

## 2011 PROFESSIONAL LIABILITY UPDATE

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## **2011 PROFESSIONAL LIABILITY UPDATE**

### **I. 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 Tim Burke, Joshua Kirsch, Joshua Hill, Gregory Kallet, Richard Mosback, Ryan Boland, Jessica Bae, Desiree Wilfong and specifically Joseph Conroy, 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.

We hope that you find these materials helpful. If you have questions or need our assistance, please do not hesitate to contact us.

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## **II. 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.

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

#### **A. 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.

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

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

The Superior Court reiterated these principles in Long v. Ostroff, 854 A.2d 524 (Pa. Super. Ct. 2004), appeal denied, 871 A.2d 192 (Pa. 2005). Plaintiff in this case was a patient of Defendant doctor, as was Plaintiff's wife. Plaintiff sued the 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 treating the Plaintiff. Plaintiff's expert was a psychiatrist who opined that Defendant's actions deviated from the required standard of care.

Upon motion of Defendant, the trial court dismissed Plaintiff's claim on the basis that he failed to plead a claim entitling him to relief. The Superior Court affirmed, treating Plaintiff's "Motion to Dismiss" as a motion for summary judgment. The court found that Plaintiff failed to state a claim for professional negligence because a general practitioner's duty of care does not prohibit an extramarital affair with a patient's spouse. The court noted that while such conduct may be unethical, it does not provide a cause of action for negligence.

The issues in Long were re-examined in the Superior Court case of Theirfelder v. Wolfert, 978 A.2d 361 (Pa. Super. Ct. 2009), appeal granted, 2009 Pa. LEXIS 2487 (Pa. Nov. 24, 2009). Here, female Plaintiff was treated for anxiety, depression, and marital problems by Defendant physician—a general practitioner. During the course of her treatment, female Plaintiff and her husband revealed intimate details of their marriage to Defendant physician so he could better treat female Plaintiff. At some point during her treatment, female Plaintiff told Defendant physician that he was her "hero", had "cured" her, and was in love with him. Around this time, she began a sexual relationship with the Defendant physician.

After confessing her sexual relationship with Defendant to her husband, Plaintiffs, as husband and wife, filed a medical malpractice suit against Defendant physician. The trial court, relying on Long, granted Defendant's preliminary objections asserting that Plaintiffs had failed to state a cause of action upon which relief may be granted as "a general practitioner's duty of care does not prohibit an extramarital affair with a patient's

spouse.” Defendant’s actions were said to not have violated the law or breached any professional duty.

The Superior Court reversed the trial court and held that “a patient does have a cause of action against a psychiatrist or 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.” The Court, in reaching this holding, noted that a healthcare provider is often in a position of superiority over his or her patient. The Court reasoned that because of this position of superiority, a patient is often in a vulnerable position and, thus, puts a high degree of trust in his or her physician. Therefore, the Court found that “it is even more incumbent upon our legal system to protect patients from the malfeasance of medical professionals when they become sexually involved with their trusting patients.”

The Court further stated that this claim belonged only to the patient who was being treated and not the spouse of the patient (upholding the decision in Long). The Court did not provide any opinion as to whether or not a cause of action would exist against a general practitioner who was not providing any treatment for emotional problems.

It should also be noted that the Supreme Court of Pennsylvania granted a Petition for Allowance of Appeal on the following, limited issue:

**Whether, for purposes of determining professional negligence, a general practitioner who provides mental health treatment to a patient is held to the same higher duty as a specialist in psychiatry or psychology?**

In Cooper v. Frankford Health Care System, 960 A.2d 134 (Pa. Super. Ct. 2008), **appeal denied**, 970 A.2d 431 (Pa. 2009), Plaintiff, a physician, brought suit against Frankford Hospital for the suicide death of her husband. Plaintiff’s husband was a physician who practiced medicine at Frankford Hospital. Various individuals within Frankford Hospital’s department of Anesthesiology suspected Plaintiff’s husband of drug abuse. Plaintiff’s husband was confronted by these individuals and given a drug test. He was still allowed to continue to complete his on-call duties for the next day. After completing his on-call duties the day after his drug test he committed suicide in the driveway of his home while in his car. Plaintiff then filed a complaint against Frankford Hospital claiming negligence in the way her husband was confronted about his potential drug abuse which led to his “foreseeable” suicide. Frankford Hospital filed preliminary objections arguing that Plaintiff’s complaint failed to properly plead a cause of action. The trial court granted the preliminary objection, effectively dismissing the complaint.

On appeal the Superior Court affirmed the trial court’s holding. In the Superior Court’s opinion it stated that “generally, suicide has not been recognized as a legitimate basis for recovery in wrongful death cases. This is so because suicide constitutes an independent intervening act so extraordinary as not to have been reasonably foreseeable by the original tortfeasor.” Id. (quoting McPeak v. William T. Cannon, Esq., P.C., 553 A.2d 439 (Pa. Super. Ct. 1989)).



## 2. Privity

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

In McCandless v. Edwards, 908 A.2d 900 (Pa. Super. Ct. 2006), appeal denied, 923 A.2d 1174 (Pa. 2007), the Superior Court held that Defendant healthcare provider did not owe a duty of care to Plaintiff's decedent, who overdosed on methadone that was stolen from Defendant's facility and sold to decedent; therefore Defendant healthcare provider could not be held liable for Decedent's death.

In McCandless, Decedent's estate filed an action against Defendant healthcare provider, alleging that Defendant was negligent in oversupplying methadone to a patient from whom it was stolen, in violation of applicable federal regulations. At trial, appellant's argument was premised on the theory that Defendant owed a general duty of care to the public at large. The trial court ultimately granted Defendant's motion for a directed verdict, holding that the Defendant healthcare provider did not owe any duty to the decedent.

On appeal, the Superior Court affirmed the trial court's entry of a directed verdict on behalf of Defendant. As a preliminary matter, the court noted that in order for a cause of action in negligence to lie, the plaintiff must demonstrate that he was owed a duty of care by the defendant, that the defendant breached this duty, and that the breach resulted in injury and actual loss. The court explained that in determining whether Defendant did, in fact, owe a duty to the party claiming negligence, the following factors must be considered:

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

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

Applying the Ferrara factors, the Superior Court agreed with the trial court that no relationship existed between Defendant healthcare provider and the decedent, and that Defendant only had a cognizable duty of care to its patients. Id. In support of this proposition, the Superior Court pointed to the fact 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. 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 persons in decedent's position. Id. at 904

In F.D.P. ex. Rel. S.M.P. v. Ferrara, 804 A.2d 1221 (Pa. Super. Ct. 2002), appeal denied, 847 A.2d 1286 (Pa. 2004), the Pennsylvania Superior Court affirmed the trial court's order granting Defendant's preliminary objections. This matter involved a resident of a group home with a long standing history of sexually deviant behavior. While visiting his family, Ferrara molested a young girl. The child's family sued the home, alleging that it breached a duty owed to a third party pursuant to the standards established under the Mental Health and Mental Retardation Act of 1966 ("MHMR Act"). The court held that Defendant owed a duty to Ferrara. However, the court clarified that mental health professionals do not owe a duty to protect third parties except when there are specific threats directed at an actual person. Accordingly, the appellate court affirmed the trial court's order granting Defendant's preliminary objections.

In Emerich v. Philadelphia Center for Human Development Inc., 720 A.2d 1032 (Pa. 1998), reconsideration/reargument denied, 1999 Pa. LEXIS 64 (Pa. Jan. 13, 1999), 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. 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. 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.

The Emerich 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 specific third party because of a specific threat to kill, thereby creating a duty to warn the non-patient. The court concluded that the defendant psychiatrist discharged his duty by specifically warning the non-patient third party to stay away from an apartment after the patient told the psychiatrist earlier that day of a specific intent to kill the third party when she returned to the apartment to pick up her clothes. The third party disregarded the psychiatrist's advice and was shot by the patient when she went to the apartment.

The issue of privity has presented itself to the Federal Courts. Plaintiff, a nursing assistant, in Collins v. Christie, No. 06-4702, 2007 U.S. Dist. LEXIS 61579 (E.D. Pa. Aug. 22, 2007), was arrested after an elderly patient at a nursing facility falsely accused him of abuse. By way of background, after the accusation was made, the patient underwent x-rays at a hospital. A doctor at the hospital misinterpreted the patient's x-rays as showing newly fractured ribs, when in fact they revealed old, healed fractures. As hospital protocol required, the doctor reported his

findings to the police. Plaintiff was subsequently arrested. Plaintiff sued the hospital and the doctor, amongst others, for breach of a “[d]uty of due care to provide true and accurate information and diagnosis to the police.” The court held that the social utility in physicians reporting elder abuse outweighs the foreseeable harm of an erroneous report. Accordingly, the court found that the hospital and doctor did not owe a duty of care to plaintiff with regard to reporting the abuse to the police.

In DeJesus v. U.S. Department of Veterans Affairs, 479 F. 3d 271 (3d. Cir. 2007), Plaintiffs filed suit after decedent killed his two children, two neighborhood children, and then himself. Decedent had voluntarily entered the Veteran Affairs Domiciliary Program, where he was diagnosed as having intermittent explosive disorder. He had a history of domestic violence and had previously attempted to hang himself multiple times. Decedent received various mental health treatments while at VA’s facilities, including medication, group therapy sessions and one-on-one counseling.

After approximately 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. Decedent was involved in an altercation with another LZ resident in which he wielded a knife. As a result, LZ and VA decided to discharge Decedent. VA had an opportunity to commit Decedent but ignored warning signs of Decedent’s imminent physiologic breakdown. Within a day of being discharged, Decedent shot and killed two of his children, two of the neighbor’s children, and then himself.

Plaintiffs, Decedent’s wife and a parent of the neighborhood children killed, brought suit asserting claims, among others, of gross negligence, failure to warn, and negligent infliction of emotional distress. After a bench trial, 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. With regard to the remaining claims, the trial court entered judgment for the Plaintiffs.

On appeal, the Third Circuit affirmed the trial court’s ruling. The court, relying on Emerich, found that Decedent never communicated a specific threat of immediate harm. Furthermore, the Court declined to impose a duty to warn based upon a letter the VA wrote to the family court attesting to Decedent’s mental health. The Court explained that it would be very difficult to inform all persons who relied on the letter. Accordingly, the Court found that Defendants did not have a duty to warn.

With regard to the scope of other duties the VA may have owed to the victim children, the Third Circuit found the District Court’s opinion to be well-reasoned. The District Court used the analysis set forth in Ferrara, to conclude that liability could not be based on a Pennsylvania common-law duty owed to the victims. The District Court also found, however, that the Mental Health Procedures Act (“MHPA”), P.L. 817, No. 143 (1976), created a duty to the third-party victims. The Court found that LZ and VA fall within a qualifying facility under the MHPA. Therefore, in affirming the District Court’s ruling, the Court reasoned,

[VA] was under a statutory duty to refrain from gross negligence in its treatment of [Decedent], and the District Court did not err in its determination that [VA] acted in such a grossly negligent manner when it strongly encouraged [LZ] to discharge [Decedent] and then failed to commit him under its procedures or Pennsylvania's MHPA. These egregious breaches of the appropriate standard of care resulted in the tragic shooting deaths of four children and [Decedent's] own suicide.

Id.; see also, Cooper v. Frankford Hosp., 960 A.2d 134 (Pa. Super. Ct. 2008), **appeal denied**, **970 A.2d 431 (Pa. 2009)**.

In Ward v. Most Health Services, Inc., No. 06-4646, 2008 U.S. Dist. LEXIS 61573 (E.D. Pa. Aug. 8, 2008), Plaintiff's decedent, Juanita Ward, brought suit on behalf of her late husband, Joseph Ward, against Most Health Services, Inc. ("Most Health") in federal court. Joseph Ward was employed by Dow Reichold Specialty Latex, LLC ("Dow"). He worked in Dow's manufacturing plant in Chickamauga, Georgia. Dow was required by the Occupational Health and Safety Administration ("OHSa") to provide free annual physicals to employees exposed to certain levels of hazardous substances. Instead, Dow provided all of its employees with free physicals that included chest x-rays. On May 8, 2003, Mr. Ward was provided a series of physical tests, including a chest x-ray. Mr. Ward later received a report regarding his x-ray results which reported no abnormalities. The chest x-ray was interpreted by Dr. Levine, a contracted employee of Most Health, incorporated in Pennsylvania. A year later Mr. Ward died from lung cancer.

A motion for summary judgment was filed arguing that there was no duty owed by Dr. Levine to Mr. Ward as no physician patient relationship existed under Pennsylvania law. The court cited five considerations in determining the existence of a doctor patient relationship as set forth in Althaus v. Cohen, 756 A.2d 1166 (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." Id. at 1169.

In arriving at its holding the court weighed each consideration set forth in Althaus and relied on 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.

Ward, 2008 U.S. Dist. LEXIS 61573 at \*31-32 (internal quotations omitted).

Therefore, the motion for summary judgment was denied and a doctor patient relationship was established by the Court.

**(b) Contractual Liability of a Doctor to the Patient**

In Vogelsberger v. Magee-Women's Hospital, 903 A.2d 540 (Pa. Super. Ct. 2006), appeal denied, 917 A.2d 315 (Pa. 2007), Plaintiff had her uterus, which contained large fibroids, removed by Defendant physician. Plaintiff contended that the physician was also supposed to remove her ovaries due to her concern about her mother's history of ovarian cancer. Defendant physician testified that although he had obtained the Plaintiff's consent to remove her ovaries, the treatment plan was for him to remove them only if he found during the surgery that she had significant endometriosis on the ovaries. Both the informed consent form and the physician's preoperative note indicated that the procedure to be performed was a TAH/BSO. Plaintiff learned the day after the surgery that her ovaries had not been removed. Plaintiff did not ask the Defendant physician why the ovaries were not removed during her post operative visits. She did tell a friend about her fear of developing ovarian cancer. Plaintiff, several years later, saw another gynecologist with complaints of abdominal pain and requested prophylactic removal of her ovaries. He eventually performed this procedure and her ovaries were found to be normal.

Plaintiff sued both the hospital and the physician who performed her first surgery. Her action against the physician included both negligence and breach of contract claims. Prior to trial, the trial court granted Defendant's motion for summary judgment on the breach of contract claim. Trial on the negligence claims resulted in a verdict in favor of the Plaintiff and a large award for noneconomic damages. The trial court granted Defendants' motion for remittitur and reduced the total amount of noneconomic damages. Plaintiff appealed to the Superior Court. Included in the issues raised on appeal was the question of whether the trial court had erred in dismissing the breach of contract claim.

In regard to this issue, the physician argued in part that section 1303.105 of the MCARE Act, which states that "[i]n the absence of a special contract in writing, a health care provider is neither a warrantor nor a guarantor of a cure," precluded Plaintiff's breach of contract claim. The Superior Court, however, found that this section was inapplicable since Plaintiff's claim was not predicated on the guarantee of a cure but rather on the allegation that Defendant physician had agreed to perform the prophylactic BSO but failed to do so. The Superior Court also found that the evidence of record showed that a question of fact existed as to whether a contract was created by the dealings between Plaintiff and Defendant physician, and, therefore, the trial court had erred in dismissing the breach of contract claim on summary judgment. The Superior Court remanded for a new trial on this claim.

**B. Standard of Care – Medical Malpractice**

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

**(a) Expert Witness Requirement**

It is settled law in Pennsylvania that in order to establish a *prima facie* case of negligence, a plaintiff must also prove that his injuries were proximately caused by negligent conduct of the alleged tortfeasor. See Flickinger Estate v. Ritsky, 305 A.2d 40 (Pa. 1973). Thus, liability may not be imposed merely upon proof of negligent conduct by the tortfeasor, but, rather, hinges upon a plaintiff's proof of a causal nexus between the negligent conduct and the plaintiff's asserted injury. See Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); see also Maurer v. Trs. of the Univ. of Pa., 614 A.2d 754 (Pa. Super. Ct. 1992), appeal 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.

**(b) 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) that, in order 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) that, in order 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.

Edward Rose filed a professional negligence action against Dr. Michael Annabi and Co-defendants Dr. Onuorah Umen, Dr. Ralph Korkor, John F. Kennedy Memorial Hospital and JFK Southwest. He claimed that Defendants' medical negligence combined to cause him harm in delaying the diagnosis of colon cancer, which if found earlier would have been more easily treated or cured. Mr. Rose died after initiating suit and his daughter, Crystal Rose, was substituted as Plaintiff. At trial, all Defendants had settled with Plaintiff, with the exception of Dr. Annabi. At the conclusion of the trial, Dr. Annabi insisted that the settled co-defendants' names should appear on the verdict slip and that a comparative negligence jury charge should be given along with the inclusion of Plaintiff's decedent on the verdict sheet for the jury to consider apportionment of comparative negligence. Judge Maier of the Philadelphia Court of Common Pleas, denied Dr. Annabi's requests and the jury returned a verdict in favor of the Plaintiff for \$908,989.71 in damages.

On appeal, the Superior Court affirmed the trial court's holdings and reasoned that "in the absence of any qualified witness to testify to the standard of care of [co-defendant] Dr. Korkor, there was insufficient evidence to include Dr. Korkor on the verdict sheet." Id. at 3. The Superior Court further reasoned that excluding Plaintiff's decedent from the verdict sheet for an apportionment of liability was proper because "Dr. Annabi failed to causally relate Rose's

conduct to the delay in colon cancer diagnosis. Although Rose missed several appointments, there was no expert testimony which indicated that this fact was a substantial factor in causing his death.” Id.

In MIIX Insurance Co. v. Epstein, 937 A.2d 469 (Pa. Super. Ct. 2007), the Superior Court held that expert reports are required in order to establish negligence of Defendant physicians in a contribution/indemnity action stemming from an underlying medical malpractice case. Plaintiff in the underlying case filed her malpractice claim after she suffered a ruptured uterus and the stillborn birth of her son while under the care of residents at Defendant hospital. The residents were not a party to the medical malpractice action. The jury returned a verdict in favor of the hospital, specifically finding on the verdict slip that the residents were negligent in their care of Plaintiff.

Subsequently, the hospital filed an indemnification/contribution action against the residents. The trial court indicated that because the residents were not a party to the original malpractice action, their negligence must be established. The trial court directed the hospital to submit expert reports. The hospital submitted the expert reports from the underlying medical malpractice case, which contained no criticism of the residents. Accordingly, the trial court granted summary judgment in favor of the residents.

The hospital appealed and the Superior Court affirmed the trial court’s ruling. The court explained that the residents were not a party to the underlying medical malpractice action; therefore, “[a]ny findings of their liability for damages is void *ab initio*.” Id. at 473. The court stated that the hospital must play the role of the original Plaintiff and prove that the residents were negligent and that their negligence caused the patient’s harm. The court further explained “[t]he necessity to provide expert information concerning the alleged negligence obtains where the contribution/indemnity action is grounded in a claim of professional negligence and no valid judicial determination to that effect is in place.” Id. at 474. Because the expert reports submitted by the hospital did not specifically identify the residents as having deviated from the standard of care, the Superior Court affirmed.

In Papach v. Mercy Suburban Hospital, 887 A.2d 233 (Pa. Super. Ct. 2005), vacated and remanded, 914 A.2d 868 (Pa. 2007), the trial court granted Defendant family practice physician’s motion for summary judgment, based on Plaintiff’s failure to produce an expert opinion setting forth the applicable standard of care. Even in response to the motion, Plaintiff had not produced an expert report stating that this Defendant had breached the standard of care. After a trial against the remaining defendants, which resulted in a defense verdict, Plaintiff argued on appeal that no expert opinion was required to establish professional negligence on the part of the family practitioner if one of the other physician-defendants had in fact told the family practitioner by phone that there was a possibly abnormal CT scan and that the patient needed follow-up.

The Superior Court disagreed, stating that the claim of negligence against this physician did not involve a matter so simple or lack of skill or want of care so obvious as to be within the comprehension of nonprofessional people. Nor, the Court further concluded, was there such an obvious causal relationship between the alleged negligence and the patient’s death as to obviate

the need for expert medical testimony. The Superior Court affirmed the trial court's order granting summary judgment in favor of the family practice physician.

The Superior Court also, however, found that the trial court had erred in overruling objections at trial to the use of an EMS report, which it found to contain inadmissible hearsay and the admission of which could not be justified by reliance on the line of cases that allows testifying experts to rely, in part, on hearsay opinions contained in medical records not introduced into evidence. Based on the improper admission of this report, the Superior Court awarded a new trial to all Defendants involved in the first trial.

Subsequently, by Order dated January 2, 2007, the Pennsylvania Supreme Court vacated the Superior Court's ruling and remanded the case to the Superior Court for a determination of the responsibility for the absence of transcripts from the record certified for appeal. However, the Supreme Court did not make any substantive rulings. See Papach v. Mercy Suburban Hosp., 914 A.2d 868 (Pa. 2007).

(c)     **What is Enough Proof?**

**In Ellison v. United States, No 09-CV-331, 2010 WL 4670359 (E.D. Pa. Nov. 10, 2010), the District Court found the testimony of two expert witnesses reliable in a suit where a patient suffered a stroke after experiencing hypotension multiple times during an oral surgery. The court followed the Daubert standard and applied a liberal and flexible interpretation of Federal Rule of Evidence 702 in determining the experts' reliability.**

**Although the standard of care expert conceded that he did not know whether other oral surgeons would use or disagree with the standard he proposed, and stated "*I think it's the correct way and that's my opinion*" (emphasis added), the court found that the expert had a reliable basis for setting forth the procedure as the general standard of care and not merely a personal standard of care. The court found the expert's testimony reliable even though the expert could not point to any texts that were specifically relevant, because the expert used indirect references that corroborated his testimony. The court also found the testimony reliable despite a contradicting text, because the expert offered a reasonable explanation for his testimony's divergence with the contradicting text.**

**The causation expert was the doctor that treated the patient after his stroke, and he testified that the stroke was cardioembolic and was caused by the episodes of hypotension during the patient's oral surgery. The court found the testimony reliable, and noted that the fact that there is no test to definitively determine the cause of a stroke does not make the expert's testimony unreliable. To determine the cause of the stroke, the expert performed a differential diagnosis, which the Third Circuit had previously held as generally reliable.**

**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. 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. 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.**

In Faherty v. Gracias, 874 A.2d 1239 (Pa. Super. Ct. 2005), the patient died after a sponge left in his body became infected. The jury found in favor of Defendants, a physician and trauma nurses, and the trial court denied Plaintiff's motion for a directed verdict. On appeal, the Superior Court affirmed, finding that based on the evidence presented, the jury could have concluded that none of the defendants were negligent.

The patient had been in a car accident, received grievous injuries, and been taken to the local hospital. His bowel was torn out and he had massive liver injury. He also suffered from pre-existing hepatitis C and, consequently, an already damaged liver. He had an operation and laparotomy sponges were deliberately left in his abdomen to help control his internal bleeding. He was then transferred to the trauma center at University of Pennsylvania, where he had another operation, during which the sponges were replaced. He then had a third operation, and the Defendant doctor removed the fourteen sponges that notes showed he had in his body. There was, in fact, a fifteenth sponge behind his liver that the doctor did not see. The patient began to run a fever, and a CAT scan showed the retained sponge. Another surgery was performed to remove this sponge and cultures showed three types of bacteria in the surrounding fluid. The patient soon after died of sepsis and multiple organ failure.

The Superior Court disagreed with Plaintiff's contention that the facts of the case, along with her experts' testimony, irrefutably proved Defendants were negligent. There was evidence at trial, the Court noted, that when the sponges were removed it was not imperative, given the goal of that particular surgical procedure (which did not involve definitive abdomen closure) that all sponges be identified and removed. There was also evidence that the doctor was not required to lift the patient's damaged liver to look for any additional sponges. Consequently, the jury could rightfully conclude that Defendants were not negligent. The Court also held that Plaintiff's argument with respect to her requested *res ipsa* charge had been waived.

In Carroll v. Avallone, 939 A.2d 872 (Pa. 2007), Plaintiff was the husband of a patient who suffered a stroke from which she ultimately died. He brought suit against his wife's physician and a jury returned a verdict against the doctor but also found the decedent to have been fifty percent negligent. At trial, Plaintiff presented expert testimony as evidence of Plaintiff's economic loss, which was estimated to be between \$800,000 and \$1,500,000. On cross-examination, Plaintiff's expert admitted that the decedent was unemployed at the time and his estimate would be reduced to zero if the decedent remained unemployed. Defendants did not present expert testimony to refute Plaintiff's expert testimony on economic loss. The jury awarded plaintiff \$29,207 in the wrongful death action, which was reduced based upon decedent's contributory negligence.

On appeal, the Superior Court held that the jury's award of damages did not bear a reasonable relationship to the evidence. The Court explained that Plaintiff's economic expert's testimony was uncontroverted and that, therefore, the jury's award should be reasonably related

to the range set forth by Plaintiff's economic expert. The Superior Court remanded for a new trial on damages.

