme Court upheld Czmus' disbarment, noting that, "we find respondent's level of fraud, which transcended professions and jurisdictions, requires disbarment." Id. at 1205. Discussing the distinction between disbarment and suspension, the Court explained that disbarment is appropriate in such 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. See also Office of Disciplinary Counsel v. Baldwin, 225 A.3d 817 (Pa. 2020) ("The primary purpose of our lawyer discipline system in Pennsylvania is to protect the public, preserve the integrity of the courts, and deter unethical conduct.")

In Office of Disciplinary Counsel v. Preski, 134 A.3d. 1027 (Pa. 2016), the Supreme Court ordered that an attorney be disbarred from the practice of law. The court found that while Preski was serving as Chief of Staff to a State Representative, he misappropriated millions of dollars in public resources for his own personal and political gain 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 [] 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 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 that 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 1033-34.

In Office of Disciplinary Counsel v. Quigley, 161 A.3d. 800 (Pa. 2017), the Supreme Court ordered that an attorney be disbarred for mishandled funds of five clients, 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 Quigley depleted his IOLTA account and was already facing disciplinary action. Id. at 802-803. Quigley attributed his mishandling of funds to a combination of personal circumstances, 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 Quigley's behalf, a psychologist testified that, based on these personal hardships, Quigley would have been diagnosed with depression and/or PTSD had he sought counseling. Id.

The court rejected Quigley's argument that his mishandling of funds was more the result of negligence rather than dishonesty, as the actions involved five separate clients over a three year period. Id. at 807. Furthermore, Quigley made restitution only after disciplinary proceedings were initiated. Id. The Court also determined that 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.

Most recently, in Office of Disciplinary Counsel v. Pozonsky, 177 A.3d 830 (Pa. 2018), the Supreme Court ordered that Judge Pozonsky be disbarred in connection with his operation and administration of Washington County's drug court program for over 20 years. The Court determined that Judge Pozonsky betrayed the public trust and exploited his position as a commissioned judge by effectuating theft (for personal use) of cocaine that was principal evidence in criminal and/or delinquency hearings held in his courtroom. Id. at 833. Given the judge's position (i.e. oversight responsibility for the drug court program), the Supreme Court rejected his argument that punishment should be mitigated by the judge's lack of prior disciplinary history, expressions of remorse, participation in community service, and cocaine addiction. Id. at 840-47. Instead, the court explained that "It is well settled that, when an attorney holds a judicial or other public office, misconduct that he or she engages in which compromises the proper function of that office requires this Court to strongly consider disbarment as an appropriate disciplinary action." Id. at 839. See also Office of Disciplinary Counsel v. Altman, 228 A.3d 508 (Pa. 2020) (Attorney disbarred with no prior disciplinary history because the evidence could not overcome the attorney's lack of genuine remorse and failure to appreciate the seriousness of his conflict of interest).

**Standing to Assert Claim**

"Standing is a core jurisprudential requirement that looks to the party bringing a legal challenge and asks whether that party has actually been aggrieved as a prerequisite before the court will consider the merits of the legal challenge itself." Com. ex rel. Jud. Conduct Bd. v. Griffin, 918 A.2d 87, 93 (Pa. 2007) (finding that petitioner did not have standing to bring an action in quo warranto).

In Hess v. Fox Rothschild, LLP, 925 A.2d 798 (Pa. Super. Ct. 2007), app. denied, 945 A.2d 171 (Pa. 2008), the Superior Court was asked to determine whether plaintiffs, potential beneficiaries of a will, had standing to bring a legal malpractice action against defendant law firm based on the estate planning advice and services provided to plaintiffs' deceased stepmother. The court was presented with: (1) whether plaintiffs had standing to bring a malpractice suit against an attorney with whom they did not have an attorney-client relationship, and (2) whether plaintiffs raised a cognizable claim sounding in negligence or contract. Id. at 802.

The court applied the rule of Guy and its progeny, which stands for the proposition that although a plaintiff in a legal malpractice claim must generally show an attorney-client 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." Id. 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. Id. at 806. To determine whether a legatee is an intended third-party beneficiary the follows 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).

Applying Guy, the Court stated that the decedent's intentions under her will were clear, and that the rule of Guy did not allow plaintiffs to bring suit simply because they felt decedent's intent was to bequeath them a greater legacy than they received. Id. at 808. Thus, plaintiffs did not have standing to bring their legal malpractice action against defendant law firm. Id.

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 property sale agreement. Klementovich had previously sought the assistance of Roman in preparation of the agreements, but never communicated with any of the plaintiffs (although they did pay a share of the attorney's fees). Id. at 178. The 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.