The Pennsylvania Supreme Court reversed the Superior Court's decision and held that the issue of the amount of economic loss caused by the death of Plaintiff's wife was for the jury to decide. 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." The Supreme Court noted that each scenario presented by Plaintiff's expert was based upon pure speculation. Accordingly, the jury was open to consider Plaintiff's expert's direct testimony and any admissions on cross-examination in its assessment of damages.

## **2. 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 pronouncement that a charge of *res ipsa loquitur* was proper where a quadriplegic fell from an operating table and sustained injuries that the plaintiff claimed ultimately led to decedent's death. The Supreme Court also agreed with the Superior Court that the plaintiff was entitled to judgment notwithstanding the verdict on liability for negligence.

In Quinby, Plaintiff's decedent, a quadriplegic, fell from an operating table in his physician's office while left unattended. Decedent suffered multiple injuries which Plaintiff claimed, and Defendants denied, ultimately caused his death. Decedent was the only person present in the operating room at the time of his fall. Plaintiff claimed that Decedent's physician and nurse negligently provided medical care to Decedent by failing to properly position Decedent on the operating table, failing to use side rails or other restraints, failing to assess Decedent's fall risk, failing to monitor Decedent and generally failing to adopt and enforce rules for the safety of patients left on examination tables. Both parties presented expert testimony.

At the close of trial, Plaintiff requested that a charge of *res ipsa loquitur* be given to the jury. The trial court declined to do so, however, and also denied Plaintiff's motion for a judgment notwithstanding the verdict. On appeal, the Superior Court reversed the trial court's holding and ruled that a *res ipsa* charge was proper and that judgment notwithstanding the verdict should have been granted in favor of Plaintiff. The Supreme Court agreed and affirmed the judgment of the Superior Court.

Holding that a charge of *res ipsa loquitur* was proper in this case, the Supreme Court cited the Restatement (Second) of Torts § 328D as the proper standard for determining whether *res ipsa* is applicable to the facts of a particular case. Section 328 provides, in pertinent part, that:

- (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 . . .

Applying this standard, the court held that all three elements were established in the present case. First, the court explained, a quadriplegic patient such as Decedent could not fall off an examination table in the absence of negligence. Next, the court held that it was "undisputed that there [was] no explanation for Decedent's fall beyond defendants' negligence." Finally, the court ruled that the indicated negligence was clearly within the scope of Defendants' duty to Plaintiff's Decedent. Applying *res ipsa loquitur*, the Supreme Court held, in turn, that judgment notwithstanding the verdict should have been granted in favor of Plaintiff because "no two reasonable minds could disagree" that Decedent, a quadriplegic incapable of all but the slightest movements, could have fallen from the operating table in the absence of Defendants' negligence. The court did find that a fact question remained as to whether the fall had caused Decedent's death, and remanded the case for a new trial on the wrongful death claim and on the issues of damages in the survival action.

In MacNutt v. Temple University Hospital, 932 A.2d 980 (Pa. Super. Ct. 2007), the Superior Court upheld the trial court's decision to preclude Plaintiff from presenting his medical malpractice case based on a *res ipsa* theory in light of the trial court's finding that Plaintiff had produced adequate evidence to support a cause of action based on a standard theory of negligence.

In MacNutt, Plaintiff alleged that Defendants negligently caused him to sustain a severe chemical burn during the second of two surgeries to correct his Thoracic Outlet Syndrome, resulting in various injuries. At trial, Plaintiff intended to proceed based upon theories of both standard negligence and *res ipsa loquitur*. Plaintiff supported his standard negligence theory by offering the expert testimony of a physician, who opined that Plaintiff suffered a chemical burn as a result of lying in an unconscious state for an extended period of time in a surgical preparatory cleansing solution, composed of betadine and alcohol, which pooled under his body.

At the close of Plaintiff's case-in-chief, the trial court precluded Plaintiff from proceeding on a *res ipsa* theory in addition to his standard negligence theory, finding that Plaintiff's expert had provided sufficient testimony to support a conventional negligence theory. Following a defense verdict, Plaintiff appealed, arguing, *inter alia*, that the trial court erred by precluding his *res ipsa* theory given that his expert opined as to how the burn "could" have occurred, but did not offer sufficient testimony to constitute direct evidence of Defendants' negligence. As a result of the court's ruling, Plaintiff insisted, he was relegated to resting his case entirely on the expert's opinion regarding the betadine pooling as the cause of the burn, which Defendants vigorously attacked and the jury subsequently rejected.

Holding that Plaintiff could not establish all three elements of the doctrine of *res ipsa loquitur* pursuant to Restatement (Second) of Torts § 328(d)(1), the Superior Court affirmed the trial court's decision to preclude Plaintiff from proceeding on a theory of *res ipsa*. The court based its holding on its findings that the nature of Plaintiff's injury was itself in dispute (and could, therefore, have occurred without negligence), and that 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. The Court concluded, in turn, that the case *sub judice* was not, in reality, a *res ipsa* case, and that the trial court properly limited Plaintiff to proceeding on a conventional negligence theory. See also Griffin v. Univ. of Pittsburgh Med. Ctr.-Braddock Hosp., 950 A.2d 996 (Pa. Super. Ct. 2008) (holding that Plaintiff could not proceed on a *res ipsa loquitur* theory of negligence because her expert testified that her injuries could have been caused by a fifty-one percent probability by negligent use of forcible restraints or by a forty-nine percent probability by seizure, therefore creating a factual dispute as to the cause of the injury).

### **3. 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), that requires scientific evidence to have “general acceptance” in the relevant scientific community. Frye, rather than Daubert, is now clearly the test applied in Pennsylvania state 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, No. 09-CV-331, 2010 WL 4670359 (E.D. Pa. Nov. 10, 2010), the District Court found the testimony of two expert witnesses reliable in a suit where a patient suffered a stroke after experiencing hypotension multiple times during an oral surgery. The court followed the Daubert standard and applied a liberal and flexible interpretation of Federal Rule of Evidence 702 in determining the experts' reliability.**

**Although the standard of care expert conceded that he did not know whether other oral surgeons would use or disagree with the standard he proposed, and stated “*I think it's the correct way and that's my opinion*” (emphasis added), the court found that the expert had a reliable basis for setting forth the procedure as the general standard of care and not merely a personal standard of care. The court found the expert's testimony reliable even though the expert could not point to any texts that were specifically relevant, because the expert used indirect references that corroborated his testimony. The court also found the testimony reliable despite a contradicting text, because the expert offered a reasonable explanation for his testimony's divergence with the contradicting text.**

**The causation expert was the doctor that treated the patient after his stroke, and he testified that the stroke was cardioembolic and was caused by the episodes of hypotension during the patient's oral surgery. The court found the testimony reliable, and noted that the fact that there is no test to definitively determine the cause of a stroke does not make the expert's testimony unreliable. To determine the cause of the stroke, the expert**

performed a differential diagnosis, which the Third Circuit had previously held as generally reliable.

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. 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. 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.

Recent Daubert cases in the federal courts within the Third Circuit include: Sampathachar v. Fed. Kemper Life Ins. Co., 186 Fed. Appx. 227 (3d Cir. 2006) (not precedential) and Montgomery v. Mitsubishi Motors Corp., No. 04-3234, 2006 U.S. Dist. LEXIS 24433 (E.D. Pa. Apr. 27, 2006).

In Sampathachar v. Fed. Kemper Life Ins. Co., 186 Fed. Appx. 227 (3d Cir. 2006) (not precedential), Plaintiff brought claims for breach of contract and bad faith against his wife's life insurance carrier based on the insurer's refusal to pay on an insurance policy following the alleged drowning of Plaintiff's wife. At issue in this case was whether the insured had actually died, and, more specifically, whether the body of a woman pulled from the Ganges River was, in fact, Plaintiff's wife. Sampathachar, 186 Fed. Appx. at 229. In support of his claim that his wife had drowned, Plaintiff called as an expert witness a forensic dentist who testified that there were certain similarities between the teeth in the post-mortem photos of the body pulled from the Ganges and Mrs. Sampathachar's teeth as seen in her dental records that identified the body as that of the insured. Id. at 232. Defendant, in response, argued that Plaintiff's expert's testimony should be excluded under Federal Rule of Evidence 702. Id. The district court denied Defendant's motion, however, and admitted the proffered testimony. Id.

Affirming the district court's ruling, the Third Circuit Court of Appeals held that the district court did not abuse its discretion by admitting Plaintiff's expert's testimony because it 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 v. Mitsubishi Motors Corp., No. 04-3234, 2006 U.S. Dist. LEXIS 24433 (E.D. Pa. Apr. 27, 2006), Plaintiffs sued Mitsubishi Motors Corporation for the "design and manufacture of a defective motor vehicle" after their son was killed in an auto accident while riding in a sports utility vehicle manufactured by Mitsubishi. Id. at \*2-3. At issue in this case was the admissibility of testimony and reports proffered by Plaintiff's expert, Dr. Gamboa, regarding probable lost earnings related to Decedent's anticipated worklife. Id. at \*2. In his reports, Dr. Gamboa computed adjusted earnings amounts for each year of Decedent's working life from the age of twenty-three until the age of eighty-nine, including the probability that Decedent would be working during each individual year. Id. at \*4-6. In response to Dr. Gamboa's testimony, Mitsubishi objected, *inter alia*, on the grounds that Dr. Gamboa's opinions regarding the level of education and employment and family choices that Decedent would have

obtained was unreliable because it was speculative and unsupported by the record, especially given that Dr. Gamboa had not consulted with any members of Decedent's family prior to preparing his reports. Id. at \*11-14, 19.

The District Court engaged in a Daubert analysis. Id. at \*4. The Court explained that in conducting a Daubert analysis, 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 Dr. Gamboa's professional background and the fact that Mitsubishi did not dispute Dr. Gamboa's qualifications, the Court found that Dr. Gamboa was qualified to testify as an expert. Id.

In regard to the reliability of Dr. Gamboa's testimony, the district court explained that "[w]hen an expert testifies to 'scientific knowledge,' the expert's opinions 'must be based on 'methods and procedures of science,' rather than on 'subjective belief or unsupported speculation.'" Id. (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, district 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 Dr. Gamboa's testimony was based would not be fully presented until trial, it would be premature to exclude Dr. Gamboa's testimony on the grounds that it was unreliable or based on faulty methodology. Id. at \*21.

In Keller v. Feasterville Family Health Care Center, 557 F. Supp. 2d 671 (E.D. Pa. 2008), the Court engaged in a Daubert analysis in reasoning determining the admissibility of Defendant's expert witness. In Keller, Plaintiff brought an action against Defendant on behalf of her deceased husband's estate. Plaintiff alleged that Defendant failed to properly diagnose a pulmonary embolism, or blood clots in the lungs, which resulted in the death of Plaintiff's husband, the decedent. The pathology report from the decedent's death revealed evidence of the onset of Alzheimer's disease. Defendant proposed introducing an Alzheimer's disease and dementia expert whose proposed testimony would include an estimate of the decedent's medical decline. The expert's opinion would include when the decedent would have stopped working, died, and the various other effects of having the disease. In turn, this testimony would reduce

Plaintiff's estimated damages. Plaintiff challenged the proposed admissibility of the testimony as misleading and speculative.

The court analyzed the admissibility of the challenged testimony against those prongs set forth in Daubert. The court ultimately held that, "Dr. Rovener's opinion is admissible because the process used in formulating and applying his opinion is reliable . . . and he states such opinion to a reasonable degree of medical certainty." Id. at 678; see also Meadows v. Anchor Longwall and Rebuild, Inc., No. 02-2062, 2007 U.S. Dist. Lexis 32764 (W.D. Pa. May 3, 2007), aff'd, 306 Fed. Appx. 781 (3d Cir. 2009) (not precedential) (granting Defendant's Daubert motion *in limine* because the challenged expert's hypothesis was not supported by his own testing, and were based on assumptions unfounded in the record facts); Gannon v. United States, 571 F. Supp. 2d 615 (E.D. Pa. 2007), aff'd, 292 Fed. Appx. 170 (3d Cir. 2008) (not precedential) (denying Defendant's Daubert motion but ruling in favor of Defendant because Plaintiff failed to prove that his cancer was caused by a vaccine contaminated with a virus that Defendant had allegedly negligently approved).

Other notable federal cases arising in courts within the Third Circuit and addressing Daubert issues include, Lillis v. Lehigh Valley Hosp., No. 97-3459, 1999 U.S. Dist. LEXIS 13933 (E.D. Pa. Sept. 3, 1999), aff'd, 251 F.3d 154 (3d Cir. 2001); Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000); Protocomm Corp v. Novell Advanced Servs., Inc., 171 F. Supp. 2d 473 (E.D. Pa. 2001); Ferris v. Pa. Fed'n Bhd., 153 F. Supp. 2d 736 (E.D. Pa. 2001); Kerrigan v. Maxon Indus., 223 F. Supp. 2d. 626 (E.D. Pa. 2002).

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, 839 A.2d 1038 (Pa. 2003), Plaintiffs sued a food manufacturer, claiming that the husband-Plaintiff had been injured when he ate the company's corn chips. The manufacturer filed motions to preclude Plaintiffs' experts' testimony, in part based on Frye. The trial court ruled that the experts were not qualified to render opinions regarding causation of Plaintiff's injuries, and also found that the experts' methods were invalid, and that the testimony offered constituted "junk science." The court precluded their testimony on this basis, and entered a compulsory non-suit in favor of Defendant.

The Superior Court reversed on appeal, holding that the experts were qualified to render opinions regarding causation, and that their methodology did not constitute "junk science" that should be precluded under Frye. On appeal to the Supreme Court, the only issue addressed was the admissibility of the testimony of Plaintiffs' chemical engineering expert. This expert had performed tests on the chips to measure their compressive dry strength and the time it took for saliva to soften the chips. Based on these tests he concluded, among other things, that the chips were dangerous and defective because they broke into smaller pieces that were too hard, thick and sharp to pass safely through the esophagus. He also concluded that these dangerous characteristics had caused Plaintiff's injuries.

At the outset of the conclusions portion of its opinion, the Supreme Court stated that the applicable rule controlling the admissibility of expert testimony is Pa. R. Evid. 702, and that the Frye test is part of this Rule. The Court also explicitly held that it is the Frye standard, as

opposed to the Daubert standard used in federal courts that “will continue to be applied in Pennsylvania.”

The court noted that proper application of the Frye standard is important, and spelled out the following elements of such proper application. First, it is the proponent of “expert scientific evidence” who “bears the burden of establishing all of the elements for its admission under Pa.R.E 702, which includes showing that the Frye rule is satisfied.” Second, the Frye rule “applies to an expert’s methods, not his conclusions”. More specifically, the proponent of the evidence must prove that “the methodology and expert used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial.” Third, the Frye test is only one of several criteria under Rule 702. The trial court must separately consider and decide whether the offered expert is qualified to render the offered opinions. Finally, the standard of review applicable on appeal to a trial court’s determination made under Frye is abuse of discretion. The appellate court is not to consider all the evidence and reach its own conclusion.

Applying these principles to the case at bar, the Supreme Court concluded that the Superior Court had ignored the trial court’s ruling and had substituted its own judgment. Rather than remand the case back to the Superior Court to apply the correct standard, the Supreme Court, “in the interests of judicial economy” applied the proper standard of review itself. In so doing, the court held that plaintiffs’ chemical engineer’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.” The Court found that plaintiffs failed to prove that the experts’ methodology was generally accepted “as a means for arriving at such a conclusion.” Based on this finding, the Supreme Court concluded that the trial court did not abuse its discretion in precluding the expert’s testimony, and reversed the Superior Court’s decision.

In Trach v. Fellin, 817 A.2d 1102 (Pa. Super. Ct. 2003), appeal denied, 847 A.2d 1288 (Pa. 2004), an *en banc* panel of the Superior Court revisited in detail the issue of when “a party seeking to exclude expert scientific evidence may test the admissibility of that evidence pursuant to Frye v. United States.” In doing this, the court discussed and criticized several aspects of recent panel decisions of the court. Specifically, the Trach Court disagreed with past statements, which it found inaccurate, to the effect that Frye applies “every time science enters the courtroom.” The Trach Court stated emphatically, to the contrary, that “Frye only applies when a party seeks to introduce novel scientific evidence.” Moreover, the Court held that 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. Trach, 817 A.2d 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.” Trach, 817 A.2d at 1118. The deduction itself does not have to have gained general acceptance, and is not subject to scrutiny under Frye.

In reaching its decision, the Superior Court relied in part on the dissenting opinion authored by Justice Cappy in Blum, 764 A.2d 1 (Pa. 2000), in which the justice criticized the decision of the Superior Court in McKenzie v. Westinghouse, 674 A.2d 1167 (Pa. Commw. Ct.



1996). In McKenzie, the Commonwealth Court ruled that the expert's conclusion, as well as the methodology, must be generally accepted.

In Trach, the Superior Court was asked to review the trial court's order granting a new trial, which it had done on the grounds that Plaintiff's expert's testimony regarding causation did not meet the Frye test and had been improperly admitted at trial. The trial court noted that there was no evidence that other members of the medical community shared the expert's conclusion or reasoning process. The expert had testified that an overdose of the anti-depressant Doxepin can, and did in Plaintiff, cause glaucoma. Plaintiff had, because of a pharmacy error, taken massive overdoses of this drug. Plaintiff challenged the admissibility of the expert's testimony on the grounds that the expert's methods and conclusions were not generally accepted in the relevant scientific community, and noted that no studies exist indicating that an overdose can cause the type of glaucoma from which Plaintiff suffered.

The Superior Court found that in reaching his decision the expert had employed the "Dose-Response" principle, which there was no question that the scientific community has generally accepted. Additionally, the methodology employed by the expert to reach his ultimate conclusion regarding causation was the process of extrapolation, which the court found was not actually science, but was a methodology generally accepted and used by scientists in the relevant scientific community. The court 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. The court stated that 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. The Trach court held that plaintiff's expert's testimony was admissible under Frye, and that the trial court had erred in vacating the jury's verdict in favor of the defendant.

#### **4. Reliance on Extrajudicial Sources**

The type of facts or data in which an expert may rely is governed by Rule 703 of the Pennsylvania Rules of Evidence, which differs from the recently amended Rule 703 of the Federal Rules of Evidence. Both the state and federal rule allow an expert to base their opinion upon otherwise inadmissible facts or data which are "of a type reasonably relied upon by experts in the particular field." However, unlike the state rule, Federal Rule 703 specifically 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 Pa. R. Evid. 703, Note (citing Primavera v. Celotex, 608 A.2d 515, 521 (Pa. Super. Ct. 1992), appeal denied, 622 A.2d 1374 (1993)). 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), appeal denied, 563 A.2d 888 (Pa. 1989). Any expert testimony which incorporates the opinions of other physicians is inadmissible

hearsay unless the physicians making the underlying statements are made available for cross-examination at trial.

Several years ago, in Cacurak v. St. Francis Medical Center, 823 A.2d 159 (Pa. Super. Ct. 2003), appeal denied, 844 A.2d 5501 (Pa. 2004), Defendants appealed from a judgment against them after a jury verdict in Plaintiff's favor. Plaintiff's malpractice claim was based on allegations that he developed curvature of the spine and other painful problems after an inexperienced resident marked the wrong vertebrae for laminectomies before surgery to remove a spinal tumor.

On appeal, Defendants argued that the trial court had erred in permitting Plaintiff's expert to testify that another, non-testifying physician had, like Plaintiff's expert, determined that the Plaintiff suffered from thoracic kyphosis. 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. The Superior Court agreed, stating that it had repeatedly held that an expert witness cannot bolster his own opinion by reading into the record the report of a non-testifying expert who is not available to be cross-examined. In this case, the court determined, 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. The Court held that a new trial was warranted on the basis of this error.

## **5. Learned Treatises**

The Supreme Court analyzed the extent to which an expert witness may refer to, or utilize, a learned treatise on direct examination in Aldridge v. Edmunds, 750 A.2d 292 (Pa. 2000). A defense expert was permitted to support his diagnosis and opinion by referring to excerpts from medical textbooks. Id. at 294. After a trial and a verdict in favor of all Defendants, Plaintiffs appealed, contending that the trial court erred in permitting the use of excerpts from the medical texts. Id. at 296. 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 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 298; **see also Hyrcza v. West Penn Allegheny Health Sys. Inc., 978 A.2d 961 (Pa. Super. Ct. 2009) (stating that use of learned treatises may be used on direct examination of an expert witness in appropriate circumstances for the limited purpose of explaining basis for opinion as long as appropriate constraints are imposed by trial court).**

On its way to reaching its holding, the Supreme Court noted that the Superior Court, whose order it was affirming, had cited the prior Superior Court's decision in Nigro v. Remington Arms Co., 637 A. 2d 983 (Pa. Super. Ct. 1993), appeal dismissed, 655 A.2d 505 (Pa. 1995) for the proposition that texts may be used to bolster or support the credibility of an expert witness. The Aldridge court also noted that the rationale in Nigro had been that authoritative texts could be offered as non-hearsay for the purpose of bolstering the credibility of an expert witness, with the implication that this purpose differed from the impermissible objective of attempting to prove the truth of the matter asserted. The Aldridge court found this reasoning unsound, and stated it was preferable to recognize the hearsay nature of texts and that Pennsylvania courts have implemented a narrow exception to the rule against hearsay statements,

that permits an expert witness to reference treatises on direct examination in order to explain the reasons underlying his or her opinion.

## **6. Expert Qualifications – Medical Malpractice**

Expert qualifications are now governed by the MCARE Act. Pursuant to MCARE, in order to be qualified to testify as an expert in a medical liability case, an expert must possess an unrestricted physician's license to practice medicine, and have been engaged in active clinical practice or teaching within the previous five years. 40 Pa. Cons. Stat. § 512(b).

MCARE additionally requires that an expert testifying as to another physician's standard of care must 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." The physician must also "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." 40 Pa. Cons. Stat. § 1303.512(c). This provision was effective sixty days after March 20, 2002, which is when the MCARE Act was passed. See Bethea v. Phila. AFL-CIO Hosp. Ass'n, 871 A.2d 223 (Pa. Super. Ct. 2005) for more regarding effective date of requirements. See supra regarding MCARE Act for more information regarding expert qualifications.

Before the Court in Madden v. A.I. DuPont Hospital, 264 F.R.D. 209 (2010), were two medical malpractice cases arising out of open-heart surgeries performed on infants who subsequently died. Plaintiff Madden brought wrongful death, negligence, and lack of informed consent actions against Defendant Physician Pizarro. Plaintiff Papacoda brought negligence and lack of informed consent claims against Defendant Physician Norwood (collectively with Dr. Pizarro "Defendants"). Plaintiffs alleged, *inter alia*, that had they been properly informed of the risks of an "experimental" surgery, they would not have consented. Madden, 264 F.R.D. at 211-212. In both cases, Defendants filed Motions to Preclude Plaintiffs' Expert from testifying at trial pursuant to Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993). Id. at 211.

In support of their Motions to Preclude, Defendants argued that Plaintiffs' expert, who is retired and stopped performing surgery approximately 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 and having only, in fact, performed said surgical procedure a handful of times during his career. Id. at 213. According to Defendants, Delaware case law provides that insufficient clinical experience with the procedure at issue and/or mere reliance on medical literature constitute sufficient grounds for finding an expert unqualified. Id.

The Court began its analysis of the qualifications of Plaintiffs' expert 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)). Additionally, the Court 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 noted that Plaintiffs' 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 the opinions of Plaintiffs' expert were

not based solely on subjective belief and held that he was qualified to testify as an expert at trial.

In Stimmler v. Chestnut Hill Hospital, 602 Pa. 539, 981 A.2d 145 (2009), the Supreme Court held that Plaintiff's expert reports expressed the requisite degree of specificity and medical certainty for a *prima facie* case of malpractice.

By way of background, Plaintiff, after giving birth to her first child at Chestnut Hill Hospital in 1965, developed peripheral circulatory failure. Stimmler, 602 Pa. at 544. As part of her medical care, Defendant Physician performed an antecubital cutdown on the inside of Plaintiff's right and left elbows. Id. Plaintiff was discharged but experienced complaints of pain and shortness of breath for the next thirty-six years. Id. None of Plaintiff's physicians could determine the cause of her condition until an echocardiogram performed in 1999 uncovered an abnormality. Id. Subsequent echocardiograms in early 2000 revealed the presence of a twelve to eighteen inch catheter coiled in Plaintiff's right atrium and passing inter her right ventricle. Id. at 544-545.

Plaintiff filed a medical malpractice suit in 2001 against Chestnut Hill Hospital and numerous physicians who had treated her in 1965. Id. In 2004, various defendants filed Motions for Summary Judgment, which were granted by the trial court. Id. at 547. In support of its decision to grant Summary Judgment, the trial court held that Plaintiff's expert reports "failed to establish, to a degree of medical certainty, that Plaintiff's injuries were caused by a fragmented catheter left behind during the removal of catheters from cutdown procedures in May 1965." Id. Plaintiff's experts stated, essentially, that the 1965 procedure had the "highest likelihood" of resulting Plaintiff's condition and/or that the catheter fragment "must have" come from the cutdown in May 1965. Id. at 548. The Superior Court upheld the granting of Summary Judgment.

The Supreme Court granted Plaintiff's Petition for Allowance of Appeal and held that the trial court and Superior Court erred in granting and upholding the Summary Judgment motions. Id. at 566. In support of its decision to reverse and remand, the Supreme Court began by 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 555 (citing Welsh v. Bulger, 548 Pa. 504, 698 A.2d 581, 585 (1997)). Based upon this authority, at its progeny, the Court concluded that there was sufficient evidence for a jury to evaluate whether the catheter left in Plaintiff's body was inserted during the May 1965 procedure. Id. at 556. Moreover, the Court found that when read in their entirety, Plaintiff's expert reports express the requisite degree of specificity for Plaintiff to show a *prima facie* cause of action. Id. at 559. Plaintiff's witnesses concluded that a catheter used in 1965 had the "highest likelihood" and was the "most likely" cause of Plaintiff's condition. Id. The Court found that when these terms are read in the context of the respective reports, it is clear that the experts are offering their opinions with a high degree of medical certainty. Id.

In Neidig v. U.S., No. 07-229, slip op., 2010 WL 1023937 (3d Cir. 2010), Plaintiff, a former prisoner acting *pro se*, alleged that unnamed staff at FCI McKean prison delayed in

diagnosing and treating his appendicitis and, therefore, that the United States of America should be held liable for the medical negligence of its employees under the Federal Tort Claims Act. Plaintiff sought the following relief:

That due to the deliberate indifference buy [sic] the staff at McKean Federal Correctional Institution which resulted in unnecessary pain and suffering as a result of negligent medical care, which almost resulted in “death.” A “sum certain” for compensatory damages is requested in the amount of 1.5 million dollars for negligent care resulting in excessive and unnecessary pain and suffering nearly resulting in death.

Defendant United States filed a motion for summary judgment and, in support of said motion, obtained the expert opinion of Jamie Stern, M.D. Id. at 1. Plaintiff requested that the Court appoint an expert witness on his behalf. Four requests were made by the Clerk of Courts – all four requests were declined. Id.

The relevant facts are as follows: On September 4<sup>th</sup>, Plaintiff was examined due to complaints of abdominal pain. It was noted that his symptoms either indicated a urinary tract infection or appendicitis. On September 5<sup>th</sup>, Plaintiff returned to the medical clinic complaining of increased pain and was promptly admitted to the hospital. On September 7<sup>th</sup>, Plaintiff underwent an appendectomy.

The Court granted Defendant’s Motion for Summary Judgment because Plaintiff did not have evidence to contradict the expert testimony of Defendant and “[w]ithout evidence to contradict Defendant’s position on summary judgment, the court will not make the inferential leap that the medical staff’s acts or omissions in its course of treatment are the cause of any resulting injuries.” Id. at 6.

In Freed v. Geisinger Medical Center, 601 Pa. 233, 971 A.2d 1202 (2009), reargument granted, 602 Pa. 207, 979 A.2d 846 (2009), aff’d, 5 A.3d 212 (Pa. 2010), the Superior Court held that a trial court does not abuse its discretion in refusing to admit the testimony of an expert who does not express his opinions with a sufficient degree of certainty. One of Plaintiff’s medical experts in this case was intended to testify regarding causation. His statements in this regard, however, were extremely general and did not include an opinion that any specific breach in the applicable standard of care had actually caused Plaintiff’s injuries. His report, instead, stated repeatedly that “it is possible” that different treatment might have prevented the harm. The Superior Court held that the trial court did not err in ruling that this opinion lacked the requisite degree of certainty and, consequently, in refusing to allow this expert to testify.

The Pennsylvania Supreme Court granted an appeal of the above case and affirmed the Superior Court’s decision. In its Freed decision, the Supreme Court overruled Flanagan v. Labe, 670 A.2d 183 (Pa. 1997), which represented the rule that a nurse was not competent to offer a medical opinion on causation because such an opinion constituted a medical diagnosis, which a nurse was prevented from making under Professional Nursing Law, 63 Pa. Cons. Stat. § 211 *et seq.*

In Freed, the trial court sustained Defendant's objection that Plaintiff's registered nurse, who was to provide expert testimony regarding the relevant nursing standard of care and to offer her medical opinion on the causation issues surrounding Plaintiff's bed sores, should not be permitted to offer any expert medical opinion as she was not a medical doctor. A compulsory nonsuit was granted when Plaintiff failed to provide any additional medical testimony on the causation issue.

As noted above, on appeal the Superior Court disagreed with the trial court and ruled that the nurse was permitted to provide testimony as to the standard of nursing care and on the issue of causation. The Supreme Court then held that the Flanagan decision should be overruled to the extent that it "prohibits an otherwise competent and properly qualified nurse from giving expert opinion regarding medical causation." In a footnote, the Court noted that this decision would have limited impact as the MCARE Act clearly states that in order for a witness to be qualified as an expert witness to testify on issues such as the appropriate standard of care, causation, and the nature and extent of injuries in medical professional liability actions, that the witness must be a physician licensed to practice medicine and must be engaged in or recently retired from active clinical practice or teaching. 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.

The issue of the required degree of certainty was also recently presented in Vicari v. Spiegel, 936 A.2d 503 (Pa. Super. Ct. 2007), appeal granted, 972 A.2d 410 (Pa. 2009), aff'd, 989 A.2d 1277 (Pa. 2010). Plaintiff filed suit alleging that Defendants, a otolaryngologist and a radiation oncologist, failed to inform Plaintiff's decedent about other treatment options to counter the risk of Decedent's tongue cancer metastasizing. The trial court struck the otolaryngologist expert's testimony on the grounds that he did not render his opinion to the requisite degree of medical certainty. A non-suit was entered against Plaintiff and Plaintiff appealed.

On appeal, the Superior Court held that although this expert did not use the exact phrase "reasonable degree of medical certainty," his opinion, in its totality, was expressed with a sufficient degree of certainty and should have been admitted. The Court also addressed issues regarding the qualifications of Plaintiff's experts. See infra. Based on errors of the trial court on all these issues, the Superior Court reversed the order entering non-suit and remanded the case for a new trial.

The Supreme Court recently granted appeal of the above case as to whether respondent's medical oncology expert was qualified to render standard of care opinions against an otolaryngologist and radiation oncologist under section 512 of the MCARE Act, 40 P.S. § 1303.512. See Vicari v. Spiegel, 972 A.2d 410 (Pa. 2009). The Supreme Court affirmed the Superior Court's holding that the oncologist was qualified to testify as an expert witness against an otolaryngologist and a radiation oncologist. Vicari v. Spiegel, 989 A.2d 1277 (Pa. 2010)

In Vicari v. Spiegel, 936 A.2d 503 (Pa. Super. Ct. 2007), the trial court found that Plaintiff's oncologist expert was not qualified under MCARE to testify as to the standard of

care applicable to Defendants. A non-suit was entered against Plaintiff and Plaintiff appealed.

Among the issues on appeal was whether Plaintiff's oncologist expert was qualified under MCARE to testify. The Court concluded that Plaintiff's oncology expert was, in fact, qualified under MCARE to testify to the applicable standard of care. The Court noted, "[i]t appears that the trial court granted a nonsuit in the instant case while under the misapprehension that the MCARE Act requires the proffered expert to be board-certified in the same specialty as the defendant . . . ." The court explained that this is not the always the case. "Although plaintiff's expert was not an otolaryngologist/ENT surgeon or radiation oncologist, his opinion was limited to when persons practicing in those oncology-related specialties... should refer a patient to a medical oncologist for chemotherapy treatment." The Court further clarified that its opinion was limited to the issue of referrals to an oncologist, which Plaintiff's expert, an oncologist himself, was well qualified to render. See also Lombardo v. Gardner, 82 Pa. D & C. 4th 233 (Lawrence Cty. Ct. Com. Pl. 2007) (holding vascular surgeon not permitted to testify regarding standard of care applicable to orthopedic surgeon).

Additionally, the Supreme Court noted that when making a competency determination, it is important to make such a determination only after delineation of precisely what is the specific care at issue. 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). Thus, plaintiff's expert was permitted to offer his opinions regarding this "related" subspecialty of the defendant physician. Vicari, 989 A.2d at 1284.

In Lasko v. Watts, 373 F. App'x 196 (3d Cir. 2010), a Federal inmate brought a *pro se* civil rights action against correctional facility officials asserting claims under the First and Eighth Amendments, Federal Tort Claims Act (FTCA), and Americans with Disabilities Act (ADA). The U.S. District Court for the Middle District of Pennsylvania granted summary judgment for the officials and held that 1) the district court did not abuse its discretion in denying the inmate's appointment for counsel, and 2) that a physician's decision not to begin the inmate's interferon regimen until after he underwent laboratory testing was not deliberate indifference.

The District Court denied the inmate's deliberate indifference claim because it found that the prisoner failed to present evidence from which a reasonable jury could conclude that any defendant possessed the "culpable mental state" required for such a claim. Id. at 203. The facts showed that there were compelling penological interests supporting defendants' actions and that the officials "would have made the same decisions...for reasons reasonably related to a legitimate penological interest." Id. at 203 (citing Rausser v. Horn, 241 F.3d 330, 334 (3d Cir. 2001)).

It should be noted, that the Court also upheld the district court's denial of counsel to the inmate as the record indicated that the inmate was able to obtain his medical records

**and other documents, present the necessary factual information and legal arguments to the court, and respond to the issues raised by the defendants' summary judgment motion. Id. at 202 (citing Parham v. Johnson, 126 F.3d 454, 457 (3d Cir. 1997) (stating the factors a district court should consider when determining whether to appoint counsel to an indigent civil litigant)).**

In Novitski v. Rusak, 941 A.2d 43 (Pa. Super. Ct. 2008), the Superior Court held 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 Novitski, Plaintiff was injured in a motor vehicle accident. As a result of the accident Plaintiff sustained several injuries, including two disc herniations in his neck. Plaintiff brought suit and at trial he presented the expert testimony of Mark Lukas, Ph.D., an expert in vocational rehabilitation and Andrew Verzilli, an expert in economic loss. Dr. Lukas testified that the herniated discs in Plaintiff's neck would cause a twenty-five percent work reduction, despite the fact that no medical records confirmed his estimate. Defendant also pointed out that after the accident Plaintiff continued to work a full time schedule. Mr. Verzilli then provided testimony of estimated wage losses based on Dr. Lukas' estimated twenty-five percent work reduction. At the end of trial the jury returned a verdict in favor of Plaintiff in the amount of \$443,040.14.

Defendant appealed the matter to the Superior Court arguing that the admission of Dr. Lukas' testimony was in error. Defendant stated that Dr. Lukas, as a vocational rehabilitation expert, was unable to testify about an estimated work reduction without any supporting medical evidence. Defendant also argued that, in turn, Mr. Verzilli's testimony was admitted in error because his estimates were based on Dr. Lukas' work reduction estimate. The Superior Court stated that: Dr. Lukas was qualified as a vocational expert and certainly was qualified to render an opinion about the degree to which Mr. Novitski's herniated discs and pinched nerve affected his ability to work. Furthermore, we conclude there was clear and concise medical testimony linking all of Mr. Novitski's injuries to the motor vehicle accident and that such medical testimony unquestionably indicates that his injuries will impact on his ability to work.

Id. at 49. Therefore, the Superior Court affirmed the trial court's decision.

In Cimino v. Valley Family Medicine, 912 A.2d 851 (Pa. Super. Ct. 2006), Plaintiff's only standard of care expert was a physician whose California medical license was subject to revocation, but this revocation had been stayed and he was placed on probation for five years. He was allowed to practice medicine during this time, but he had to comply with several terms and constraints, including completing specific courses in medical record keeping and ethics, having a billing monitor and notifying the state if he left to live or practice medicine in another state. The expert's agreement with California also stated that if he complied with certain requirements during the probationary period, his license would be fully restored in three years.



Defendants challenged this expert's qualifications under MCARE to testify as an expert. Specifically, Defendants argued that he did not possess an "unrestricted physician's license" as required under § 1303.512(b)(1) of the Act. Plaintiff, on the other hand, argued that the purpose of this section 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.

The Superior Court agreed with Defendants. The court noted that MCARE did not provide a definition of "unrestricted" but that in common usage the meaning of this word denotes no limitations or constraints. The Court concluded that this expert's license, therefore, was not unrestricted and he was not qualified to testify as an expert. Consequently, the Superior Court affirmed the trial court's order precluding this expert's testimony, as well as the order dismissing Plaintiff's case for lack of the required expert testimony.

In George v. Ellis, et al., 911 A.2d 121, (Pa. Super. Ct. 2006), the Superior Court evaluated Plaintiff's standard of care expert under the MCARE Act's requirements regarding expert qualifications and reached a conclusion contrary to that previously reached by the same court when the same expert was evaluated under the common law standard in George v. Ellis, 820 A.2d 815 (Pa. Super. Ct. 2003), appeal denied, 834 A.2d 114 (Pa. 2003). Plaintiff in this case alleged that Defendant performed three surgical procedures on her knee, that three surgeries were not indicated for her condition, that they were improperly performed and that appropriate tests and consultations regarding Plaintiff's condition were not undertaken.

At trial in 2002, Plaintiff called Charles Bull, M.D., who testified regarding his education and experience. Plaintiff's counsel then offered Dr. Bull as an expert in the field of orthopedic medicine and orthopedic surgery. Defendants objected, arguing that Dr. Bull was not qualified because he was not board-certified, not licensed to practice in the United States and had never done surgery in the United States. The trial court ruled Dr. Bull was not qualified and precluded his testimony. Plaintiff had no other standard of care expert and so a non-suit was entered in favor of defendants.

In 2003, the Superior Court ruled that Dr. Bull did, in fact, have sufficient skill, knowledge and experience to aid the jury in making their determination, and remanded the case for a new trial. In February 2005, before the second trial was to begin, Defendants filed a motion seeking once again to have Dr. Bull disqualified as an expert, arguing that he was not qualified under the MCARE Act, and for summary judgment. The trial court granted this motion and Plaintiff once again appealed.

On this appeal, the Superior Court first rejected Plaintiff's argument that the prior finding that Dr. Bull *was* qualified as an expert was not the controlling law of the case, because the court had reached that determination "under the liberal common law standard" and now Defendants were challenging his qualifications under the MCARE Act standards. The Court also rejected Plaintiff's arguments that the MCARE Act should not be applied retroactively to this case and if it were, Plaintiff should be afforded the opportunity to secure a substitute expert. The Superior Court noted that the presumption against retroactivity does not apply to purely procedural statutes, and concluded that § 512 of the MCARE Act is procedural and so could be applied

retroactively to this case. With respect to Plaintiff's argument that she should be allowed to secure a replacement expert, the Court found that she had not developed this argument and so it was waived.

Finally, the Superior Court rejected Plaintiff's argument that Dr. Bull was qualified under § 512 of MCARE. The Court examined Dr. Bull's qualifications in detail under the provisions of this section and concluded that because he only possessed a license to practice medicine in Canada, he was not qualified because he failed to meet the requirement of possessing an unrestricted physician's license in any state or the District of Columbia. Consequently, and because Plaintiff conceded she had no other standard of care expert to testify on her behalf, the Superior Court affirmed the trial court's grant of Defendant's motion for summary judgment.

In Smith v. Paoli Memorial Hospital, 885 A.2d 1012 (Pa. Super. Ct. 2005), the issue involved was whether Plaintiff's expert witnesses, a surgeon and an oncologist/internist, were qualified to testify as to the standard of care of Defendant gastroenterologists pursuant to the requirements of the MCARE Act. The Superior Court affirmed the lower court's decision and held that Plaintiff's experts were qualified to testify at trial.

Donald J. Smith, administrator of the estate of his late wife, filed a wrongful death and survival action. Plaintiff claimed that Defendant physicians breached the standard of care in failing to timely diagnose and treat the decedent's small bowel leiomyosarcoma, thereby resulting in her untimely death. Specifically, the decedent presented to Dr. Battafarano's office in May 1998 with rectal bleeding.

In support of his claim, Plaintiff experts retained W. Stuart Battle, M.D., a board-certified general surgeon, and Allen Krutchik, M.D., a board-certified oncologist and internist, to address the standard of care for determining the cause of occult gastrointestinal bleeding. Specifically, the experts were retained to address whether gastroenterologists, Drs. Tolin and Astroff, breached the standard of care by failing to order a CT scan to investigate the possibility of a source extrinsic to the GI tract.

Ten days prior to trial, Defendants filed motions *in limine* seeking to preclude Plaintiff's experts from testifying based upon their purported lack of qualification pursuant to the MCARE Act. Although Plaintiff agreed that the experts did not possess expertise in the subspecialty of gastroenterology, Plaintiff asserted that their specialties and/or subspecialties overlap with that of gastroenterology as to the standard of care applicable when a patient presents to any appropriately trained medical care provider with an obscure GI bleed. The trial court denied Defendants' motion and concluded that both Drs. Battle and Krutchik met the requirements of the MCARE Act. Specifically, the court stated that Dr. Battle was board-certified in surgery, which overlaps with gastroenterology for the specific care at issue in this case and Dr. Krutchik was board-certified in medical oncology which is a subspecialty of internal medicine, which has a substantially similar standard of care as gastroenterology for the specific care at issue in this case.

Defendants appealed the trial court determination. The Superior Court upheld the trial court's order denying Defendants' motion *in limine*. The court concluded that the MCARE Act requires that experts be familiar with the standard of care for the specific care at issue and

practice in the same or a substantially similar subspecialty which has a substantially similar standard of care for the specific care at issue. 40 Pa. Cons. Stat. § 1303.512(c)(1). Although gastroenterology is not a subspecialty of oncology or general surgery, the court concluded that it is a subspecialty of internal medicine, in which Dr. Krutchik was board-certified. Further, Dr. Krutchik testified that he saw “all kinds of patients,” including patients with various gastrointestinal cancers, including soft tissue sarcoma. Additionally, Dr. Krutchik instructed medical students in the examination, diagnosis and management of patients with various cancers. He published papers on all types of sarcoma, including soft tissue sarcoma and small bowel sarcoma. Dr. Krutchik testified that there is an overlap in the standard of care among physicians specializing in different areas, i.e. internist, gastroenterologist, oncologist who are all involved in the treatment of cancer and non-cancer related problems.

Further, the court concluded that Dr. Battle is a general surgeon with specialization in gastrointestinal surgery. He testified that over the past thirty-three years he has diagnosed and treated cancers of the intra-abdominal organs, specifically the gastrointestinal tract, the thyroid and skin cancers such as melanoma and smaller cancers of the skin. Dr. Battle was a member of the American Society of Gastrointestinal Endoscopy and had been one for over thirty years at the time of trial. Dr. Battle was familiar with the standard of care for the evaluation and work-up of a sixty year old woman with GI bleeding. Dr. Battle testified that the standard of care for a surgeon is the same as it would be for a gastroenterologist. The problem of bleeding from the gastrointestinal tract is addressed by either specialty and both specialties are knowledgeable and well-trained in the diagnosis and treatment of those diseases.

The Superior Court agreed with the trial court and concluded based upon this testimony that both experts were substantially familiar with the applicable standard of care for the specific care at issue and practiced in a subspecialty with a substantially similar standard of care for the specific care at issue. 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 for purposes of the MCARE Act. Therefore, the court permitted both experts to testify at the time of trial.

In Bethea v. Philadelphia AFL-CIO Hospital Association, 871 A.2d 223 (Pa. Super. Ct. 2005), Plaintiff, administrator of the decedent’s estate, appealed the lower court’s decision to preclude the testimony of the decedent’s expert due to his failure to qualify as an expert under the MCARE Act.

Plaintiff, now deceased, brought an action against Defendants stemming from care received during her hospitalization in January 1999. A suit was filed in May 2000 and she died from septic shock in November 2000. A second complaint was filed after her death, naming the administrator of her estate as a substituted Plaintiff. Plaintiff retained Charlton B. Futch, M.D., a retired general surgeon, whose medical license expired in 1999 to serve as a medical expert. In a report dated August 23, 2002, Dr. Futch stated that Defendants deviated from the appropriate standard of care during the treatment of the decedent.

Defendants filed a motion to preclude the testimony of Dr. Futch because he did not qualify as an expert under the MCARE Act. Specifically, Defendants argued that Dr. Futch

should be precluded from testifying because his medical license expired in 1999. The trial court granted Defendant's motion and entered a nonsuit. Plaintiff appealed this order, maintaining that the trial court erred in applying the MCARE Act "retroactively".

The MCARE Act was passed on March 20, 2001 and section 512 was effective sixty days later. Dr. Futch's medical license expired in 1999, the same year that the alleged negligence took place. Dr. Futch's expert report was prepared in 2002 and trial was scheduled to take place in 2003. The Superior Court upheld the lower court's decision and concluded that the application of the MCARE Act to the current litigation did not constitute a retroactive application since the trial was scheduled to take place approximately eighteen months after Section 1303.512 went into effect. Therefore, the MCARE Act was applicable. Since the expert did not possess a valid medical license at the time of trial, he was not deemed qualified under the MCARE Act to testify. Plaintiff had not retained any other medical expert and therefore, the suit could not be sustained. The Superior Court concluded that the trial court did not commit any error in entering a nonsuit.

In Weiner v. Fisher, 871 A.2d 1283 (Pa. Super. Ct. 2005), Plaintiff, individually and as executrix of her husband's estate, appealed the trial court's decision granting Defendant's motion for nonsuit. The Superior Court vacated the trial court's order and remanded for reconsideration of the expert's qualifications.

Dr. Weiner sought medical care from gastroenterologist Robert Fisher, M.D. between 1990 and 1998 for various gastrointestinal symptoms. Although Dr. Fisher diagnosed Dr. Weiner with intestinal metaplasia, pernicious anemia and atrophic gastritis, he found no evidence of malignancy. Approximately seven months after his last appointment with Dr. Fisher, Dr. Weiner was diagnosed with gastric cancer and underwent a total gastrectomy. Dr. Weiner was treated for this malignancy until his death in February 2000. Mrs. Weiner, as executrix of her husband's estate, filed a complaint containing wrongful death and survival actions. In the complaint, plaintiff alleged that Defendant Dr. Fisher was negligent in failing to follow up on the decedent's gastrointestinal symptoms and in failing to diagnose a 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. On appeal, Plaintiff contended that the trial court misconstrued the MCARE Act's requirement that a testifying expert "be engaged in or retired within the previous five years from active clinical practice or teaching," arguing that the five year period is measured from the time of the alleged negligence and not from the time of the trial. Further, Plaintiff asserted that the trial court erred in not qualifying Dr. Bisordi on the basis of his current teaching activities.

The Superior Court rejected Plaintiff's contention that the five year time period within the statute refers to five years prior to the date of the alleged malpractice and concluded that the trial court was correct on this issue. The Superior Court held that the phrase "within the previous five years" contained within section 512(b)(2) of the Act refers to a time period that is measured from the time that the expert testifies. It is not measured from the time of the alleged negligence.

The Superior Court, however, agreed with Plaintiff's second contention that the trial court erred in not qualifying Dr. Bisordi as an expert on the basis of his teaching activities. Specifically, the trial court held that Dr. Bisordi was not qualified to testify as an expert because although he "was actively teaching, he was not teaching in the specialized field of endoscopy which is the specialty he was being offered to testify in." The Superior Court held that according to the MCARE Act, in order for an expert to qualify to testify in a medical malpractice action, he 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 Superior Court stated that the relevant subspecialty in this case was gastroenterology. Both Dr. Bisordi and Dr. Fisher are gastroenterologists. Therefore, Dr. Bisordi satisfied the requirement of section 512(c)(2). The Superior Court ruled that the trial court erred in focusing its inquiry on Dr. Bisordi's teaching activities in the specialized field of endoscopy as endoscopy is not a subspecialty, but rather a diagnostic technique. The Superior Court concluded that the MCARE Act does not contemplate disqualifying an expert based upon his failure to teach a specific diagnostic technique. The Superior Court noted that the record was unclear as to whether Dr. Bisordi actively teaches in the area of gastroenterology or where he teaches. Further the record was not clear with respect to other factors such as the subject matter he teaches, the amount of time he teaches, or the academic level of his students. Therefore, the Superior Court remanded this matter for reconsideration of Dr. Bisordi's qualifications as a teacher of gastroenterology.