In Fortunato v. CGA Law Firm, No. 1:17-cv-00201, 2017 U.S. Dist. LEXIS 115136 (M.D. Pa. July 24, 2017) the court considered whether three grandchildren had standing to assert claims for breach of contract and professional negligence against the attorney who handled their grandfather's estate planning. In summary, the grandfather's attorney erroneously assured one of the plaintiffs and the grandfather that the grandfather's investment account would be part of the estate's residue and that plaintiff would receive 70% of the account. Id. at *1. After the grandfather's death, plaintiffs filed suit, and defendant-law firm moved to dismiss based on lack of standing. Id. Applying the two-part test from Guy, the trial court determined that plaintiffs adequately pled facts to establish standing because: (1) the grandfather executed a will entitling plaintiffs to a percentage of his estate's residue, so it was reasonable to infer that plaintiffs were legatees; and (2) defendant promised to draft a will to effectuate the grandfather's intent to benefit the legatees (plaintiffs). Id. at *3-5. However, the professional negligence claim was dismissed due to plaintiffs' failure to allege any attorney-client relationship between plaintiffs and the defendant. Id. at *5. See also Srausser v. Gross McGinley LaBarre & Eaton & Malcolm Gross, Esquire, No. 2958 EDA 2012, 2014 Pa. Super. LEXIS 2694 (July 15, 2014) ("To sustain a cause of action for legal malpractice, the plaintiff must establish the existence of an attorney-client relationship.").

**Entry of *Non Pros* for Failure to Comply With Discovery Order**

*Non pros* **was succinctly explained by the Pennsylvania Superior Court in** **Moton v. Robinson** **where the Court stated:**

> **By definition, a non pros is a judgment entered by the trial court which terminates a plaintiff's action due to the failure to properly and/or promptly prosecute a case. Our rules of civil procedure provide for entry of judgment of non pros in four situations: (1) under Rule 1037(a) for failure to file a complaint after the issuance of a rule to do so; (2) under Rule 1042.7 for failure to file a certificate of merit; (3) under Rule 218 on the trial court's motion for failure to be ready at the start of trial; and (4) under Rule 4019 as a discovery sanction. Non pros may also be entered for inactivity if there is a lack of due diligence in prosecuting the case on the part of the plaintiff, no compelling reason for the delay, and actual prejudice to the defendant.**

**No. 1778 EDA 2020, 2021 Pa. Super. Unpub. LEXIS 2500, at *4 (Sep. 16, 2021) (internal citations omitted).**

In Sahutsky v. Mychak, Geckle & Welker, P.C., 900 A.2d 866 (Pa. Super. Ct. 2006), app. denied, 916 A.2d 1103 (Pa. 2007), plaintiff's malpractice claim was dismissed by an entry of *non pros* pursuant to Pennsylvania Rule of Civil Procedure 4019, for failure to comply with a discovery order, and plaintiff's petition to open/strike off the entry of *non pros* was denied. After the Superior Court quashed plaintiff's appeal, the Pennsylvania Supreme Court vacated and remanded for disposition on the merits of three questions relating to the entry of *non pros*:

> (1) Where a case had been *non prossed* 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.

Importantly, relief from a judgment of *non pros* shall be sought by petition and need be timely filed. See, e.g., Moton, supra at *8; Bartolomeo v. Marshall, 69 A.3d 610, 611 (Pa. Super. Ct. 2013); Intech Metals, Inc. v. Meyer, 153 A.3d 406, 408 (Pa. Super. Ct. 2016). This issue must be raised at the trial court level so as to not waive the issue on appeal. See, e.g., id.; id.; id.

**Insurance Coverage as to Professional Liability Claim**

In Post v. St. Paul Travelers Ins. Co., 593 F. Supp. 2d 766 (E.D. Pa. 2009), recons. denied, 629 F. Supp. 2d 427 (E.D. Pa. 2009), an attorney was hired by Mercy Hospital to defend a medical malpractice case. The case was settled, in part, due to allegations of improperly abusing discovery procedures, and a petition for sanctions was filed against the attorney. Id. at 769. Thereafter, the attorney was put on notice that the hospital intended to sue for malpractice, and he retained his own counsel. Id. The hospital also joined in the petition for sanctions. Id.

The attorney notified his professional liability insurance carrier, St. Paul Travelers Insurance Co. ("St. Paul") of the pending petition, and St. Paul denied coverage because the petition only sought relief in the form of sanctions, which were excluded under his professional liability policy ("Policy"). Id. The attorney, through counsel, attempted to discuss coverage responsibilities with St. Paul, who ultimately offered to pay $36,220.26 when the attorney had already accrued $400,000 in attorneys' fees. Id. The attorney declined the offer and filed a Complaint against St. Paul for breach of contract. Id. at 769-70. He then filed a motion for partial summary judgment as to the counts for breach of the insurance policy, breach of the agreement to pay the costs of the sanctions proceeding, and for declaratory judgment. Id. In analyzing the motion, 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 774.

The court proceeded to grant the motion, in part, 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), app. granted, 68 A.3d 328 (Pa. 2013), involved a legal malpractice claim concerning advice provided in connection with the sale of a company. Id. at 835. Plaintiffs filed a breach of contract action against defendant-counsel and her firm for professional negligence, but defendants maintained that plaintiffs failed to pay for the legal services, and therefore had no actionable damages. Id. Defendants moved for judgment on the pleadings, which the trial court granted, in reliance on Bailey v. Tucker, 621 A. 2d 108 (Pa. 1993), which limits damages for criminal malpractice cases to attorneys' fees, plus statutory interest. Id. at 836. However, plaintiffs maintained that they were entitled to pursue their consequential damages, and the Superior Court agreed, finding that Bailey was limited to the criminal arena. Id. at 836. The Supreme Court granted appeal, but the case was resolved prior to a ruling. See Coleman, 68 A.3d 328 (Pa. 2013).