It should be noted that the Superior Court also stated that section 512(b)(2) does not require that the expert's teaching responsibilities be full-time. However, the court stated that a *de minimis* level of teaching is not sufficient to satisfy the statute. The level of teaching must be sufficient to establish the general requirement of the statute that the witness possess "sufficient education, training, knowledge and experience to provide credible, competent testimony . . . ." 40 Pa. Cons. Stat. § 1303.512(a).

In Miville v. Abington Memorial Hospital, 377 F. Supp. 2d. 488 (E.D. Pa. 2005), the case involved a pregnant patient with muscular dystrophy, a history of lung disease and a history of being difficult to intubate. She developed preeclampsia and was admitted to the hospital. While there, she complained of being short of breath and her doctors decided she needed an emergency c-section. When the anesthesiologist was administering spinal anesthesia, the patient's condition worsened and a tracheotomy was performed. Her doctor delivered a baby boy, but the mother died. The executor/plaintiff brought suit and claimed that the anesthesiologist was negligent in failing to intubate the mother and failing to protect her airways before administering the anesthesia. Defendant filed a motion for summary judgment on the basis that Plaintiff could not establish a *prima facie* case of malpractice because she lacked experts qualified as required by section 512 of MCARE.

The District Court initially determined that, pursuant to Rule 601 of the Federal Rules of Evidence that section 512 of the MCARE Act did apply in a federal diversity case. The court then decided that Plaintiff's experts, who were 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 these experts practiced in subspecialties with similar standards of care. The court then decided, however, that the experts did not meet the requirements of section 512(c)(3) because neither were board-certified in anesthesiology or had

been actively involved in or taught full time in the field of anesthesiology within the previous five years. Consequently, Plaintiff's experts were not competent to testify against the Defendant anesthesiologist.

The District Court allowed Plaintiff some time to obtain a qualified expert and ordered that if her counsel did not file a notice with the court by a particular date that such an expert had been obtained, Defendant's motion for summary judgment would be granted.

In Gartland v. Rosenthal, 850 A.2d 671 (Pa. Super. Ct. 2004), the trial court had held that Plaintiff's expert neurologist could not comment on the standard of care applicable to Defendant-radiologists and that Plaintiffs' supplemental reports from other experts were late and could not be submitted. As a result, the trial court entered summary judgment in favor of Defendants.

The Superior Court reversed and remanded the case for trial. The court found that Plaintiff's expert, a neurologist, was qualified to give an expert opinion, at least at the summary judgment stage, about the radiologists' standard of care even if the tougher standard under MCARE was applied. The court found that the fact that the expert was a neurologist established, *prima facie*, his qualifications to read the x-rays in the case and to offer an opinion as to what should have been done under the circumstances. Further, the trial court should have allowed the later submitted supplemental reports because the governing court order (and a stipulation of the parties) required Plaintiffs to submit just "an" expert report, which they did timely, not to complete all discovery. The Court noted that Defendants had failed to take sufficient steps to enforce their requests for all expert names and reports and that the court had failed to take control of scheduling the case from the beginning.

In Campbell v. Attanasio, 862 A.2d 1282 (Pa. Super. Ct. 2004), appeal denied, 881 A.2d 818 (Pa. 2005), Plaintiff sought treatment for chronic obstructive pulmonary disease and pneumonia. Id. at 1283. Plaintiff subsequently developed anxiety and was treated with sedatives, including Ativan. Id. at 1283-84. Plaintiff then complained of "mild respiratory discomfort." Id. at 1284. In response to these symptoms, Defendant physician, a third year resident in the department of internal medicine, prescribed intravenous Ativan. Id. Intravenous Ativan is "a sedative so powerful that the United States Food and Drug Association [*sic*] has restricted its use to: (1) treating individuals who suffer from recurrent seizures; and (2) anaesthetizing patients prior to surgery." Id. Plaintiff developed acute respiratory distress and later sued the physician and hospital.

Defendants moved for summary judgment, arguing that Plaintiff's expert psychiatrist was not qualified to testify about the standard of care under MCARE section 1303.512. Id. Judge Glazer denied Defendants' motions for summary judgment, and the case was subsequently assigned to Judge Moss for trial. Id. at 1284-85. Defendants submitted pretrial motions *in limine* again arguing Plaintiffs' expert was not qualified under MCARE. Id. at 1285. Judge Moss granted Defendants' motions and dismissed the case. Id.

On appeal, the Superior Court addressed three issues: whether the trial court violated the coordinate jurisdiction rule when it granted Defendants' motions notwithstanding that the facts had not changed since a judge of the prior court denied the motions; whether a psychiatrist who

treats anxiety is qualified to offer an opinion on the standard of care regarding administration of intravenous Ativan by a resident not trained in any specialty; and whether the court erred in holding that Plaintiff's expert was not qualified to offer an opinion against Defendant hospitals. Id. at 1285. The court held that the coordinate jurisdiction rule had been violated when the trial court granted Defendants' motions *in limine*. Moreover, the court explained that the earlier denial of Defendants' motions for summary judgment was not clearly erroneous; therefore, the violation of the coordinate jurisdiction rule could not be excused. Id. at 1287. Additionally, the court agreed with Plaintiff, holding that Defendant had prescribed the 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 Defendant physician was a resident and 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.

Finally, the court held that the trial court erred in dismissing the claims against Defendant hospitals. Id. at 1290. The court explained that Plaintiff's claims against the hospitals sounded in *respondeat superior* liability and were therefore dismissed based on the trial court's finding that Plaintiff's expert was unqualified. Accordingly, because the Superior Court found Plaintiff's witness qualified, it found in favor of Plaintiffs. Id.

The Superior Court reversed and remanded, holding that Plaintiff's expert was qualified to testify and that the trial court erred on all counts in granting summary judgment in favor of all Defendants.

In Wexler v. Hecht, 928 A.2d 973 (Pa. 2007), Plaintiff brought a medical malpractice action alleging Defendant doctor breached the applicable standard of medical care in treating Plaintiff's bunion. Plaintiff submitted the *curriculum vitae* and expert report of a podiatric surgeon. In his report, Plaintiff's podiatrist expert "[o]pined that [Defendant] deviated from the ordinary standard of care in the surgery; that he provided substandard post-surgical care; and that these alleged deviations were the direct and proximate cause of [Plaintiff's] medical complaints."

Defendant filed a motion *in limine* in which he sought to preclude Plaintiff's podiatrist expert from testifying at trial on the grounds that a podiatric surgeon was not competent to testify to the standard of care pertaining to an orthopedic surgeon. In his motion, Defendant relied on the common law "specialized knowledge in the subject matter of the inquiry" and the stricter MCARE standard. The trial court granted Defendant's motion, initially indicating its oral ruling that it was relying on the common law standard. However, in its written opinion, the trial court indicated that its decision rested on the newly-enacted MCARE Act, specifically section 512(b)(1). 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.” Therefore, the trial court concluded that Plaintiff’s podiatrist expert “was not a physician holding an unrestricted license to practice medicine; [therefore,] he was unqualified under [MCARE] section 512(b)(1) to render an opinion concerning the applicable standard of care pertaining to a medical doctor, such as [Defendant.]”

On appeal, the Superior Court affirmed the trial court’s ruling. Plaintiff appealed, arguing that: (i) MCARE is not applicable because it was enacted after alleged acts; (ii) Plaintiff’s podiatrist expert met MCARE’s competency requirements; and (iii) the trial court erred by failing to permit Plaintiff’s podiatrist expert to testify to his qualifications at the Motion *in Limine* hearing. Regarding the applicability of the MCARE Act, the Supreme Court held that “[MCARE] Section 512 applies at trials of medical malpractice actions occurring after its effective date, again, assuming the affordance of adequate time for preparation and adjustment.”

Furthermore, the Court agreed with the lower court’s assessment of MCARE’s competency standard. The Court explained, “[w]e find that the General Assembly’s reference in Section 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.” The Court further noted that there is no waiver provision regarding the competency requirement of expert testimony of the standard of care. Therefore, the Court reasoned that the trial court was correct in finding Plaintiff’s podiatrist expert unqualified to testify under the MCARE Act.

In Herbert v. Parkview Hospital, 854 A.2d 1285 (Pa. Super. Ct. 2004), Plaintiff claimed that Defendants had been negligent in treating the decedent, who was an end-stage renal failure patient who, two days after admission to the hospital, was found to have a large piece of steak lodged in his throat. Plaintiff entered into a joint tortfeasor release with the hospital and one physician Defendant. At trial the jury found in favor of Plaintiff and apportioned liability to all Defendants. After trial, Plaintiff claimed that the names of the settling Defendants should not have been on the verdict slip and argued that there was no basis for the jury to apportion liability to them because there was no expert testimony as to their liability. The non-settling Defendant argued that their inclusion on the verdict sheet was correct but challenged the qualifications of Plaintiff’s expert. Plaintiff’s expert was an internist and the non-settling Defendant was a nephrologist.

The Superior Court concluded that there was sufficient evidence against the settling Defendants to warrant submission of them to the jury for apportionment and to justify the jury’s apportionment of liability. The Court also found that while the MCARE Act plainly prefers, and in some cases may require, that expert testimony in professional medical malpractice cases come from witnesses with expertise in the Defendant’s particular subspecialty, the Act does not require that expert testimony in all cases be so restricted. In this case the allegation was that the Defendant nephrologist, during a nephrology consultation, had failed to notice symptoms indicating airway obstruction and respiratory distress. The Court held that the expert internist was qualified to testify about the standard of care applicable to physician, such as the Defendant nephrologist, with internal medicine and critical care experience who encounters a patient manifesting numerous signs of respiratory blockage and distress.



In Gbur v. Golio, 932 A.2d 203 (Pa. Super. Ct. 2007), aff'd, 963 A.2d 443 (Pa. 2009), the Superior Court held that Plaintiff's expert, a radiation oncologist, was qualified to opine as to the standard of care applicable to Defendant, a urologist, with regard to Defendant's alleged failure to diagnose Plaintiff's decedent's prostate cancer, which ultimately metastasized to his mandible and caused his death.

Applying the MCARE expert qualification standard, the court held that, although Plaintiff's expert was not a board-certified urologist, his extensive experience and board certifications in radiation oncology qualified him under section 512(d) (relating to care outside specialty) to opine regarding Defendant's alleged failure to timely diagnose Plaintiff's decedent's prostate cancer despite elevated PSA tests and suspicious radiological studies. In support of its holding, the Superior Court noted that Plaintiff's expert did not testify as to the substantive standard of care applicable to urologists as such, but rather to the standard of care applicable in diagnosing prostate cancer, an area in which Plaintiff's expert was clearly qualified to testify. The Court thus concluded that Plaintiff's expert did, in fact, meet the standard required to testify to care outside his own particular specialty under section 512(d) of the MCARE Act.

The Supreme Court of Pennsylvania recently granted allocatur in this case solely on the issue of Plaintiff's experts' qualifications under MCARE. **Upon review, the Supreme Court affirmed the holding of the Superior Court and held that Defendant failed to preserve the argument that Plaintiff's expert did not satisfy the statutory requirement of certification by the same or similar board as Defendant physician; and that the Defendant physician also failed to preserve his challenge to the evidentiary foundation for admission of Plaintiff's expert testimony under the "same subspecialty requirement."** Gbur v. Golio, 963 A.2d 443 (Pa. 2009).

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

In Jacobs v. Chatwani, 922 A.2d 950 (Pa. Super. Ct. 2007), Plaintiff alleged that she sustained injuries to her left ureter resulting from Defendant doctor's negligent performance of a hysterectomy. As a result, Plaintiff brought this medical malpractice action against the doctor who performed the surgery and hospital. In the Defendant's urology expert's report, he "[o]pined that the injury to [Plaintiff's] ureter was not due to any negligence in the performance of the hysterectomy but, rather, was the result of a known risk involved in this type of surgery from temporary loss of blood supply to the ureters occurring when the uterine arteries are clamped off . . . ." Plaintiff filed a motion *in limine* to preclude Defendant's urology expert, arguing that the expert was unqualified to testify to the standard of care of an obstetrician/gynecologist. The trial court denied Plaintiff's motion, explaining that Defendant's urology expert testified to the standard of care involved in avoiding ureteral injury during abdominal surgery and to post-operative diagnostic testing. Ultimately, judgment was entered in Defendants' favor and Plaintiff appealed.

The Superior Court affirmed the lower court's decision on appeal. The court agreed with the lower court that "[a] 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 to opine on diagnostic testing of urological structures following pelvic surgery, all of which were directly within his area of expertise." The Court explained that the standard of care with regard to avoiding ureteral injury does not differ among doctors, whether a urologist or gynecologist, who perform pelvic surgery. Furthermore, Defendant's urology expert provided extensive testimony concerning post-operative diagnostic procedures.

Additionally, the Court agreed with the trial court that Defendant's urology expert met the common-law standard to testify as an expert. The Court explained that although the urology expert's practice dealt primarily with male urological issues, the record established that Defendant's urology expert had a specialized knowledge of the subject matter in question. For these reasons, the Court held that a board-certified urologist was qualified under MCARE and common law standards to qualify to the standard of care involved in avoiding ureteral injury during pelvic surgery and post-operative assessment.

**The Superior Court recently addressed the issue of expert qualification in Hyrca v. West Penn Allegheny Health System, Inc., 978 A.2d 961 (Pa. Super. Ct. 2009). In Hyrca, the executrix of a deceased patient's estate brought a wrongful death and survival action against numerous medical defendants after the patient died from massive gastrointestinal bleeding. On appeal, appellants 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 psychiatrist. Appellants argued that because Plaintiff's expert was not familiar with the applicable standard of care and did not practice in a specialty substantially similar to that of physician Defendant, he was unqualified to render standard of care opinion as to Defendant physician under section 512 of the MCARE Act.**

Specifically, the trial court stated in its 1925(a) opinion that it was satisfied that the post-operative care of the patient (a multiple sclerosis patient having undergone hip surgery) with aspirin and steroids was a matter within the expert's training, regardless of specialty. 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. The Superior Court accepted the trial court's decision and affirmed its decision regarding Plaintiff's expert.

## **7. 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 (Pa. 1992); Levine v. Rosen, 616 A.2d 623 (Pa. 1992); Sinclair v. Block, 633 A.2d 1137 (Pa. 1993). In Gala v. Hamilton, 715 A.2d 1108 (Pa. 1997), the Pennsylvania Supreme Court ruled that defendants in medical malpractice cases do not need medical literature to receive a "two schools of thought" jury instruction. Rather, defendants are able to meet their burden of establishing the alternative "school of thought" as legitimate with expert testimony alone.

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

The Superior Court disagreed, stating that the doctrine did not apply because both parties' experts agreed that the TRAM flap procedure was not appropriate for a patient that is extremely obese, and it was a disputed question whether Plaintiff fell into the extremely obese category. 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. at 241. 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. It was for the jury to decide if Plaintiff met the criteria of being extremely obese. If she did, all experts agreed the procedure performed was the wrong one. Because the doctrine did not apply, and the improper "two schools" instruction given to the jury may have contributed to the verdict in favor of Defendant, a new trial on negligence was required.

In Reger v. A.I. duPont Hospital for Children of the Nemours Foundation, 259 Fed. Appx. 499 (3d Cir. 2008) (not precedential), Plaintiffs brought a medical malpractice action against Defendants after the death of their son. At trial, Plaintiffs' expert testified that there was only one way to perform the procedure at issue. Defendants presented multiple experts, who testified that there were other acceptable approaches to perform the procedure. As a result, the district court submitted the "two schools of thought" charge to the jury.

On appeal, the Third Circuit affirmed. The court held that the “two schools of thought” charge was appropriate. 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. at 3.

### **C. Causation – Medical Malpractice**

It is also necessary that the plaintiff 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.

#### **1. Reasonable Certainty**

In order to establish the element of proximate cause, the plaintiff first has the burden of establishing, with a “reasonable degree of medical certainty,” that the injury in question did result from the negligent act alleged. McMahon v. Young, 276 A.2d 534 (Pa. 1971); see also Carrozza v. Greenbaum, 866 A.2d 369, 379 (Pa. Super. Ct. 2004), appeal denied, 882 A.2d 1000 (Pa. 2005). 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 (Pa. Super. Ct. 1989) (citing Kravinsky v. Glover, 396 A.2d 1349, 1355-56 (1979)), appeals denied, 569 A.2d 1367 (Pa. 1989), 571 A.2d 383 (Pa. 1989). 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 (Pa. Super. Ct. 2001).

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

Note, however, that this aspect of the Winschel court’s ruling ignores the well accepted rule stated in Neal by Neal v. Lu, 530 A.2d 103, 109-110 (Pa. Super. Ct. 1987), that a defense expert is not required to testify to a reasonable degree of medical certainty because the defendant does not bear the burden of proof. This same well accepted rule is stated in the 2007 Superior Court case, Jacobs v. Chatwani, 922 A.2d 950, 961 (Pa. Super. Ct. 2007): “Pennsylvania law does not require a defense expert in a medical malpractice case to state his or her opinion to the same degree of medical certainty applied to the plaintiff, who bears the burden of proof at trial.” The Jacobs opinion was filed approximately two weeks before the Superior Court issued its opinion in Winschel.

More recently, in Griffin v. University of Pittsburgh Medical Center-Braddock Hospital, 950 A.2d 996 (Pa. Super. Ct. 2008), the Superior Court held that an expert opinion merely using the words, “within a reasonable degree of medical certainty,” by itself is not enough to meet the requirements for admissible expert testimony. In Griffin, Plaintiff was admitted as a patient at Defendant’s healthcare facility. Exploratory laparotomy and ileocelectomy were performed to relieve Plaintiff’s abdominal discomfort. Post-operatively, Plaintiff began to complain of right shoulder pain. She was diagnosed with a shoulder fracture/dislocation which required extensive medical care to treat. Plaintiff brought suit against Defendant claiming negligence.

The main issue at trial was whether Plaintiff’s injury occurred as a result of a grand mal seizure or from forcible restraint. The expert for Plaintiff 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. The jury ultimately returned a verdict in favor of Plaintiff. Defendant appealed that determination to the Superior Court based on the expert testimony provided on behalf of Plaintiff. 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.

## **2. 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 in order 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 of —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.

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

Only after a plaintiff first establishes competent medical expert testimony to support these foundation 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 Hankey v. York County Prison, No. 3:05-CV-0136, 2009 WL 2043392 (M.D. Pa. July 8, 2009), Plaintiff brought suit under Pennsylvania medical malpractice law and under § 1983. Ryan Rorhbaugh, deceased, was substituted by Jessica Hankey as Plaintiff following his death on June 7, 2006. Rorhbaugh was incarcerated at several facilities that used third-party health care providers. During Rorhbaugh’s incarceration, he was diagnosed with malignant melanoma. Plaintiff brought claims against the third-party providers, and several of their employees in the United States District Court for the Middle District of Pennsylvania. In response, the Defendants filed motions for summary judgment.

Under Pennsylvania law, the Court noted that the Plaintiff has the burden of proof in a medical malpractice claim and must establish that there was: “(1) a duty owed by the physician to the patient (2) a breach of duty from the physician to the patient (3) that the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient, and (4) damages suffered by the patient that were a direct result of that harm.” Hankey, 2009 WL 2043392, at \*4 (quoting Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888, 891 (Pa. 1990)). The Court also determined that in cases where a patient is likely to suffer harm, regardless of the quality of medical treatment, the proximate cause prong of the test is relaxed and it becomes the realm of the jury “to balance probabilities and decide whether defendant’s negligence was a substantial factor in bringing about the harm.” Id. (quoting Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280, 1286 (Pa. 1978)).

In their motions for summary judgment, all the defendants alleged that the Plaintiff could not establish that their actions were the proximate cause of the Plaintiff’s injury. However, the Plaintiff put forth expert testimony for each claim stating that each doctor or facility had not adhered to the required standard of care. The Court noted that the substance of all the testimony would be weighed at trial, but for the purposes of summary judgment there remained a dispute as to the material facts, which warranted denial of the motions for summary judgment.

Dr. Baker also sought summary judgment on Plaintiff’s § 1983 claim for violation of the Eighth Amendment’s prohibition of cruel and unusual punishment. Particularly, Plaintiff alleged that Dr. Baker, as a prison official, breached his “obligation to provide medical care for those whom [he is] punishing by incarceration.” 2009 WL 2043392, at \*9 (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). The Plaintiff had the burden of proof to show that “Dr. Baker acted with deliberate indifference to Rorhbaugh’s serious medical needs.” Id.

Dr. Baker argued that he did follow-up with Rorhbaugh after the surgery and tried to refer him to an oncologist, but that Rorhbaugh insisted on waiting until he was released to seek medical help. Dr. Baker testified that he then checked with the prison officials to determine Rorhbaugh’s release date, which he verified was within 2-8 weeks and met once more with him to ensure that Rorhbaugh knew the severity of the situation and that follow-

up care was necessary. Plaintiff tried to counter that because Dr. Baker did not order a consultation with an oncologist and because Dr. Baker referred Rorhbaugh to a general surgeon for the excision and not an oncologist, Dr. Baker displayed deliberate indifference. The Court agreed with Dr. Baker that a dispute between preferred choices of treatment does not rise to the level of deliberate indifference and therefore, the § 1983 claims against Dr. Baker could not stand.

The Court then discussed Dr. Esper's request that it "remand or transfer" all state law claims remaining after any § 1983 claims had been dismissed. It noted that it would interpret this request as a request to decline supplementary jurisdiction as the case had originated in federal court, and had not been removed from state court. The Court acknowledged that exercising supplementary jurisdiction was a matter of discretion, which should be weighed against several factors, including judicial economy, convenience and fairness to parties. Because the case had been in federal court for numerous years, a date for trial had been set and the statute of limitations had run on the Plaintiff's state law claims, the Court determined that the factors weighed in favor of retaining supplementary jurisdiction.

In Carrozza v. Greenbaum, 866 A.2d 369 (Pa. Super. Ct. 2004), appeal denied, 882 A.2d 1004 (Pa. 2005), a case in which Plaintiff alleged the Defendants failed to timely diagnose her breast cancer, the Superior Court held that testimony offered by Plaintiff's experts regarding both standard of care and causation was sufficient to meet the burden of proof and that there were sufficient facts for the jury to have found in favor of the Plaintiff. Consequently, the trial court had not erred in denying Defendants' motion for judgment notwithstanding the verdict.

In reaching its holding, the court noted that Plaintiff was not required to establish that the Defendant's negligence was the actual "but for" cause of her injuries, but rather, this was a case in which the relaxed "increased risk of harm" standard applied. The court concluded that when viewed in its entirety the expert testimony in this case was sufficient to sustain Plaintiff's burden of proof and that it was not a clear case for judgment notwithstanding the verdict. The Superior Court affirmed the trial court's order denying Defendants' motion for same. The Pennsylvania Supreme Court did grant appeal in the case on an insurance issue, at 882 A.2d 1000 (Pa. 2005); however, the Court has denied further appeal on the "increased risk of harm" standard.

In Winschel v. Jain, 925 A.2d 782 (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 a complete obstruction of Plaintiff's decedent's left coronary artery was against the weight of the evidence and that Plaintiff had succeeded in establishing the causation element under the increased risk of harm standard.

In this case, Plaintiff (Decedent's wife) filed suit against Defendant physician, alleging that Defendant was negligent for failing to diagnose a complete obstruction in Decedent's left coronary artery, causing him to suffer an acute myocardial infarction and die. To support this theory, Plaintiff offered the testimony of two board-certified cardiologists, both of whom testified that Defendant fell below the standard of care by failing to recommend catheterization of Plaintiff's decedent's left coronary artery three months prior to his death. In response to this

testimony, Defendant presented his own expert witnesses, who testified that Defendant's treatment of Decedent did not fall below the standard of care.

Likewise, Plaintiff relied on the testimony of her expert cardiologists on the issue of causation. Specifically, the expert cardiologists opined that when Defendant tested Decedent, his left coronary artery was already substantially occluded, and that occlusion would have been detected by catheterization. Additionally, Plaintiff offered the expert testimony of a board-certified forensic pathologist, who testified that the near-total occlusion of Decedent's left coronary artery was a factual cause of his death. Importantly, Defendant's own experts also agreed that catheterization would have detected the occlusion.

After the close of evidence, the jury returned a verdict in favor of Defendant. Specifically, the jury indicated that although it found Defendant's conduct to be below the applicable standard of care, it also found that Defendant's negligence was not a factual cause of Decedent's death. Following the denial of Plaintiff's post-trial motions, Plaintiff appealed to the Superior Court, seeking a new trial on the grounds that the jury's conclusion as to causation was against the weight of the evidence and was inconsistent with the medical testimony as to causation that had been proffered at trial.

Applying the increased risk of harm standard, the Superior Court found that the trial court abused its discretion by refusing to grant Plaintiff's motion for a new trial. Specifically, the Court noted that, under the increased risk of harm standard, "the plaintiff must introduce sufficient evidence that the defendant's conduct increased the risk of plaintiff's harm." See Carrozza v. Greenbaum, 866 A.2d 369, 380 (Pa. Super. Ct. 2004). Clarifying this standard, the Court further held that:

[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.

Applying this standard and considering the strength of Plaintiff's expert testimony with regard to causation (especially in relation to the weak expert testimony proffered by Defendant), the Superior Court concluded that the jury's verdict was "irrational" in light of the uncontradicted and uncontested evidence of causation presented by Plaintiff, and remanded the case for new trial. See also Qeisi v. Patel, No. 02-8211, 2007 U.S. Dist. LEXIS 9895 (E.D. Pa. Feb. 9, 2007) (holding testimony of expert witness that nine-month delay in performance of mammogram was sufficient to establish that Defendant increased Plaintiff's risk of harm of developing cancer for purposes of stating *prima facie* case of negligence); Gannon v. United States, 571 F. Supp. 2d 615 (E.D. Pa. 2007) (Federal Tort Claims Act case holding Plaintiffs failed to prove that Plaintiff-husband's cancer was caused by a vaccine contaminated with a virus that Plaintiffs alleged Defendant had negligently approved and further holding that: 1) under Pennsylvania law Plaintiffs had to prove both general causation (i.e. that the vaccine could cause cancer in humans) and specific causation (i.e. that it caused cancer in the Plaintiff); 2) they needed admissible expert testimony in order to prove causation and, 3) Plaintiffs' expert failed to meet



the required burden because his opinion was inconsistent with recent biological and epidemiological evidence and he relied only on experiments with rodents).

#### **D. Informed Consent – Medical Malpractice**

The Pennsylvania Supreme Court has in the past several years revisited and upheld the intentional tort battery theory underlying the doctrine of informed consent. See Montgomery v. Bazaz-Sehgal, 798 A.2d 742 (Pa. 2002); Morgan v. MacPhail, 704 A.2d 617 (Pa. 1997); see also Gouse v. Cassel, 615 A.2d 331 (Pa. 1992); Moure v. Raeuchle, 604 A.2d 1003 (Pa. 1992). To date, the Supreme Court has declined to recognize a cause of action for negligent failure to obtain informed consent.

**However, the distinction is not always material. For instance, in Fitzpatrick v. Natter, 961 A.2d 1229, n.13 (Pa. 2008), the 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.”**

##### **1. General Rule**

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

##### **2. Expert Testimony Required**

Pennsylvania courts place the burden upon the plaintiff to establish through expert testimony the existence of all risks of the chosen treatment, alternative methods of treatment and risks of alternatives as well as causation. See, e.g., Hartenstine v. Daneshdoost, NO: 2005-C-2059V, 2008 Pa. Dist. & Cnty. Dec. LEXIS 60 (Lehigh Cty. Ct. Com. Pl. January 16, 2008). In Festa v. Greenberg, 511 A.2d 1371 (Pa. Super. Ct. 1986), appeal denied, 527 A.2d 541 (Pa. 1987), the court specifically held that expert testimony is required to establish the following three elements:

- a. The existence of risks in the specific medical procedure;
- b. The existence of alternative methods of treatment; and
- c. The attending risks of such alternatives.

Following Cooper v. Roberts, 286 A.2d 647 (Pa. Super. Ct. 1971), the Festa court stated that once these three elements are established by expert testimony, it remains for the trier of fact to determine the materiality of those risks.

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

For another example of expert testimony not required in proving an informed consent claim see Hartenstine v. Daneshoost, 4 Pa. D. & C. 5th 282 (Lehigh Cty. Ct. Com. Pl. 2008). In Hartenstine, plaintiff alleged that consent to surgery was obtained following the physician's misrepresentation of the surgical procedure to be performed. See id. The Court of Common Pleas, Lehigh County, held that in this situation, expert testimony is not required to support a claim based on medical battery. Id. The court explained that a consent obtained through a knowing misrepresentation is ineffective and, therefore, expert testimony is not required regarding alternate treatments and risks of those treatments because the patient's claim is not grounded on the physician's failure to disclose such information but, rather, on the physician's affirmative misrepresentation. See Id.

### **3. The MCARE Act**

Under the MCARE Act, Pennsylvania law now (since March 20, 2002) requires the physician to obtain the patient's full, knowing, and voluntary informed consent prior to the following procedures:

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

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

Under MCARE, as under the predecessor statute, informed consent results where the physician gives the patient (1) a description of the procedure and (2) the risks and alternatives that a reasonably prudent patient would need to consider to make an informed decision as to that procedure. The question of whether the physician obtained his patient's informed consent is still governed under the "prudent patient" standard. 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.

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.

See Fitzpatrick v. Natter, 961 A.2d 1229 (Pa. 2008) (citing Hohns v. Gain, 806 A.2d 16, 19 (Pa. Super. Ct. 2002); Gouse v. Cassel, 615 A.2d 331, 333 (Pa. 1992)).

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. Expert testimony is also required to determine whether the procedure at issue constituted the type of procedure which necessitates informed consent and to identify the risks of that procedure, the alternatives to that procedure and the risks of these alternatives. Under MCARE, as under Act 135, a plaintiff must establish the element of causation in order to set forth a viable claim for lack of informed consent. Specifically, a physician is liable for failure to obtain informed consent of a patient only if the patient proves that receiving such information would have been a substantial factor in his decision whether to undergo that procedure.

MCARE, unlike Act 135, also contains a provision stating that a doctor can be held liable for failure to obtain a patient's informed consent if the doctor "knowingly misrepresents to the patient his or her professional credentials, training or experience." 40 Pa. Cons. Stat. § 504(d)(2). This provision, with respect to procedures performed after MCARE's effective date, apparently overrules the Supreme Court case, Duttry v. Patterson, 771 A.2d 1255, 1259 (Pa. 2001) ("Based on the foregoing, we hold 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.").

#### **4. Recent Decisions**

McSorley v. Deger, 905 A.2d 524 (Pa. Super. Ct. 2006), appeal denied, 919 A.2d 958 (Pa. 2007), involves surgery that occurred in 1997, before the enactment of MCARE. The surgery at issue was planned as a diagnostic laparoscopy to evaluate Plaintiff's cystic right ovary. During the procedure, one physician Defendant noted that her terminal ileus was markedly abnormal and so called for an intraoperative consult by another Defendant physician. The consulting physician found the Plaintiff's small bowel was severely distorted, believed the abnormality could be caused by (among other things) cancer, and made the decision to remove it. It was subsequently determined that the distortion was caused by scar tissue. After surgery,

Plaintiff developed chronic diarrhea and other complaints that she claimed were caused by the bowel resection. She filed suit, alleging battery, medical negligence and lack of informed consent.

The case proceeded to trial against only the consultant physician and the jury found in his favor. On appeal, Plaintiff argued that the trial court had erred in denying her motion for a directed verdict on her informed consent claim because the physician, as a matter of law had exceeded the scope of her surgical consent, which was an unauthorized extension of the diagnostic laparoscopy. The Superior Court disagreed and found that, given the language of the consent Plaintiff had signed and the testimony of the physician at trial regarding what he believed might be causing the distorted bowel, it was a jury question whether the surgeon's actions were within the scope of consent the Plaintiff had provided. Consequently, the trial court had correctly rejected Plaintiff's motion for a directed verdict.

Plaintiff also argued that the trial court's charge regarding informed consent constituted error, but the Superior Court rejected this argument as well.

In Schroeder v. Jaquiss, 861 A.2d 885 (Pa. 2004), an informed consent and negligence case, the Pennsylvania Supreme Court held that the Superior Court had correctly concluded that a decedent's representative did not waive the Dead Man's Act by not attending depositions to object on the basis of this Act. Plaintiffs had filed a complaint alleging medical negligence and failure to obtain informed consent in connection with surgery to remove a growth in the Plaintiff-patient's ear. One of the Defendant-physicians died shortly after the case was commenced and his estate raised the Dead Man's Act in its Answer and New Matter. When discovery depositions were held, the estate was given notice, but did not attend and did not initiate or engage in any discovery.

At trial, the court first ruled that the Act applied to the Plaintiff and the other physician-Defendants and rendered them incompetent witnesses regarding matters that took place before the death of the now-deceased Defendant-physician. Upon motion, the court reversed this ruling on the basis that the Act had been waived because the estate had not raised it at the depositions of the other parties. The jury returned a verdict against the estate in the amount of \$1,000,000.

On appeal, the Superior Court held that the trial court committed reversible error in finding the Act waived and remanded for a new trial against the estate. The Supreme Court affirmed, noting that a decedent's representative waives the Act by taking depositions or requiring answers to interrogatories from an adverse party, but that there is no principle in place requiring the decedent's representative to appear at depositions of such parties just so he can raise the Act. The Supreme Court further held that the rules of discovery did not otherwise require the estate to show up at depositions simply to raise the Act, in order to preserve its objection for trial.

The Supreme Court also concluded that the Superior Court had correctly found that the trial court's error was harmful to the estate and, therefore, reversible error, because its ruling allowed Plaintiff to testify that the deceased doctor did not advise her of the scope or risks of her surgery, which testimony went to the heart of her informed consent claim. In a footnote the Supreme Court noted that the verdict in its entirety must be vacated because the jury found in

Plaintiff's favor and against the estate without making any distinction between the negligence and informed consent claims.

In Pollock v. Feinstein, 917 A.2d 875 (Pa. Super. Ct. 2007), the court examined whether a certificate of merit needs to be filed for an informed consent claim that alleges an incomplete disclosure of the risks of surgery. The court explained the claim focused on whether Defendant's conduct conformed to a professional standard, "namely '[t]o provide patients with material information necessary to determine whether to proceed with the surgical or operative procedure or to remain in the present condition.'" Id. (quoting Valles v. Albert Einstein Med. Ctr., 805 A.2d 1232 (Pa. 2002)). The court stated at a minimum, Plaintiff needed to produce expert testimony identifying the procedure's risks, alternative procedures, and the risks of alternative procedures. Therefore, a certificate of merit must be filed for an informed consent claim which alleges an incomplete disclosure of the risks of surgery. The court did not address whether a certificate of merit is needed in cases involving the performance of an unauthorized procedure. **See also, Leaphart v. Prison Health Servs., Civil No. 3:10-CV-1019, 2010 U.S. Dist. LEXIS 135435 (M.D. Pa. Nov. 22, 2010) (citing, inter alia, Pollock, and noting, "Moreover, Pennsylvania caselaw construing this certificate of merit requirement has expressly extended the requirement to malpractice claims like those brought here that are grounded in an alleged failure to obtain informed consent") (Magistrate Judge's recommendation), adopted by, 2010 U.S. Dist. LEXIS 135448 (M.D. Pa. Dec. 21, 2010).**

In Isaac v. Jameson Memorial Hospital, 932 A.2d 924 (Pa. Super. Ct. 2007), the court examined whether a Medicaid regulation governing the informed consent procedures necessary to obtain federal reimbursement have any relevance to a cause of action for informed consent. The court only examined a single set of Medicaid regulations governing reimbursement for sterilization procedures and did not make a blanket conclusion regarding the relevance of all Medicaid regulations to an informed consent claim.

First, the court examined the applicability of Medicare regulations to an informed consent claim against the hospital. The court examined Fritter v. Iolab Corp., 607 A.2d 1111 (Pa. Super. Ct. 1999), where the court created an exception to the general rule that health care institutions are not liable for a lack of informed consent. In Fritter, the court concluded the hospital "as a participant in a clinical investigation for the FDA" the hospital assumed a duty to ensure all patients participating in the study give informed consent. In contrast, the Isaac court found these particular Medicaid regulations do not place an independent duty on health care institutions to obtain informed consent. The court explained Medicaid regulations only set forth the preconditions necessary for federal reimbursement. Thus, the court concluded the Medicaid regulations do not place an independent duty on a hospital to obtain informed consent.

Next, the Isaac court examined the relevance of the Medicaid regulation on informed consent claims against a doctor. The court stressed the Medicaid regulation at issue did not relate to the quality of information provided to a patient and only related to the timing of a patient's consent for a sterilization procedure. The court noted that Plaintiffs were seeking to impose new duties upon a doctor beyond providing material information regarding a medical procedure. 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. 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. Ultimately, the court concluded the Medicaid regulations in question “do not impose a legal standard relevant to an action for lack of informed consent.”

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

The Supreme Court of Pennsylvania recently addressed whether the substantial factor element of an informed consent claim may be established solely through the testimony of the patient’s spouse.<sup>1</sup> See Fitzpatrick v. Natter, 599 Pa. 465, 961 A.2d 1229 (2008). In Fitzpatrick, The court held that the testimony of a patient’s spouse may be sufficient to prove the substantial factor element.<sup>2</sup> Id.

The evidence at trial revealed that Carol Fitzpatrick, appellant, was diagnosed with multiple sclerosis (“MS”) when she was nineteen years old, in or around 1972. In 1998 Carol became a patient of Dr. Natter, a neurologist. By 1998, Carol was having difficulty walking, had incontinence, intermittent pain, and other symptoms. Rather than continue taking oral doses of an anti-spasticity drug, Dr. Natter suggested that Carol undergo surgery to have a subcutaneous pump implanted that would administer the drug uniformly and continuously. Dr. Natter provided Carol with information on the pump, which included the risks and benefits associated with it, and referred Carol to appellee, Dr. Munz. Carol opted for surgery.

Subsequent to the surgery Carol’s condition deteriorated drastically until she became paraplegic, incontinent, and wholly dependent upon her husband, Thomas. In 2002, Carol and Thomas filed a professional liability action alleging breach of standard of care, battery or lack of informed consent, and loss of consortium.

A jury trial commenced in 2004 limited to the claims of lack of informed consent and loss of consortium. At trial, Thomas testified that he and his wife, Carol, made all medical decisions jointly and that, had all risks associated with Carol’s surgery been fully disclosed, Carol would have opted against surgery. According to the findings of the Court, Plaintiffs made the strategic decision for Carol not to testify, although she was present in the courtroom for most proceedings. In March 2004, the jury returned a verdict for Plaintiffs finding, in part, that appellee failed to obtain Carol’s informed consent before performing the pump implantation surgery and that information he failed to provide would have been a substantial factor in Carol’s decision to undergo the surgery.

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

<sup>2</sup> It should be noted that the court, in reaching its decision, interpreted informed consent statute 40 Pa. Cons. Stat. §1301.811-A, which has been repealed in favor of 40 Pa. Cons. Stat. § 1303.504, although the court did note that the statutes are materially similar for the purposes of its decision.

Appellee filed post-trial motions for a new trial and judgment notwithstanding the verdict. The trial court granted the motion for judgment notwithstanding the verdict, finding that Plaintiffs' informed consent claim failed as a matter of law. Specifically, the trial court found that Plaintiffs' claim failed because the informed consent statute required the patient herself to testify that the allegedly undisclosed information would have been a substantial factor in her decision making. The trial court reasoned that without Carol's testimony, the jury could only speculate as to what her thought process was and whether she had, in fact, provided informed consent to the surgery.

Appellants appealed the decision of the trial court to the Superior Court, which affirmed the grant of judgment notwithstanding the verdict in an unpublished opinion. The Superior Court panel determined that Thomas' testimony was insufficient to prove that the allegedly undisclosed information would have been a substantial factor in Carol's decision making. The panel reasoned that although Thomas could testify as to what *he* understood the risks of the surgery to be, or what *he* suggested to Carol regarding the risks, he could not testify about the significance Carol may have placed on the allegedly missing information.

The primary issue before the Supreme Court was whether the testimony of a person other than the patient can be sufficient to prove the substantial factor element. 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." Fitzpatrick, 961 A.2d at 1241. Thus, "a patient's decision to refrain from testifying at trial is not fatal to the claim." Id.

## **E. Hospital Liability**

### **1. 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 (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 (Pa. 1965). Today, Pennsylvania courts may impose liability on hospitals based on any one of three theories.

#### **(a) 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 (Pa. 1974), the Pennsylvania Supreme Court held for the first time that agency principles should also apply to operating physicians as well as hospitals. Because the hospital's liability is based on principles of agency law, a Plaintiff must show the existence of a master-servant relationship between the negligent staff member and the hospital.

Generally, a master-servant relationship will be found where the hospital not only controls the result of the work but has the right to direct the manner in which the work shall be

accomplished. In Valles v. Albert Einstein Medical Center, 758 A.2d 1238 (Pa. Super. Ct. 2000), aff'd, 805 A.2d 1232 (Pa. 2002), the court held, as a matter of law, that a hospital cannot be held vicariously liable for the failure of its physicians to obtain a patient's informed consent. In finding no evidence of control, the court explained:

While we agree with appellant 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.

It should also be noted that in a recent case, Toney v. Chester County Hospital, 961 A.2d 192 (Pa. Super. Ct. 2008), **appeal granted, 973 A.2d 415 (Pa. 2009)** 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 employed by the hospital allegedly misinterpreted an ultrasound as being normal, thus causing severe emotional distress for Plaintiff-mother after her child was born with severe birth defects (the Superior Court ultimately dismissed Plaintiff's claim for intentional infliction of emotional distress, however, for failure to set forth sufficient allegations in the Complaint to sustain her claim).

**On June 3, 2009, the Pennsylvania Supreme Court granted an appeal on this matter. The issue on appeal to be decided by the Court is:**

**Whether 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 (Pa. 2009). The court heard argument in March 2010, but has not yet reached a decision.**

**(b) Ostensible Agency**

In 1980, the Pennsylvania Superior Court recognized a second form of hospital liability. Capan v. Divine Providence Hosp., 430 A.2d 647 (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 generally Capan, 430 A.2d at 649.

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



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

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

In Yacoub v. Lehigh Valley Medical Associates, P.C., 805 A.2d 579 (Pa. Super. Ct. 2002), appeal denied, 825 A.2d 639 (Pa. 2003), the Pennsylvania Superior Court upheld the trial court’s decision to preclude Appellant from introducing evidence that Defendant radiologists were ostensible agents of Appellee, Lehigh Valley Hospital, with respect to their interpretation of two radiological studies taken of Appellant’s decedent. Citing Goldberg, the Court held that given the facts of this case, in order to impute liability on Lehigh Valley Hospital, not only would Appellant have had to show that the radiologists were negligent in reading the films at issue, but she would have also have been required to establish that such negligence contributed to the neurosurgeons making a faulty diagnosis. 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 Appellant’s harm, then the Court held that Appellant was precluded from establishing that the radiologists could have affected the jury’s determination as to causation.

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. Further, evidence that a physician holds staff privileges at a hospital shall be insufficient to establish vicarious liability through principles of ostensible agency. See 40 Pa. Cons. Stat. § 1303.516. The MCARE Act only applies to causes of action that arise on or after March 20, 2002. For cases that fall before March 20, 2002, the subjective standard used in Capan v. Divine Providence Hospital, 430 A.2d 647 (Pa. Super. Ct. 1980), applies.

(c) **EMTALA CASES**

**In Torretti v Main Line Hospitals, Inc., 580 F.3d 168 (3<sup>rd</sup> Cir. 2009), appellant Honey Torretti (“plaintiff”) was pregnant with her second child. Plaintiff’s pregnancy was considered high risk due to her diabetes. Plaintiff was referred to Paoli Hospital Perinatal Testing Center (“Paoli”) for monitoring during her pregnancy. Plaintiff’s primary obstetrician was Dr. McConnell, based out of Lankenau Hospital.**

Plaintiff had a routine monitoring appointment at Paoli scheduled for the Monday of Week 34 of her pregnancy. Two days before her appointment, she called Dr. McConnell twice, complaining of contractions, discomfort due to her large size and decreased fetal movement. Dr. McConnell informed plaintiff that she could come into Lankenau Hospital but that nothing could be done until Monday. Plaintiff chose not to go to the hospital that weekend and did not believe that her condition was emergent.

That Monday plaintiff arrived at Paoli for her routine monitoring appointment. During her appointment, a fetal non stress test was performed. The stress test did not show expected heart rate variability-normal accelerations and decelerations. Additionally, during the stress test, plaintiff began experiencing contractions. Due to these factors as well as plaintiff's abdominal circumference (fetus weighed 11 lbs.), Dr. Gerson of Paoli recommended that plaintiff should be sent to Lankenau Hospital for additional care. Plaintiff's husband inquired if she should be taken to Lankenau via ambulance, to which Dr. Gerson replied that it was not necessary. Plaintiff's husband then drove plaintiff to Lankenau. On the way to the hospital, they stopped at home. Once Plaintiff arrived at Lankenau, she had to wait 15 to 20 minutes for a room. Plaintiff was connected to a monitor and her condition "worsened quickly". Shortly thereafter, a physician from Dr. McConnell's group looked at the "preliminary results" and rushed plaintiff into surgery where she gave birth via caesarean section. Her child was born with severe brain damage.

Plaintiff brought suit in federal court under the Emergency Medical Treatment and Active Labor Act ("EMTALA"). 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".

The Third Circuit affirmed the decision of the district court holding that the EMTALA does not apply to outpatient visits even if the patient is "later found to have an emergency medical condition and [is] transported to the hospital's dedicated emergency department." The Third Circuit arrived at this holding by adopting 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). (The Court did leave the door open for a claim under the EMTALA in a situation where an individual comes to a hospital requesting treatment for an emergent condition despite having a pre-scheduled appointment within the hospital for a related or unrelated reason.) Therefore, because plaintiff presented to Paoli for a regularly scheduled appointment, she could not maintain an action under the EMTALA.

Despite the above holding, the Third Circuit also decided to analyze the substance of plaintiff's "stabilization claim" under the EMTALA for "future guidance." Plaintiff's EMTALA claim alleged that defendants violated EMTALA because they did not stabilize her emergent condition and inappropriately transferred her. The Court held that in order to maintain a stabilization claim under the EMTALA, plaintiff must show that plaintiff 1) had an emergency medical condition; 2) the hospital actually knew of the condition; and 3) the patient was not stabilized before transfer. The Court held that plaintiff cannot be successful in a EMTALA stabilization claim unless the defendant has "actual knowledge"

of plaintiff's emergency medical condition. Based on the facts outlined above, the Court found that "there is no evidence that any of the hospital staff at Paoli, and specifically Dr. Gerson, actually knew that [plaintiff's] condition was an emergency before directing her to Lankenau for further monitoring." Based on the above, the Court affirmed the decision of the District Court.

In Byrne v. The Cleveland Clinic, 684 F. Supp. 2d 641 (E.D. Pa. 2010), pro se plaintiff brought suit against the Cleveland Clinic and Chester County Hospital alleging claims under the EMTALA as well as state claims for breach of contract. The instant opinion was issued in response to defendants' motions to dismiss plaintiff's Amended Complaint under Federal Rules of Procedure 12(b)(1) and 12(b)(6).

Plaintiff alleges that he presented to Chester County Hospital Emergency Room and that despite complaints of severe chest pain and shortness of breath, he had to wait approximately six and a half hours for a "catheterization procedure."

The Court found that there was no diversity jurisdiction due to the fact that plaintiff and Chester County Hospital are residents of Pennsylvania. The Court went on to analyze whether Plaintiff had sufficiently alleged a claim under the EMTALA in order to establish federal question jurisdiction

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

#### **Plaintiff's Screening Claim**

The Court, relying on the holding of Correa v. Hospital San Francisco, 69 F.3d 1184 (1st Cir. 1995) (failure to attend to a patient who presents a condition that indicates an immediate and acute threat to life can constitute a denial of an appropriate screening under the EMTALA), found that plaintiff's chest pains "certainly constituted" an immediate and acute threat to life and that his allegations that he was ignored for multiple hours were sufficient to meet the pleading standard for an EMTALA screening claim.

#### **Plaintiff's Stabilization Claim**

The Court held that 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.

Accordingly, the Court denied defendants' 12(b)(6) motion in relation to the screening claim and granted their motion with regard to plaintiff's stabilization claims.

## **Plaintiff's Contract Claims**

The Court held that under Pennsylvania Law, a breach of contract action is permissible in the medical malpractice context, only when the parties have contracted for a specific result, which was not the situation in the instant case. The Court dismissed plaintiff's breach of contract claims.

In Kauffman v. Franz, No. 07-CV-5043, 2010 WL 1257958 (E.D. Pa. 2010), this memorandum opinion was issued in response to defendants' Motion For Reconsideration. Defendants claimed that the Court should reconsider its denial of their Motion for Summary Judgment based on the recent Third Circuit Opinion in Torretti v. Main Line Hospitals, Inc.

The facts presented to the Court in Defendants' Motion for Summary Judgment are as follows: Plaintiff's decedent contacted a friend and explained to her that he was experiencing chest pains and was having difficulty breathing and that he may be having a heart attack. Decedent's friend took him to the ER where he was admitted with a diagnosis of "difficulty breathing." The Triage Nurse listed decedent's chief complaint as an "anxiety attack." Decedent was seen by the ER attending who upon seeing a chief complaint of anxiety ordered a psychiatric assessment. The assessment was performed by a mental health worker who noted that decedent had come to the ER with complaints of chest pains. The mental health worker informed the attending that decedent had complained of chest pains. The attending followed up with decedent who at that point denied experiencing chest pain. Decedent was discharged from the hospital with a prescription for Ativan and died of a myocardial infarction six hours later.

The Court recognized that under Torretti, the plaintiff must show that the hospital must have actual knowledge of a patient's emergency condition before they can be successful under the "stabilization prong" of the EMTALA. In the instant case the Court found that the hospital had actual knowledge of decedent's emergency condition once decedent told the mental health worker that he was experiencing chest pain, despite denying the chest pain when asked by the attending later on.

Based on the above, the Court denied defendants' Motion for Reconsideration holding that even after Torretti, it was unable to determine plaintiff's EMTALA claim at summary judgment.

### **(d) Corporate Negligence**

#### **(i) General Rule**

In Thompson v. Nason Hospital, 591 A.2d 703 (Pa. 1991), the Pennsylvania Supreme Court held that a hospital owes a non-delegable duty directly to a patient. 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.

The Thompson 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.

#### (ii) **Requirement of Knowledge**

In Edwards v. Brandywine Hospital, 652 A. 2d 1382 (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.

The Superior Court explained that the Thompson theory of corporate liability would not be triggered every time something went wrong in a hospital which harms a patient. The court reasoned that acts of malpractice occur at the finest hospitals, subjecting the hospitals to liability under theories of *respondent superior* or ostensible agency. Edwards, 652 A. 2d 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. This requires evidence that the hospital knew or should have known about the breach of duty that is harming its patients." Id. The Superior Court thus affirmed dismissal of those corporate liability claims which Plaintiff was unable to support with evidence of a "systemic negligence" of which the hospital either knew or should have known.

In Welsh v. Bulger, 548 Pa. 504, 698 A.2d 581 (1997), the Pennsylvania Supreme Court granted allocatur to address "what type of evidence is necessary to establish a prima facie claim of corporate liability for negligence against a hospital pursuant to our decision in Thompson . . . ." Id. at 584. The Welsh 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 n.13.

The Welsh court did not require a showing of "systemic" negligence by the hospital Defendant in order to establish corporate liability.

In Krapf v. St. Luke's Hospital, 4. A.3d 642 (Pa. Super 2010), the plaintiffs, on behalf of the estates of five (5) decedents, filed wrongful death and survival actions against the defendant hospital. By way of background, a critical care unit ("CCU") nurse employed by the defendant hospital raised suspicion of harming patients by administering various intravenous medications without authorization. Id. at 645. A nursing manager initially investigated the situation after used and unused medications were found in a trash receptacle. Id. The hospital's attorney investigated. Id. During his investigation, employees raised concern about Nurse Cullen, but the attorney completed his investigation without interviewing Nurse Cullen or identifying the culprit. Id. Additional used and unused medications were found two (2) days later in another location. Id. The hospital's risk manager informed the attorney and advised him that Nurse Cullen may be to blame. Id. The attorney confronted Nurse Cullen and, despite denying the allegations, Nurse Cullen resigned. Id. at 645-646. The hospital's attorney investigated into whether any patients were harmed by the improperly administered medications and, based upon his investigation, apparently was confident that no patients were harmed. Id. at 646. Despite the attorney's findings, various nurses raised concerns about an unusually high number of patient deaths during Nurse Cullen's shift to the attorney, as well as the hospital's Clinical Care Coordinator and the CCU Nursing Manager. Id. at 646-647. Their concerns apparently were met with resistance and ultimately ignored. Id. at 647.

Approximately a year and a half later, Nurse Cullen was fired when his new employer had suspicion of inappropriate patient care. Id. In response to questioning by police, Nurse Cullen confessed to killing a number of patients, including the plaintiffs' decedents. Id. The plaintiffs subsequently filed suit against the hospital, alleging *inter alia*, corporate negligence. The hospital moved for summary judgment arguing that the plaintiffs' claims were barred by the statute of limitations. Id. at 648. The motion was denied. Id. The hospital appealed. Id.

In affirming the denial of summary judgment, the Superior Court addressed the sufficiency of the plaintiffs' corporate negligence claims. The Superior Court noted that

[the] corporate 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. This theory of liability creates a nondelegable duty which the hospital owes directly to the patient. Therefore, an injured party does not have to rely on and establish the negligence of a third party.

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. at 651 (citing Thompson v. Nason Hosp., 527 Pa. 330, 591 A.2d 703 (Pa. 1991)). In explaining the hospital's duties, the court stated that hospital staff and employees have "[a] duty to recognize and report abnormalities in the treatment and condition of [their] patients." Id. (citing Thompson, *supra*). A hospital may be held liable for a breach of the Thompson duties where it has constructive notice – "should have known" – but fails to act. Id. at 653. Moreover,

[c]onstructive notice must be imposed when the failure to receive actual notice is caused by the absence of supervision. We interpret "failure to enforce adequate rules and policies" as an analog to "failure to provide adequate supervision."

Id. The court concluded that the facts of record, specifically the testimony of the nurse who claimed that their concerns went ignored by hospital supervisors charged with investigating the situation, support the application of constructive notice. Id.

In Davis v. Frederick, 2010 WL 3566833 (E.D. Pa. Sept. 9, 2010), the plaintiffs filed a medical malpractice action against the physician and hospital arising out of allegedly negligent treatment of the plaintiff's decedent. The plaintiffs set forth, *intra alia*, claims of corporate liability against the hospital defendant. Id. at \*1. The defendant hospital filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Id. In its motion, the defendant argued that the plaintiffs failed to plead sufficient facts to support a claim of corporate negligence. Id. at \*2. In addressing the defendant's motion, the district court noted that "[u]nder Pennsylvania law, corporate negligence is a basis for hospital liability separate from the liability of the practitioners who actually have rendered medical care to a patient." Id. (internal citations and quotations omitted). The court noted the four (4) discrete areas of a hospital's general corporate duties as first recognized in Thompson. Id. Upon examining the plaintiffs' Complaint, the court found that the claim for corporate negligence was properly pled. Id. The court explained that the Complaint alleged that the hospital defendant

[failed] to insure that physician personnel and resident physicians practicing at [the defendant hospital] and participating in [the plaintiff's] treatment and care were appropriately knowledgeable, experienced, and trained in the management, diagnosis, treatment, treatment options and indications for gall bladder surgical intervention and complications from these medical conditions; [failed]

to implement adequate policies and procedures for discharge and follow-up of patients having outpatient abdominal surgery; and [failed] to formulate, adopt and enforce policies and procedures for adequate evaluations in the post-operative recovery unit to assure post-surgical patients are not discharged with post-operative life threatening complications.

Id. (internal citations and quotations omitted). The court found that the allegations fit within the four (4) Thompson duties. Additionally, the court held that the plaintiffs provided sufficient factual support to proceed with this claim. Id. Interestingly, the court noted, “[t]o the extent that the Complaint does not contain more specific factual allegations concerning the actual policies and procedures and any language therein, this is because Defendant, not Plaintiffs, is in possession of, and knowledgeable about, such policies.” Id. at \*3. Based on the facts as pled, the court found it “plausible” that the defendant hospital’s policies and procedures were responsible for the decedent’s death. Id. Accordingly, the court denied the defendant’s motion.

In Scampone v. Grane Healthcare Co., 2010 WL 2780315 (Pa. Super. July 15, 2010), the court upheld an extension of corporate liability beyond hospitals and against a nursing home facility, Highland Park Care Center, and the corporation managing the nursing home, Grane Healthcare Company. In this medical malpractice action, the plaintiff alleged that his decedent received substandard care and treatment, causing the decedent’s decline in health and death. Id. at \*1. Among the various claims, the plaintiff set forth a claim for corporate liability “premised upon the existence of chronic understaffing at the facility such that the employees were incapable of performing appropriate care to the nursing home residents, including [his decedent].” Id. Following trial, the jury concluded that the defendant nursing home was liable under theories of corporate and vicarious liability. Id. at \*2. The nursing home appealed. In the appeal, it argued, *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 \*3.

In addressing the types of entities which may be held liable under a theory of corporate liability, the court stated that it has previously extended liability to HMOs and medical professional corporations which are responsible for coordination of the plaintiff’s care and which “[assume] responsibility for the coordination and management of all patients.” Id. at \*5. In the instant case, the court held

that 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 \*6. Likewise, the court concluded that the corporation managing the nursing home is also subject to corporate liability for understaffing. **Id.** at \*21. The court noted that the management corporation exercised complete control over all aspects of the nursing home's operation. **Id.** 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. Specifically,

Grane established and administered a quality assurance program to ensure the nursing facility provided quality nursing care to its residents. Part of this program included establishing an operating budget for Highland, which in turn would staff the nursing facility according to Grane's budget recommendations. Additionally, employees of Grane worked at the nursing facility and oversaw the daily operation of the nursing staff and the administration of the facility. Grane hired the RNs and appointed the directors of nursing. Further, any money remaining in Highland's bank account at the end of the month was transferred to Grane. Grane's involvement with the operation of the nursing facility and its sway over Highland garnered them control over the total health care of the residents similar to the hospital, HMO, and medical professional corporation....

**Id.**

The Superior Court concluded that issues of staffing fall within the four (4) **Thompson** duties for which a corporation may be held directly liable. **Id.** at \*7. The court explained,

[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.**

With regard to expert testimony, the "[p]laintiff 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 harm to the plaintiff." **Id.** at \*18. The court noted that the plaintiff established breach and causation by expert testimony from a nurse practitioner. **Id.**

Similarly, the Eastern District of Pennsylvania permitted a corporate liability claim to be pursued against MHM Correctional Services, Inc. ("MHM"), a corporation which provided mental health services to prisoners. **Zheng v. Palakovich**, 2010 WL 158521 (M.D. Pa. Apr. 12, 2010).

By way of background, the decedent was an inmate at State Correctional Institute at Smithfield. Id. at \*1. Defendant MHM was a private company that was contracted to provide mental health services to the Smithfield inmates. Id. The decedent was diagnosed as severely mentally disabled and required continued psychiatrist treatment. Id. Over the course of approximately one (1) year, the decedent submitted numerous requests seeking a mental health evaluation, follow-up care with a psychiatrist, as well as psychotropic medications which he previously had been taking for years but MHM discontinued. Id. at \*1-2. Despite expressing concern that he may harm himself, many of these requests were ignored. Id. Moreover, although apparently treated as the decedent “acting out”, on two (2) occasions, the decedent sliced his wrist and arm with a razorblade. Id. at \*2. Nearly one (1) year after his initial request, the decedent hung himself with a bed sheet in his cell. Id. at \*3. Among other claims, the plaintiff, administrator of the decedent’s estate, set forth a claim of corporate liability against MHM. Id. at \*4. Specifically, the plaintiff alleged that “MHM’s policies prevented [the decedent] from receiving proper in or outpatient psychiatric care, and that these policies were motivated by MHM’s desire to maximize profits.” Id. at \*3. The plaintiff maintains that, due to MHM’s policies, the decedent did not receive appropriate care, which caused a decline in his mental health and ultimately his death. Id.

The defendant MHM filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Id. at \*4. In its motion, the defendant argued, *inter alia*, that the “plaintiff has failed to state a claim of corporate liability as this is a limited cause of action in Pennsylvania which does not extend beyond hospitals.” Id. at \*7. The district court noted that the Pennsylvania Supreme Court had not yet ruled on this issue; therefore, it was tasked at attempting to predict how that court would rule. Id. The court agreed with prior decisions of the Eastern District of Pennsylvania, as well as other lower Pennsylvania state courts, which have permitted corporate liability claims against private companies, such as MHM. Id. Specifically, the court explained that the Pennsylvania Courts have held institutions liable where the patients “[h]ad been constrained in their choice of medical care options by the entity sued.” Id. Moreover, the court noted “[n]o difference between the services provided by a hospital and the services provided by health care institutions in prisons.” Id. Consequently, the court concluded that “[a] corporation which provides medical services must be held to the same duty of care as hospitals.” Id. at \*8. The court further found that the plaintiff had sufficiently pled this claim. Accordingly, the defendant’s Motion to Dismiss was denied on this issue. Id.

See also Vochinsky v. Geo Group, Inc., 2009 WL 4017254 (E.D. Pa. Nov. 20, 2009) (holding plaintiff failed to state corporate liability claim where plaintiff failed to allege corporate defendant’s knowledge of defect in procedure that resulted in harm to plaintiff).

In Stroud v. Abington Memorial Hospital, 546 F. Supp. 2d. 238 (E.D. Pa. 2008), the United State District Court for the Eastern District of Pennsylvania held that, under the more liberal federal pleading standards, Plaintiff sufficiently pled a claim of corporate negligence despite failing to allege that Defendant hospital was aware of its inadequate policies and procedures.

In Stroud, Plaintiff sued Defendant Abington Memorial Hospital (“Abington”) following the death of his father due to complications after knee surgery. In the Complaint, Plaintiff alleged that Abington was negligent for failing to have in place and enforce proper policies and procedures for interdepartmental communication. Id. at 242. Defendant Abington subsequently filed a Motion to Dismiss pursuant to Federal Rule 12(b)(6), arguing, *inter alia*, that Plaintiff’s Second Amended Complaint failed to state a claim for corporate negligence by “fail[ing] to adequately plead that it knew or reasonably should have known of the alleged failings in its patient care procedures.” Id. at 245.

Taking into the account the relaxed federal pleading standards, the court held that although plaintiff had not expressly pled that Abington actually or constructively knew of the alleged defects in its patient care procedures:

The Second Amended Complaint does however contain a detailed recitation of the facts upon which the corporate negligence claim is predicated. In addition, he specifically pled, among other things, that Hospital failed to have proper rules, policies, and procedures in place concerning communication of critical test results and availability of existing patient medical records from prior admissions. He also specifically pled that Hospital failed to enforce its existing rules, policies, and procedures concerning such matters. These pled facts are certainly sufficient to give notice to Hospital that Plaintiff reasonably asserted that its interdepartmental communication procedures were deficient, and that this deficiency was the predicate upon which the corporate negligence claim was based.

Id. at 246 (citations omitted).

Accordingly, the court concluded that that Plaintiff’s corporate negligence claim stated a legally cognizable cause of action under the Federal Rules, and Abington’s motion to dismiss was denied (the corporate negligence claim was ultimately dismissed on other grounds, however). Id.

### (iii) 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, 548 Pa. 504, 698 A.2d 581 (1997).

In Rauch v. Mike-Mayer, 2001 Pa. Super. 270, 783 A.2d 815 (2001), appeal denied, 568 Pa. 634, 793 A.2d 909 (2002), the Superior Court held that where a hospital’s negligence is not obvious, Plaintiff’s expert witness must, in order to make out a *prima facie* case of medical malpractice, 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. Plaintiff’s experts’ reports in this case had fulfilled these requirements and, therefore, the trial court had erred in granting Defendant’s Motion for Summary Judgment. The Superior Court reversed.

#### (iv) **Certificate of Merit Required**

A claim for corporate negligence against a hospital (or other qualifying corporate entity) requires the filing of a proper Certificate of Merit stating that an appropriate licensed professional has opined in writing that there is a “reasonable probability” that the care, skill, or knowledge associated with the treatment, practice, or work of the defendant fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm. See Pa. R. Civ. P. 1042.3; see also, Rostock v. Anzalone, 904 A.2d 943 (Pa. Super. Ct. 2006); Weaver v. Univ. of Pittsburgh Med. Ctr., No. 08-411, 2008 U.S. Dist. LEXIS 57988 (W.D. Pa. July 30, 2008). Critically, a Certificate of Merit submitted in support of a corporate negligence claim must allege that the corporate entity *itself* deviated from the appropriate standard of care, not that the corporate entity’s liability is based solely upon the actions or inactions of other licensed professionals for whom the hospital is responsible. See id.; see also Stroud v. Abington Mem’l Hosp., 546 F. Supp. 2d 238 (E.D. Pa. 2008) (holding proper Certificate of Merit alleging direct corporate negligence must be filed in support of corporate negligence claim, subject to certain equitable considerations).

Of note, in Everett v. Donate, No. 3:CV-08-1243, 2010 WL 1052944, \*3 (M.D. Pa. Mar. 22, 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 to Abdulhay v. Bethlehem Medical Arts, 2005 WL 2416012 (E.D. Pa. Sept. 28, 2010), and held that under the Erie doctrine, “federal courts must apply [Rule 1042.3] to state law claims arising under pendent jurisdiction.” Id. The court also noted that plaintiff’s incarceration or pro se status is not a viable excuse for plaintiff’s failure to comply with Rule 1042.3. Id. at \*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.

## 2. **Limitations on Corporate Liability**

### (a) **Informed Consent**

In Valles v. Albert Einstein Medical Center, 805 A. 2d 1232 (Pa. 2002), Plaintiff sought to impose vicarious liability on Defendant hospital for the alleged failure of one of its employee-physicians to obtain informed consent in connection with both the performance of an aortogram and the placement of a catheter. The trial court had granted summary judgment in favor of Defendant physician and hospital, and the Superior Court had affirmed.

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.” Consequently, the court held bluntly that “a medical facility cannot be held vicariously liable for a physician’s failure to obtain informed consent.”

The Supreme Court affirmed the Order of the Superior Court, which had affirmed the trial court’s grant of summary judgment in favor of Defendants.

The Valles court noted, however, that in cases where the hospital specifically assumes the duty to obtain a patient's informed consent, it will be subject to direct liability. See Friter v. Iolab Corp., 607 A.2d 1111 (Pa. Super. Ct. 1992) (finding hospital liable for the lack of informed consent when it was involved in a clinical investigation on behalf of the Food and Drug Administration 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 Hospital, 814 A.2d 766 (Pa. Super. Ct. 2002), appeal denied, 854 A.2d 968 (Pa. 2004), 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.

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

We are satisfied that the trial court acted properly when it dismissed Count IV of Husband and Wife's Amended Complaint. It is clear that Count IV of the Amended Complaint sets forth a claim of corporate negligence because it alleges that CMC "had a duty to and/or assumed the duty to inform [Husband] of the fact that catheterization was to be performed on him [ ]." See Husband and Wife's Amended Complaint, 3/21/1997, at 9. Pennsylvania law forbids a claim of corporate negligence against a hospital to be founded upon a theory that the hospital failed to ensure the patient's informed consent. Accordingly, Count IV of Husband and Wife's Amended Complaint failed to state a cause of action, and the trial court acted properly when it dismissed the claim. Therefore, Husband and Wife's argument fails.

Id. at 225.

**(b) Sovereign Immunity**

In Dashner v. The Hamburg Center of the Dept. of Public Welfare, 845 A.2d 935 (Pa. Commw. Ct. 2004), appeal denied, 858 A.2d 111 (Pa. 2004), the Commonwealth Court explicitly followed Moser v. Heistand, 681 A.2d 1322 (Pa. 1996), in holding that Defendant intermediate care facility for the mentally retarded 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. Based on its holding, the Commonwealth Court reversed the trial court's order denying Defendant-facility's motion for summary judgment.

(c)     **Limitations of Corporate Negligence**

Until relatively recently, neither the Supreme Court of Pennsylvania nor the State Superior Court had addressed the issue of whether the doctrine of corporate liability should be extended to physicians' practices or professional corporations. Then, in Sutherland v. Monongahela Valley Hospital, 856 A.2d 55 (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 held only that the court would not extend the negligence principles of Thompson "to the case *sub judice*," the reasoning of the court appears to apply more generally. The court reasoned:

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. Hospital of the University of Pennsylvania, No. 06-3561, 2006 U.S. Dist. LEXIS 69119 (E.D. Pa. September 25, 2006), the United States District Court for the Eastern District of Pennsylvania denied Defendants' motion to dismiss Plaintiff's corporate negligence claim against Defendant hospital trustees, health system and practice group. The court noted that although the Pennsylvania Supreme Court has not addressed the extension of corporate liability to medical providers other than hospitals, other courts (such as the Pennsylvania Superior Court in Shannon v. McNulty, *infra*) 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." 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.

**In Hyrcza v. West Penn Allegheny Health System, Inc., 978 A.2d 961 (Pa. Super. Ct. 2009), reargument denied, 2009 Pa. Super. LEXIS 4448 (Pa. Super. Sept. 11, 2009), the Superior Court confronted numerous objections raised by Defendant-appellants, a physician and a professional corporation, after a trial on claims sounding in medical malpractice and corporate negligence resulted in the entry of a multi-million dollar judgment against them. One of the arguments the Superior Court confronted on appeal, was whether the jury should have been charged on the issue of corporate negligence, with respect to the appellant professional corporation. The appellant corporation argued that professional corporations are not liable under a theory of corporate negligence. The Superior Court acknowledged its prior decision in Sutherland v. Monongahela Valley Hospital, 856 A.2d 55 (Pa. Super. Ct. 2004), in which it had declined to extend the doctrine of corporate negligence to physicians' offices. Ultimately, however, the Hyrcza Court**

concluded that the appellant corporation was more in the nature of a hospital or HMO, as to whom corporate negligence claims have been found viable. Citing to both Thompson v. Nason Hospital, 591 A.2d 703 (Pa. 1991) and Shannon v. McNulty, 718 A.2d 828 (Pa. Super. Ct. 1998), the Hyrca court concluded that the trial court did not err in charging the jury on corporate negligence.

By way of additional background, the professional corporation at issue held an agreement with the rehabilitation unit of a hospital, “to provide medical care for patients admitted to its Rehabilitation Unit.” Hyrca, 978 A.2d at 966 (quoting the Trial Court Opinion). The professional corporation was responsible for the decision to assign the Defendant-appellant physician to Decedent’s care, following Decedent’s successful hip surgery. Plaintiff theorized that Defendant physician erred in prescribing and continuing decedent “on two medications, which, in combination, are known to cause stomach bleeding, without taking appropriate precautions or monitoring her.” Id. at 967 (quoting the Trial Court Opinion). Apparently, Decedent had showed signs of gastrointestinal bleeding on July 4, 2001, two days prior to the time that the Defendant-appellant physician left the professional corporation’s care. On July 8, 2001, the decedent had to be transferred to the intensive care unit for shortness of breath; she died two days after that, “from massive gastrointestinal bleeding.” Id. at 967 (quoting the Trial Court Opinion). Notably, after the appellant physician left the professional corporation’s employ, the professional corporation did not assign another physician to Decedent’s care. Id.

The Superior Court wrestled with whether Defendant-appellant corporation was more akin to a Hospital or HMO on the one hand, or a physician’s office on the other, the latter of which no liability attaches to under a corporate negligence theory. The trial court found that:

[Defendant-appellant] arranged and coordinated the total health care for its patients in the Rehabilitation Unit. [The appellant-corporation] was responsible for all of the medical care of patients in the Rehab Unit. There was testimony from physicians affiliated with [the appellant-corporation] that the corporation had all the duties of a hospital under [*Thompson*] except the duty to use reasonable care in the maintenance of safe and adequate facilities and equipment . . . .

...

After [the appellant-physician] left, [the appellant-corporation] did not assign another physician to attend to Decedent. It did not arrange for another physician to check on her after July 5<sup>th</sup>, literally leaving her in the Rehabilitation Unit bleeding to death.

Id. at 983. The Superior Court concluded that the appellant corporation was “responsible for the coordination and management of all patients in the rehabilitation unit at [the hospital], which it independently operated,” and that it “failed to deliver the

comprehensive care it was contractually obligated to provide the Decedent.” Id., at 984. The Superior Court thus agreed with the trial court’s decision to charge the jury regarding corporate negligence.

Even more recently, our Superior Court held that the doctrine of corporate negligence applies to nursing homes. In Scampone v. Grane Healthcare Co., 2010 PA Super 124, 2010 Pa. Super. LEXIS 1486 (Pa. Super. Ct. 2010), reargument denied, 2010 Pa. Super. LEXIS 3250 (Pa. Super. Ct. Sept. 24, 2010), a decedent’s executor brought suit for the allegedly inadequate care received by the decedent at a nursing home facility. The Superior Court reasoned that nursing homes are sufficiently akin to hospitals, to support the application of the doctrine of corporate negligence. The Superior Court wrote:

Herein, we conclude that 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. Plaintiff’s decedent was a full-time resident of the nursing home, and with the exception of occasional visits from her own doctor, Highland oversaw her care twenty-four hours a day, seven days a week. In addition, whenever a patient entered the facility, a Highland nurse assessed the patient and developed the appropriate health care plan for that patient, including rehabilitative services. Highland was responsible for coordinating nearly all of the health care of its patients. Even though Highland did not have staff physicians, it was responsible for ensuring that all doctor-ordered testing was performed. Clearly, the degree of involvement in the care of patients of skilled nursing home facilities is markedly similar to that of a hospital and bears little resemblance to the sporadic care offered on an out-patient basis in a physician’s office. Hence, we hold that the trial court correctly concluded a nursing home could be found liable under a corporate negligence theory.

Id., 2010 Pa. Super. LEXIS 1486 at \*21. The Court also reversed the grant of non-suit against the management company of the nursing home, finding that it too, could be held liable under the doctrine of corporate negligence. Id., 2010 Pa. Super. LEXIS 1486 at \*71 (“Grane is also subject to corporate liability for the understaffing based upon the extent of its corporate control over Highland”). Moreover, it is of interest to note that the Superior Court found that a corporate negligence claim can be based on inadequate staffing levels. Id. at \*22 (“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.”).



**(d) HMO Liability**

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

The Court held that the doctrine of corporate liability should extend to HMOs. Central to the Shannon court’s conclusion was its finding that HMOs, like hospitals, “play central role[s] in the total health care” of their patients. Id. at 835 (quoting Thompson, 591 A. 2d at 708). The court reasoned that the 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 (staffed by the HMO’s triage nurses) 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 Superior 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.

**3. Peer Review Protection Act (“PRPA”)**

**(a) HMO Issues**

In McClellan v. Health Maintenance Organization, 686 A.2d 801 (Pa. 1996), the executors of the estate of a patient who died from malignant melanoma sued Decedent’s doctor and Health Maintenance Organization (HMO) for negligence, breach of contract and misrepresentation. The Superior Court was presented with the issue of whether the PPRPA precludes the discovery of peer review material in an action against an Independent Practice Association HMO. The court held that since HMOs are not specifically identified by the legislature as health care providers, it will not construe the statute to extend protection or confidentiality to the HMO in this case.

On appeal, the Supreme Court was evenly divided. Consequently, the order of the Superior Court was affirmed. 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. Moreover, HMOs conduct peer review to select competent doctors. Since other health care facilities that conduct peer review are protected from producing confidential peer review documents, HMOs should also be protected. Justice Nigro wrote that this conclusion is consistent with the purpose of the Act—to foster candor and frankness at peer review committee meetings. Justice Zappala, who also wrote in favor of reversal and was joined by Justice Castille, stated that hospitals and IPA model HMOs are sufficiently similar as to impose on both a duty to select and retain competent physicians. He then went on to conclude that IPA model HMOs merit the same protection as is afforded to hospitals under the Act.

Those justices who wrote in support of affirming the Superior Court Opinion stated that the definition of “health care provider” in the Act is ambiguous. Thus, they sought to ascertain the intention of the General Assembly. Using the statutory construction doctrine of *ejusdem generis*, the Justices concluded that an HMO is not a health care provider or administrator of a health care facility as defined by the Act. Accordingly, the justices held that an HMO cannot be “embraced by the confidentiality protection of the Act”.

**(b) Discovery of Hospital Files**

In Pirolì v LoDico, M.D., 909 A.2d 846 (Pa. Super. Ct. 2006), Plaintiff sued a physician and his practice after his wife died following a transforaminal epidural steroid injection during which, Plaintiff alleged, Defendant punctured Decedent’s vertebral artery. At issue in this case was whether information gathered during a peer review was discoverable under the Peer Review Protection Act (“PRPA”) given that individuals other than health care providers (including a billing manager) were present during the peer review session. Id. 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 the trial court’s judgment and held that the information *was* protected by the PRPA even though non-health care professionals were present at the peer review session. Id. As explained by the Superior Court, the Peer Review Protection Act protects the confidentiality of information gathered and presented by “review organizations,” defined as:

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

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

Despite the PRPA’s provision that peer review must be conducted by “health care professionals,” however, the Superior Court gave more weight to the purpose of the statute than to the plain language. 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.” Pirolì, 909 A.2d at 850 (quoting Troescher v. Grody, 869 A.2d 1014, 1020-1021 (Pa. Super. Ct. 2005)). The court explained, furthermore, that the “‘overriding intent of the Legislature’ is to ‘protect peer review records.’” Id. at 849 (quoting Troescher v. Grody, 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. The Superior Court thus concluded that the information sought by Plaintiffs *was* protected by the PRPA despite the fact that a billing agent was present at the peer review session. Id. at 853.

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

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

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

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

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

**See, Ellison v. Women & Children's Hosp. of Buffalo, C.A. No. 08-313 Erie, 2010 U.S. Dist. LEXIS 130828 (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.”), citing, *Dodson v. Deleo*, 2005 PA Super 137, 872 A.2d 1237, 1242-43 (Pa. Super. 2005).

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

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

#### IV. MENTAL HEALTH LAW

##### A. Qualified Immunity Standard

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

In Emerich v. Philadelphia Center for Human Development., Inc., 720 A.2d 1032 (Pa. 1998), a case of first impression, the Pennsylvania Supreme Court held that, under certain limited circumstances, mental health professionals have a duty to warn third parties of serious bodily threats made by their patients. 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, 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.

Emerich, 720 A.2d at 1043.

In the instant case, the Pennsylvania Supreme Court concluded that the requisite psychiatrist-patient relationship existed and that the psychiatrist had a duty to warn the third party non-patient of any potential harm that his patient posed to the third party based on serious threats made by the patient.

The court found that Defendant psychiatrist discharged this duty 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. 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 to protect another by warning the intended victim of possible danger.

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.” It 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. at 1038, n.7.

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

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. Decedent was involved in an altercation with another LZ resident in which he wielded a knife. As a result, LZ and VA decided to discharge Decedent. VA had an opportunity to commit Decedent but ignored warning signs of Decedent’s imminent physiologic breakdown. Within a day of being discharged, decedent shot and killed two of his children, two of the neighbor’s children, and then killed himself.

Plaintiffs brought suit asserting claims, among others, of gross negligence, failure to warn and negligent infliction of emotional distress. After a bench trial, 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. With regard to the remaining claims, the trial court entered judgment for Plaintiffs.

On appeal, the Third Circuit affirmed the trial court’s ruling. The court, relying on Emerich found that Decedent never communicated a specific threat of immediate harm. Accordingly, the court found that Defendants did not have a duty to warn. With regard to the scope of other duties the VA may have owed to the victim children, the Third Circuit agreed with the District Court’s conclusions that: 1) liability could not be based on a Pennsylvania common-law duty owed to the victims; 2) the MHPA created a duty to the third-party victims, and 3) the VA had been grossly negligent and so had violated this duty. **See also Francis v. Northumberland Cty., 636 F. Supp. 2d. 368 (M.D. Pa. 2009) (holding a psychiatrist could be held liable for malpractice in relation to inmate’s death by suicide and was not entitled to qualified immunity under MHPA where jury could find that psychiatrist acted with “reckless indifference” with respect to prison’s suicide prevention protocol).**

**In Bayer v. Monroe County Children and Youth Services, 557 F.3d 186 (3d Cir. 2009), the mother of minor children who were removed from her custody brought a section 1983 claim against Monroe County Children and Youth Services (“MCCYS”) and two MCCYS employees, alleging that her due process rights were violated after a dependency hearing regarding her children’s custody was held more than seventy-two hours after removal. At the close of discovery, the MCCYS employees filed motions for summary judgment on grounds of qualified and absolute immunity and argued that they could not**

be held liable to Plaintiff as a matter of law. The trial court denied both motions and the MCCYS employees appealed.

On appeal, the Third Circuit noted that “[t]he doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” Bayer, 557 F. 3d at 191 (citing Pearson v. Calhoun, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d. 565 (2009)). Examining the facts of record, the court held that the actions of the MCCYS employees, including the filing and processing of the necessary paperwork for the dependency hearing, were reasonable under the framework set forth by the United States Supreme Court in Pearson. Accordingly, the court held that the MCCYS employees were entitled to qualified immunity as a matter of law and reversed the trial court’s denial of the employees’ respective motions for summary judgment. Because the court held that the MCCYS employees were entitled to qualified immunity, it did not reach the issue of absolute immunity.

## **B. Other Developments**

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. She called hospital Defendant to ask if she should stop taking her medications and a physician there recommended she take none until she consulted with her own physician. She did stop taking medications and her mental condition deteriorated. She was hospitalized, released and failed to show at a follow-up appointment. Shortly thereafter, she terminated the pregnancy. 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. 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. She argued that the MHPA immunity provisions did not apply because the alleged negligence related to voluntary outpatient treatment.

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

In Bell v. Mayview State Hospital, 853 A.2d 1058 (Pa. Super. Ct. 2004), the trial court dismissed an inmate’s purported medical malpractice claim as frivolous. The inmate alleged that Defendants misdiagnosed his mental condition, which resulted in him receiving a harsher sentence in a previous criminal matter. On appeal, the Superior Court reviewed his complaint for validity under Pennsylvania Rule of Civil Procedure 240. The court held that Plaintiff had failed to allege the existence of any physician-patient relationship that would impose any duty toward him on Defendants. He also failed to assert any breach of duty on the part of Defendants and simply surmised that because a much later evaluation yielded contrary results, the previous one was incorrect. The court held that the complaint failed to state a cause of action for medical negligence and affirmed the trial court’s order.

In Thierfelder v. Wolfert, M.D., 978 A.2d 361 (Pa. Super. Ct. 2009), patient brought an action for medical malpractice against her family physician, alleging that Defendant physician negligently engaged in a consensual sexual relationship with her while he was treating her for anxiety and depression, causing her to suffer significant psychological harm. The trial court granted Defendant doctor's preliminary objections on the grounds that Plaintiff failed to set forth sufficient facts to demonstrate a *prima facie* cause of action for medical malpractice, and Plaintiff appealed.

Reversing the trial court's holding, the Superior Court held that,

[s]ubstantively, we believe that a patient does have a cause of action against either a psychiatrist or 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.

Id. at 364. More specifically, in explaining the viability of a cause of action for medical malpractice resulting in psychological harm under these circumstances, the court noted that:

When a general practitioner is . . . rendering psychological care, just like a psychiatrist, that general practitioner owes a duty of professional care to such patient. The physician's actions coupled with his or her awareness of the patient's emotional issues (anxiety, depression and marital problems) carries with it a foreseeable and unreasonable risk of mental and/or emotional harm to the patient.

...

As such, it is very common that the patient is in a vulnerable position and as a result puts a high degree of trust in her doctor. In such relationships where the players are on unequal playing fields, it is even more incumbent on our legal system to protect patients from the malfeasance of medical professionals when they become sexually involved with their trusting patients.

Id. at 366. Accordingly, the Superior Court held that, based on the facts set forth in the Complaint, Plaintiff had established a *prima facie* cause of action for medical malpractice against Defendant physician.

It is also important to note that the court made a bright line distinction between the situation in which a doctor rendering psychological or psychiatric care as opposed to medical care, such as treatment for arthritis. In this latter situation, the court suggested that a cause of action for medical malpractice resulting from consensual sexual relations with a patient would not lie.



In Gormley v. Edgar, 995 A.2d 1197 (Pa. Super. 2010), Plaintiff motorist appealed a discovery order requiring her to produce emergency room records pertaining to mental health issues, arguing that the records were protected under the Mental Health Procedures Act (50 P.S. § 7101, et seq.), the Mental Health and Mental Retardation Act (50 P.S. § 4101, et seq.) and the Pennsylvania Alcohol and Drug Abuse Act (71 P.S. § 1690.101, et seq.), as well as the Pennsylvania psychiatrist-patient privilege (42 Pa.C.S. § 5944). Affirming the trial Court's Order, the Superior Court held that the MHPA, MHMRA and PADAA did not apply as Plaintiff voluntarily sought mental health treatment and drugs and alcohol were admittedly not at issue. Id. at 1202-1203. As for the psychiatrist-patient privilege, the Court noted that while the privilege is based upon a strong public policy designed to encourage and promote effective treatment, the privilege may be waived in civil actions where the plaintiff places the confidential information at issue in the case. Id. at 1204. Because Plaintiff sought damages for frustration and anxiety, the Superior Court held that the psychiatrist-patient privilege did not apply and concluded that "[Plaintiff] directly placed her mental condition at issue when she alleged that she suffered from anxiety as a result of the accident. Absent other considerations militating against disclosure, the records as discoverable." Id. at 1206.

## **V. STATUTE OF LIMITATIONS**

### **A. General Rule**

A statute of limitations provides that no suit shall be maintained for certain prescribed causes of action unless brought within a specified period of time after the right to bring suit has accrued. B.F.W.R. Co. v. Quaker City Flower 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 state claims which may greatly prejudice the defense of such claims.” Ins. Co. of N. Am. v. Carnahan, 284 A.2d 728, 729 (Pa. 1971).

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

### **B. Discovery Rule**

Pennsylvania law also recognizes the discovery rule, which extends this 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 (Pa. 2005); Ayers v. Morgan, 154 A.2d 788 (Pa. 1959); Bickford v. Joson, 533 A.2d 1029 (Pa. Super. Ct. 1987), appeal denied, 544 A.2d 959 (Pa. 1988).

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

The “discovery rule” provides an exception to the general rule that precludes a party from bringing suit once the statutory period expires. 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 (Pa. Super. Ct. 1990), appeal denied, 592 A.2d 45 (Pa. 1990). Accordingly, the “discovery rule” can serve to ameliorate the harsh effects of the statute of limitations.

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

Reasonable diligence is just that, a reasonable effort to discover the cause of an injury under the facts and circumstances present in the case. Long ago we recognized that there are few facts which diligence cannot discover, but there must be some reason to

awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence.

Cochran, 666 A.2d at 249.

The Court stressed that:

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

Id.

### **C. Recent Case Law Developments**

In Wilson v. El-Daief, 964 A.2d 354 (Pa. 2009), Mary Wilson filed a writ of summons against Samir El-Daief, M.D., and Montgomery Hospital Medical Center in October of 2003. The subsequent complaint alleged that Dr. El-Daief negligently lacerated her radial nerve during the surgical procedures on her wrist and hand in May and August of 2000. Dr. El-Daief and Montgomery Hospital sought summary judgment claiming that Ms. Wilson filed her claim beyond the requisite two year statute of limitations. Ms. Wilson argued that the discovery rule applied and tolled the statute of limitations until October 2001 when she first learned from another physician about her injury. Ms. Wilson noted that prior to finding out that she was injured, she was treating with Dr. El-Daief and another orthopedic surgeon for approximately thirteen months, and was always told by Dr. El-Daief that there was nothing wrong, even though evidence suggested that Dr. El-Daief was told by the other orthopedic surgeon that there were four possible causes for her condition. The common pleas court awarded summary judgment and explained that Ms. Wilson's cause of action arose after the second surgery in August of 2000 when she experienced constant, persistent, excruciating pain. Within several weeks of the second surgery it was noted that Ms. Wilson's hand contracted into a fist, her right elbow bent inward and her right elbow drew upward. The Superior Court affirmed.

The Pennsylvania Supreme Court reversed and held that a question of fact existed as to the accrual of the cause of action under the discovery rule precluded summary judgment. 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 180. 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...we believe the rules allow sufficient flexibility to avoid untenable results.” Id. at 182. 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 184-85.

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

I am compelled to write, however, as I believe the convergence of this Court’s adoption of the certificate of merit (COM) requirements and our application of the discovery rule in medical malpractice cases has the potential for unbridled mischief. Application of current Pennsylvania Jurisprudence places plaintiffs. Like Appellant, in the precarious position of being constrained to file a lawsuit before they know whether resulting symptoms are linked to a physicians malpractice or are common side effects of the procedure performed. Such an absurd consequence resulting from the application of these two countervailing principles of law should not be countenanced. To avert this fundamental unfairness, we should construe the discovery rule so as to toll the statute of limitations until the plaintiff obtains, or with the exercise of due diligence should have obtained, medical evidence sufficient to enable the plaintiff to link her injury to the acts of the defendant. In the instant case, there is no genuine issue of material fact that the lawsuit was filed within two years of when the Appellant, after diligent investigation, obtained medical evidence connecting her injury to the Appellee Dr. El-Daief’s actions. Thus, in my view, Appellant’s action was timely filed as a matter of law . . .

Id. at 187-88.

In Wilson v. King, No. 06-CV-2608, 2010 WL 1071651 (E.D. Pa. March 22, 2010), the Defendants, filed a Motion for Summary Judgment against Plaintiff Edward K. Wilson, whose original and amended complaints alleged that the Defendants engaged “in a civil conspiracy to deprive (him) of civil rights guaranteed under 42 U.S.C. § 1983.” Wilson, 2010 WL 1071651 at \*1. Plaintiff operated a newsstand in Philadelphia, Pennsylvania and sought a license to sell Instant Lottery Tickets. Plaintiff commissioned the necessary telephone line, but Defendant Lombardi, General Manager of Compass Management and Leasing, Inc. at Suburban Station, intervened and prevented the installation.

In its Answer to the Plaintiff's Third Amended Complaint, Defendant Verizon asserted the affirmative defense that the two-year statute of limitations for civil conspiracy claims under Pennsylvania law had already passed. Defendants then filed a Motion for Summary Judgment. As the basis for the Motion for Summary Judgment was procedural, the Court did not address the merits of the civil conspiracy claim, preferring "that the claim be disposed on the threshold basis of the statute of limitations." Id. at \*3 (quoting Bougher v. University of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989))

Under Pennsylvania's discovery rule, "the statute of limitations does not begin to run until 'the injured party knows, or in the exercise of reasonable diligence should have known, (1) that he has been injured, and (2) that his injury has been caused by another's conduct.'" Id. at \*5 (quoting Gleeson v. Prevoznik, No. 06-4969, 2007 WL 3307211 at \*4 (3d Cir. Nov. 8, 2007)). Therefore, although the Plaintiff claimed that he did not know of certain acts by the Defendants, which he alleged formed the basis of the claim for civil conspiracy, until well after the statute of limitations had run, the Judge determined that the facts were knowable and discoverable by the Plaintiff if he had sought them.

As to equitable tolling, the Court noted that as a preliminary matter the Plaintiff failed to exercise reasonable diligence, therefore, the equitable tolling doctrine was unavailable to him, as it "is an extraordinary remedy." Id. at \*7, (quoting Hedges v. United States, 404 F.3d 744, 751 (3d Cir. 2005)). Nevertheless, the Court also found that even if the Plaintiff had exercised reasonable diligence, the Defendants had not actively misled the Plaintiff as to the cause of action, there were no extraordinary circumstances preventing the Plaintiff from asserting his claim and that the Plaintiff had not filed his claim within the statute of limitations, yet in the wrong forum, which are the circumstances that would merit equitable tolling.

In Kach v. Hose, 589 F.3d 626 (3d Cir. 2009), plaintiff Tanya Kach was a 14-year-old student at Cornell Middle School when she began a relationship with defendant Thomas Hose, a security guard stationed at the school through a private security firm. Plaintiff then ran away from home and began living with defendant Hose, where she remained for ten years. Authorities removed her from the home in March of 2006 after she revealed her true identity to a friend. Plaintiff then instigated a lawsuit in District Court, suing defendant Hose and his parents, as well as her former school district, a number of its employees, and members of the McKeesport police department under state law and § 1983 claims. Defendants moved for summary judgment on the grounds that the § 1983 claims were time-barred and that Hose was not acting under the color of law. The District Court granted the motions and then declined to exercise supplemental jurisdiction over the remaining state law claims. Plaintiff Kach appealed the decision.

Plaintiff alleged that her claims were timely because the date of accrual of her injury should have been the date when she revealed her actual identity to her friend and was removed from defendant Hose's home. Plaintiff relied on Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir. 2006), in which the Court "carved out 'a narrow equitable exception to Kubrick's reasonable person standard for mentally incapacitated persons who, for whatever reason, do not have a legally appointed guardian to act in their

stead.” Kach, 589 F.3d 626 at 636. Plaintiff alleged that she was without a legal guardian during the time that she was in defendant Hose’s home. The Court noted that because the plaintiff reached the age of majority in 1999, even if she had lacked a guardian, she would have to prove that she was mentally incompetent prior to the government conduct that injured her in order to qualify for the Miller exception.

Additionally, plaintiff argued that Pennsylvania “recognizes duress as a statute-of-limitations tolling mechanism.” Id. at 639. The Court disagreed that the cases relied upon by the plaintiff concluded that duress was an appropriate reason for tolling a statute of limitations. The Court even did its own survey of Pennsylvania law and concluded that no cases have even hinted that duress is “a cognizable tolling device under Pennsylvania law.” Id. at 640. Plaintiff also argued that Pennsylvania’s discovery rule tolled the statute of limitations on her claims. However, the plaintiff seemed to confuse the discovery rule with Pennsylvania’s infancy tolling provision and its 2002 amendment permitting someone who suffered childhood sexual abuse to commence a civil action up to 12 years after reaching the age of 18. Nevertheless, the Court refers to the statutory language which clearly states that the amendment is not retroactive, therefore, because plaintiff’s claims were already time-barred at the moment the amendment was enacted, the Plaintiff could not rely on the statute to revive her claims. Plaintiff fared no better with her argument that federal tolling law made her claims timely because she could not show that Pennsylvania state law conflicted with a federal law or policy.

As to the issue of whether defendant Hose was acting under the color of state law, the Court determines that defendant Hose does not qualify as a state actor under any of the three tests outlined by the Supreme Court: “(1) whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state’; (2) ‘whether the private party has acted with the help or in concert with state officials’; and (3) whether ‘the [s]tate has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity.’” Kach, 589 F.3d 626 at 646 (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1142 (3d Cir. 1995)). The Court found that plaintiff’s assertions failed the first test because she put forth no evidence that school security is purely a function of the state. Similarly, the Court found that Plaintiff’s case failed the third test because there is no evidence that defendant Hose’s relationship with her was at the direction of any school official. Defendant Hose’s behavior was instead of his own accord and in violation of his prescribed duties. Therefore, he was not acting under color of law and the plaintiff’s § 1983 claim against him fails.

Finally, the Court rejected plaintiff’s argument that the District Court should have maintained jurisdiction over the state law claims that plaintiff raised against the defendants who failed to respond to the federal claims. The Court points to statutory language allowing district courts to decline supplementary jurisdiction if “the district court has dismissed all claims over which it has original jurisdiction.” Id. at 650 (quoting 28 U.S.C. § 1367(a)). Therefore, the Court found that the District Court was well within its rights to decline supplemental jurisdiction over the state law claims of the defaulting defendants.

**In Byrne v. The Cleveland Clinic, 684 F. Supp. 2d 641 (E.D. Pa. 2010), the *pro se* plaintiff brought suit against defendant under the Emergency Medical Treatment and Active Labor Act (EMTALA), as well as a state law claim for breach of implied contract. Defendants moved to dismiss on multiple grounds, including plaintiff's failure to file within the two year statutory period.**

**The court notes that although a 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 actions has not been brought within the statute of limitation.'" Id. quoting Zankel v. Temple Univ., 245 Fed. Appx' 196, 198 (3d Cir. 2007).**

**The court also notes 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*. The court specifically points out that the constructive date of filing is not the date the litigant mails the complaint or when the complaint is notarized.**

**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. The court acknowledged that although it could not yet be sure 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. As 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.**

**The court held that it could not dismiss the breach of contract claim on the statute of limitations grounds based on the same reasoning. It did, however, dismiss that claim on the grounds that the plaintiff alleged merely a delay in treatment and not a breach based on the quality or result of the treatment.**

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

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

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

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

In Ward, plaintiff had her wisdom teeth extracted by Dr. Rice on March 28, 1995. Immediately following the surgery, Plaintiff experienced some numbness and occasional tingling in her lip. Plaintiff told Dr. Rice of her condition, and he assured her it would go away. Plaintiff continued to treat with Dr. Rice until May, 1995. He continued to assure her the problems she was having would subside. Plaintiff asked Dr. Rice for a referral on July 5, 1995, but it was not until September 20, 1995 that he directed her to another doctor. Her first visit to the new doctor occurred on October 11, 1995. On September 26, 1997, Plaintiff filed a writ of summons. Dr. Rice filed a motion for summary judgment based on the statute of limitations and Ward responded that her action was timely because the record showed the statute had been tolled under the discovery rule and the doctrine of fraudulent concealment.

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

Because the cases covered the same issues, the Supreme Court consolidated the appeals. The Supreme Court decision reviewed the settled aspects of the discovery rule and then noted that it remained unsettled whether the rule requires that it be determined whether the injury and its cause were reasonably ascertainable *at any point* within the prescribed statutory period. One school of thought was that if they were—even if this occurred one day before the statutory period ended—the discovery rule does not apply and the statute is not tolled. Another camp believed that the discovery rule always applies to toll the statute if *at the time the injury occurs*, the injury or its cause is neither known nor reasonably knowable.

The Supreme Court held that “the discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises.” Id. at 859. To adopt the alternate position, the court reasoned, could lead in many instances to unreasonable and arbitrary results. It would also, the court explained, 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. at 860.



With respect to fraudulent concealment, that court noted that this also serves to toll the statute of limitations, but that the court has not yet ruled upon the circumstances under which a defendant, once estopped under this doctrine, may invoke the statute of limitations and commence its running. The court stated 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. Consequently, the 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.* at 861.

Applying the applicable principles of law to the cases at hand, the court found in both that Defendants were not entitled to summary judgment because in both cases the jury needed to determine what the dentist had said to the patient following surgery and whether these statements amounted to fraudulent concealment. Thus, there were genuine issues of material fact with respect to the statute of limitations defense.

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

Pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b)(1), Plaintiff filed a claim in federal court. The FTCA requires that a claim be filed within two years from which it accrues. Unlike Pennsylvania, the FTCA does not contain a minor tolling statute. However, it does contain a limited exception to save claims mistakenly filed in a state court within the two year statute of limitation.

Defendant filed a motion for summary judgment, claiming that the claim was barred as it was not filed within the FTCA’s two year statute of limitations. Although Plaintiff admitted that the claim was not brought within the FTCA’s two year statute of limitation, Plaintiff claimed that the statute of limitations should be equitably tolled. Plaintiff explained that she had no reason to believe that the clinic was a federal entity. However, Plaintiff admitted that she took no steps to confirm this assumption.

The Court found Plaintiff’s response unpersuasive and granted Defendant’s motion for summary judgment. The court explained, “Plaintiff’s error does 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.” *Santos*, 523 F. Supp. 2d at 443-44.

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. See Santos v. U.S., 559 F.3d 189 (3d Cir. 2009). The court explained that although the statute of limitations under the FTCA was not tolled due to Plaintiff's status as a minor, it was tolled for purposes surrounding Plaintiff's timely assertion of her rights in the wrong forum coupled with her exercising due diligence. See id. The court held that Plaintiff diligently and vigorously pursued her claim, albeit prior to realizing that she filed a state court action against a federal defendant. See id. at 198. Evidence in support of the diligence included the fact that she retained diligent counsel who requested and reviewed medical records, visited Defendant, corresponded with Defendant, performed a public records search on Defendant, retained experts, all of whom prepared expert reports. See id.

The Government argued that several other courts of appeals from other circuits held that the equitable tolling rule would not apply in those situations where Plaintiff failed to perform reasonable investigations that would have demonstrated that Defendants had been deemed federal employees covered by the FTCA. See id. at 199. The court explained that even the district court concluded that it was not clear whether Plaintiff knew or should have known that Defendant received federal funds. See id. at 200. The court went on to explain that the Plaintiff's belief that Defendant was a state entity, was far from a baseless assumption as Defendant resembled a private clinic and except for FTCA purposes, the clinic and its employees were private actors rather than federal employees. See id. Plaintiff's attorney also performed a public records search on Defendant which revealed it as an apparently private corporation. Plaintiff's counsel's many visits and discussions with Defendant also failed to provide any evidence that they were indeed a Federal entity. See id. at 200-01.

The Government argued, *inter alia*, that the website for Defendant indicated that it is a "federally qualified health center." See id. at 201. The court explained that although Defendant received grant support from the United States Department of Health and Human Services:

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

See Id.

**The court further held that if Defendant was a federal employee, it would not be expected to be receiving state and local government aid or charitable contributions. See Id. In conclusion, the court held that the record revealed no reasons which should have caused Plaintiff to inquire into the federal status of Defendant. See Id. at 202.**

**The court warned that its decision to apply equitable tolling to the FTCA claim came with great caution and was an extraordinary remedy that was rarely applied, however, tolling would be applied in situations where a reasonably diligent claimant could not discover a defendant's federal status. See Id. at 203.**

In Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir. 2006), Plaintiff's decedent was a severely-retarded sixty-four year old man with the mental age of a four-year-old child. Beginning in 1988, Decedent resided in a community living home, during which time Defendant doctors provided psychiatric treatment and prescribed psychiatric medications to Decedent. On October 4, 1995, Decedent was admitted to Frankford Hospital with possible acute rhabdomyolysis, a serious condition characterized by muscle breakdown. While Decedent was in Frankford Hospital, Plaintiff discovered that decedent had suffered an adverse reaction to the psychiatric medications. Decedent remained at Frankford Hospital until November 27, 1995 at which time he was transferred to Philadelphia Geriatric Center. Decedent resided at PGC until he was transferred to Temple University Hospital on September 9, 1997. Decedent died at Temple University Hospital on September 24, 1997 with the cause of death listed as sepsis.

Plaintiff (Decedent's sister) subsequently brought a survival action against Defendants, alleging that Defendant physicians had negligently prescribed excessive doses of psychiatric medications to decedent. Because one of the Defendant physicians was employed by a facility receiving funds from the federal government, Plaintiff sued the United States under the FTCA. The other Defendant physician was sued under Pennsylvania state law. Both Defendants raised a statute of limitations defense, arguing that Plaintiff's claims were time-barred because they were brought more than two years after the accrual of the injury. Plaintiff responded that the "discovery rule" should apply to toll the statute of limitations because Decedent's injury was not "discoverable" until Decedent's death. Plaintiff argued, furthermore, that in light of Decedent's profound mental retardation, she (i.e. Plaintiff) should be the "reasonable person" for purposes of determining when Decedent's injury was "discoverable." The district court granted summary judgment in favor of Defendants, and plaintiff appealed to the Third Circuit.

On appeal, the Third Circuit, in a split panel opinion, reversed the district court's ruling and held in favor of Plaintiff under both the FTCA and Pennsylvania law, holding that Pennsylvania's discovery rule did, in fact, toll the statute of limitations until decedent's death because a plaintiff exercising reasonable diligence could not have discovered Decedent's injury until that time. The majority of the panel based its decision on dicta contained in the 2005 Pennsylvania Supreme Court's Fine opinion, supra, which they found required a subjective, rather than an entirely objective, evaluation of when decedent should have been able to discover his injury and its cause. The Court also held that in cases involving the mentally retarded, a "narrow equitable exception" to the reasonable person standard should be carved out under federal law for purposes of determining when an injury is "discoverable" and when the two-year statute of limitations should be tolled.

In Miller v. Ginsberg, 874 A.2d 93 (Pa. Super. Ct. 2005), Plaintiff, who was born with a congenital defect known as a double ureter, contended that her ureter was negligently cut during an operation on 1/18/96, and that surgery to repair the cut was negligently performed on 1/21/96. Plaintiff had had many prior surgeries, resulting in scar tissue and adhesions to the bowel. The January 1996 surgeries eventually were determined to have caused her injuries of bladder reflux and loss of a kidney. She commenced suit in June 1998.

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

The Superior Court ruled that the high/low agreement was unambiguous and properly enforced. With respect to the urologist's claim that the statute of limitations barred the claim and the jury instruction and decision were improper, the court disagreed. The court noted that in all three trials, the trial courts had determined that the discovery rule was applicable due to the nature of Plaintiff's injuries and was a question of fact for the jury. While Plaintiff may have known her ureter was cut at the time of the January 1996 surgeries, a jury could conclude that it was not until she began treatment with a new doctor in August of 1996 that she became aware her injuries were related to these surgeries. This was particularly true since Plaintiff testified that the Defendant told her that her problems were not related to his treatment. The Superior Court held that there was no clear error of law, that the trial court had not abused its discretion in its jury instruction on the statute of limitations, and that the statute of limitations did not bar the claim.

In Devine v. Hutt, 863 A.2d 1160 (Pa. Super. Ct. 2004), the Superior Court affirmed the trial court's grant of summary judgment in favor of Defendant physician because Plaintiffs' did not reply to new matter, which had asserted the affirmative defense of the statute of limitations. Plaintiffs thereby waived their claimed defenses of estoppel, agreement, agency and/or apparent authority.

Plaintiffs had filed their medical malpractice complaint about two weeks before the statute of limitations expired, but did not have the complaint served on Defendant. A few days after the complaint was filed, a claims adjuster for the doctor's insurer acknowledged receipt of the complaint and was given a ninety day extension to file an answer. He was not an attorney and did not accept service on the doctor's behalf. He later did provide Plaintiffs with the name of an attorney for Defendant. About seven months after the complaint was filed, counsel for Defendant accepted service for the doctor but expressly reserved the right to assert the affirmative defense of the statute of limitations.

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

On appeal, Plaintiffs raised several substantive arguments as to why their claim should not be barred by the statute of limitations. The Superior Court found that Plaintiffs had waived any defense to the application of the statute by failing to respond to Defendant's new matter. The Court further found that Plaintiffs had waived their substantive arguments on appeal because they had not raised them in the court below by way of a timely response to Defendant's motion for summary judgment. Consequently, the order granting summary judgment in favor of Defendant was affirmed.

In Chaney v. Meadville Medical Center, 912 A.2d 300, (Pa. Super. Ct. 2006), reargument denied, 2007 Pa. Super. LEXIS 12 (Pa. Super. Ct. Jan. 2, 2007), Plaintiff brought a malpractice action against Meadville Medical Center (MMC) and a physician, Dr. Glenn A. Bollard, after her eighteen-year-old daughter died following a bout of pneumonia and severe hypoxia. After Plaintiff instituted her action, Defendants moved to have certain paragraphs and subparagraphs stricken from Plaintiff's complaint. The court granted Defendants' motion, and Plaintiff subsequently filed a petition for rule to amend her complaint. Plaintiff's petition was denied, and summary judgment was entered for Defendants. 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 . . . complaint." Id. at 303.

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'. . . [o]nly 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 303-4 (quoting Stalsitz v. Allentown Hosp., 814 A.2d 766, 776 (Pa. Super. Ct. 2002)).

Given that the statute of limitations had run before Plaintiff moved to amend her complaint, the Superior Court examined the proposed amendments and affirmed summary judgment with regard to the amendments establishing new causes of action against Dr. Bollard but reversed summary judgment with regard to the proposed amendments that merely amplified or expanded theories of liability that were included in the original complaint.

#### **D. Wrongful Death and Survival Actions**

The discovery rule is generally inapplicable to wrongful death and survival actions. See Pastierik v. Duquesne Light Co., 526 A.2d 323 (Pa. 1987); Anthony v. Koppers Co., 436 A.2d 181 (Pa. 1981); Moyer v. Rubright, 651 A.2d 1139 (Pa. Super. Ct. 1994), appeal denied, 659

A.2d 988 (Pa. 1995). Accordingly, in actions brought under the Wrongful Death and Survival Statutes, 42 Pa. Cons. Stat. §§ 8301-02, the statute of limitations commences, at the latest, upon the death of the individual, and not from the date the survivors knew, or should have known, the cause of death. This is true even if the deceased person is a child, as the minority tolling statute does not apply to a deceased minor, and does not toll such an action until two years after the child would have reached the age of eighteen. Holt v. Lenko, 791 A.2d 1212 (Pa. Super. Ct. 2002).

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

Since the mid 1980's, organized medicine has sought medical malpractice tort reform. The first statute reflecting this was Act 135 in 1996. This was rather short lived. Thereafter, the General Assembly enacted Act 13 -- The MCARE Act, and the Supreme Court promulgated a number of Rules.

### **A. MCARE**

The 2002 Medical Care Availability Act ("MCARE") marks 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 seeks to "level the playing field" in the area of malpractice litigation by both providing for patient safety and reporting while attempting to address the crisis of skyrocketing malpractice insurance premiums. 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: patient safety, medical professional liability, malpractice insurance and administrative provisions.

#### **1. Patient Safety**

MCARE includes numerous provisions seeking to ensure the safety of Pennsylvania patients. Specifically, MCARE creates the "Patient Safety Authority," under the supervision of the Pennsylvania Department of Health, and funded through assessments on licensed medical facilities. 40 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 1303.308 – 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." 40 Pa. Cons. Stat. § 1303.302. 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.* A facility's failure to report or comply with the reporting requirement may result in an administrative penalty of \$1,000 per day. 40 Pa. Cons. Stat. § 1303.313(f).

## **2. Medical Professional Liability**

### **(a) Informed Consent**

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

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

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

Under MCARE, as under the predecessor statute, informed consent results where the physician gives the patient (1) a description of the procedure and (2) the risks and alternatives that a reasonably prudent patient would need to consider to make an informed decision as to that procedure. The question of whether the physician obtained his patient's informed consent is still governed under the prudent patient standard. 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 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. See 40 Pa. Cons. Stat. § 1303.504(b). Expert testimony is also required to determine whether the procedure at issue constituted the type of procedure which necessitates informed consent and to identify the risks of that procedure, the alternatives to that procedure and the risks of these alternatives. See 40 Pa. Cons. Stat. § 1303.504(c). Under MCARE, as under Act 135, a Plaintiff must establish the element of causation in order to set forth a viable claim for lack of informed consent. Specifically, a physician is liable for failure to obtain informed consent of a patient only if the patient proves that receiving such information would have been a substantial factor in his decision whether to undergo that procedure. See 40 Pa. Cons. Stat. § 1303.504(d).

MCARE, unlike Act 135, also contains a provision stating that a doctor can be held liable for failure to obtain a patient's informed consent if the doctor "knowingly misrepresents to the



patient his or her professional credentials, training or experience.” 40 Pa. Cons. Stat. § 504(d)(2). This provision apparently overrules the Supreme Court case, Duttry v. Patterson, 771 A.2d 1255 (Pa. 2001), with respect to procedures performed after MCARE’s effective date.

**(b) Punitive Damages**

MCARE also makes changes to Pennsylvania’s law related to the imposition of punitive damages. Under the new law, 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 Pa. Cons. Stat. § 1303.505(a). A showing of gross negligence is insufficient to support punitive damages. 40 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 1303.505(c). Except in cases alleging intentional misconduct, the punitive damage award shall not exceed two hundred percent of the amount of compensatory damages awarded. 40 Pa. Cons. Stat. § 1303.505(d). For causes of actions arising after March 20, 2002, MCARE allocates twenty-five percent of the punitive damage award to the Medical Care Availability and Reduction of Error Fund, while the remaining seventy-five percent is paid to the prevailing party. 40 Pa. Cons. Stat. § 1303.505(e). (The MCARE Fund is discussed in greater detail below.)

A recent 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 (E.D. Pa. 2008). In Stroud, defendants argued that Plaintiff’s claims, which were based upon Defendants’ alleged failure to diagnose the decedent’s obstructed bowel, amounted to negligence at most and, therefore, did not support punitive damages. See id. As such, defendants filed a Motion to Dismiss Plaintiff’s punitive damages claim.<sup>3</sup> See id. Plaintiff countered that his pleading was sufficient to support a claim for punitive damages. Plaintiff also asserted that he was further entitled to a claim for punitive damages based upon Defendants’ alleged “cover up” of their prior negligence. See id.

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

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<sup>3</sup> The District Court in Stroud also addressed the adequacy of Plaintiff’s Certificate of Merit. The court’s analysis and holding with respect to the Certificate of Merit issue is addressed in another section.

With respect to Plaintiff's contention that Defendants' actions "covering up" their alleged negligence supported a claim for punitive damages, the District Court held that any alleged "covering up" of negligence by Defendants was independent from the underlying tort claims upon which Plaintiff's recovery was premised. See 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." See id. at 258. Thus, guided by the Superior Court and the Third Circuit, the District Court granted moving defendants' motion to dismiss plaintiff's claim for punitive damages premised on the theory defendants acted to cover up their prior negligence. See Id.

(c)     **Collateral Source Rule**

MCARE also makes noteworthy changes to the collateral source rule, which prior to MCARE, often permitted double recovery of economic damages by plaintiffs. Under the new law, 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 Pa. Cons. Stat. § 1303.508(a). While the plaintiff has the option to introduce into evidence the total amount of medical expenses he actually incurred, his right to recover is limited to only the total of those expenses for which the defendant is personally responsible. 40 Pa. Cons. Stat. § 1303.508 (b). Additionally, an insurer has no right of subrogation or reimbursement from a plaintiff's tort recovery. 40 Pa. Cons. Stat. § 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 (DPW), and public benefits paid under a program to which ERISA and other federal law preempts state law. 40 Pa. Cons. Stat. § 1303.508(d)(1)-(4).

(d)     **Calculation of Damages**

Under MCARE, juries are asked to separately enumerate a specific dollar amount for six different categories of potential damages (past and future medical expenses, past and future lost earnings, and past and future non-economic damages such as pain and suffering). 40 Pa. Cons. Stat. § 1303.509(a). Juries have to specify future medical expenses for each year. 40 Pa. Cons. Stat. § 1303.509 (a)(2)(i). For jurors, MCARE means that instead of reaching a consensus on one number totaling damages for future medical expenses, they will have to reach an agreement on six different categories of damages.

For causes of action arising after March 20, 2002, MCARE also changes the manner in which judgments including future lost earnings and future medical expenses are calculated. Instead of the former calculation method where future inflation was deemed to be equal to future interest rates, future lost income is to be reduced to present values based upon the return that the claimant can earn on a reasonably secure fixed income investment. 40 Pa. Cons. Stat. § 1303.510. Expert evidence will still be admissible with regards to the effects of productivity and inflation over time. Id. **Further, evidence of future wage loss must be supported by expert testimony. See Hartenstine v. Daneshdoost, 4 Pa. D. & C. 5th 282 (Lehigh Cty. Ct. Com. Pl. 2008).**

MCARE also changes the manner in which judgments, including future medical expenses, are paid. Under the statute, future medical expenses will be paid quarterly based upon the present value of the expenses awarded with adjustments for inflation and the life expectancy of the plaintiff. 40 Pa. Cons. Stat. § 1303.509(b)(1)-(2). These periodic payments will terminate upon the death of the plaintiff. 40 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 1303.505(b)(8).

**(e)      Preservation and Accuracy of Medical Records**

In another effort to protect the safety of patients, MCARE requires 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 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 1303.511(b)(2)(i)-(ii).

Additionally, MCARE addresses the consequence of an intentional alteration or destruction of a patient's medical records. 40 Pa. Cons. Stat. § 1303.511(c). The license of a medical professional who engages in such prohibited activity is subject to suspension or revocation. 40 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 1303.505(c).

This issue was also addressed by the Philadelphia County Court of Common Pleas in Bugieda v. Hospital of the University of Pennsylvania, 2007 Phila. Ct. Com. Pl. LEXIS 36 (Phila. Cty. Ct. Com. Pl. Feb. 6, 2007). In this case, the defendant hospital argued that, pursuant to the MCARE Act, 40 Pa. Cons. Stat. § 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. The Court rejected this argument and held that there was no indication that the MCARE charge was intended to replace the charge given in medical malpractice actions as noted by the Superior Court in Magette v. Goodman, 771 A.2d 775 (Pa. Super. Ct. 2001), appeal denied, 790 A.2d 1017 (Pa. 2001). The Court reasoned that the general rule regarding 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.

**(f)      Expert Qualifications**

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

Act, in order to qualify as an expert, a physician must possess an unrestricted medical license in any state (including the District of Columbia), and have been engaged in active clinical practice or teaching within the previous five years. 40 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 1303.512(c).

The 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. Under such circumstances, the court will certify a proposed expert where that proposed expert is trained in the treatment of the condition for which the defendant physician actually treated (where such condition is outside of the specialty of the defendant doctor). 40 Pa. Cons. Stat. § 1303.512(d)

However, many of these qualifications may be waived if the 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. 40 Pa. Cons. Stat. § 1303.512.

#### **(g)     Statute of Repose**

For causes of action arising on or after March 20, 2002, a seven-year statute of repose will apply. 40 Pa. Cons. Stat. § 1303.513. This provision will bar the commencement of a lawsuit asserting medical malpractice more than seven years from the date of the alleged tort or breach of contract. 40 Pa. Cons. Stat. § 1303.513(a). The Statute of Repose affects the influence of the "discovery rule." The "discovery rule" tolls the two-year statute of limitations for personal injuries until the patient becomes aware of the alleged tort, or reasonably should have become aware of the alleged tort. Prior to the enactment of MCARE, the discovery rule was available to delay the expiration of the statute of limitations for many years under certain circumstances. However, MCARE now limits the amount of time that the discovery rule can toll the statute of limitations by requiring that suits be brought within seven years despite a possibly later deadline previously available under the discovery rule.

It is worth noting that MCARE's Statute of Repose does not apply to situations where foreign objects are unintentionally left in the patient's body, or for affirmative misrepresentation or fraudulent concealment of the cause of death in wrongful death or survival actions. 40 Pa. Cons. Stat. § 1303.513 (c). Furthermore, minors may commence a lawsuit alleging a tort or breach of contract within the seven years under the Statute of Repose, or until their 20th birthday, whichever is later. 40 Pa. Cons. Stat. § 1303.513(d).

#### **(h)     Venue**

Significant changes have been enacted with respect to the propriety of venue in medical malpractice actions in Pennsylvania. First, the MCARE revised existing law regarding venue. Specifically, section 5101.1 of the Act relates to venue in medical malpractice actions. See 42 Pa. Cons. Stat. 5101.1. While previous venue principles essentially permitted an action to be filed in a county in which any defendant conducted business or had sufficient contacts, section

5101.1(b) specifically provides that a medical professional liability action may only be filed in the county in which the cause of action arose. See id.

Secondly, as noted above, the Pennsylvania Rules of Civil Procedure have recently been revised to conform to the General Assembly's changes set forth in MCARE. 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. See Pa. R. Civ. P. 1006(a.1). Moreover, 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). See Pa. R. Civ. P. 1006(c)(2). Section (f)(2) of the rule also sets forth 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). See Pa. R. Civ. P. 1006(f)(2). The revisions to Rule 1006 as applied to individual defendants are incorporated into the following other Rules of Civil Procedure: 2130 (Partnerships as Parties); 2156 (Unincorporated Associates as Parties); 2179 (Corporations and Similar Entities as Parties). See Pa. R. Civ. P. 2130, 2156, 2179.

By an Amendatory Order dated March 3, 2003, the Pennsylvania Supreme Court ruled that Pa. R. Civ. P. 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."

**(i) Remittitur**

Where a health care provider challenges a verdict on the basis of its excessiveness, MCARE establishes a standard for the court's evaluation of the challenge. 40 Pa. Cons. Stat. § 1303.515. The trial court shall consider whether the health care provider's satisfaction of the verdict will impact the availability of the community's access to medical care. 40 Pa. Cons. Stat. § 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. 40 Pa. Cons. Stat. § 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 court finds that requiring a bond in excess of the insurance policy limits would effectively deny defendant's right to an appeal. 40 Pa. Cons. Stat. § 1303.515(d).

**(j) Ostensible Agency**

MCARE modifies Pennsylvania's doctrine of ostensible agency for causes of action arising after the Act's effective date. Under pre-MCARE case law, plaintiffs were required to satisfy two factors before they could establish a cause of action against a healthcare institution under the ostensible agency theory, even where the alleged offending physician was not a member of the staff of the healthcare institution. First, plaintiffs must show that they looked to the health care institution as opposed to the individual physician, and that the institution "held out" the physician as its employee. Under MCARE, however, a healthcare provider can be held vicariously liable if the plaintiff shows that a "reasonably prudent person in the patient's

position” would believe that the care was being rendered by the hospital or its agents or that the care in question was “advertised or otherwise represented” as being care rendered by the hospital or its agents. 40 Pa. Cons. Stat. § 1303.516(a). MCARE changes the traditional subjective belief of the patient to a reasonable prudent person standard.

### **3. Insurance Reform**

MCARE created the Medical Care Availability and Reduction of Error Fund (“The MCARE Fund”) which replaced the Pennsylvania Medical Professional Liability Fund (“The CAT Fund”) as of October 1, 2002. 40 Pa. Cons. Stat. § 1303.712. Like its predecessor, the MCARE Fund provides insurance coverage in excess of the basic limits for each eligible health care provider. 40 Pa. Cons. Stat. § 1303.712(a). The MCARE Fund is subsidized through assessments on each participating health care provider. 40 Pa. Cons. Stat. § 1303.712(d). **An amendment** to the Act, entitled the “Health Care Provider Retention Program” (“HCPR”), **allowed** eligible healthcare providers to receive an abatement of this assessment upon application to the Insurance Department, in exchange for which the health care provider is required to attest in writing that he or she will continue to provide health care services in Pennsylvania for at least one full year following the year for which he or she receives the abatement. 40 Pa. Cons. Stat. § 1303.1101-1115 (**repealed 2009**). **However, in 2009, the HCPR was repealed. Id.**

Under MCARE, the minimum required limits of professional liability insurance are the sum of the basic limits (for policies issued or renewed in 2003, \$500,000 per occurrence or claim and \$1,500,000 per year for a participating provider) and the MCARE fund limits (\$500,000 per occurrence or claim and \$1,500,000 per year). 40 Pa. Cons. Stat. § 1303.711(d); § 1303.712(c). The basic limits are secured from private commercial insurance carriers, or, upon certain qualifications, through self-insurance. 40 Pa. Cons. Stat. § 1303.711. The MCARE fund will eventually terminate following satisfaction of all liabilities of the Fund. 40 Pa. Cons. Stat. § 1303.712(k). The MCARE fund limits, during the phase-out, will be reallocated to the basic insurance coverage provided by the private insurers (or the self-insurers). 40 Pa. Cons. Stat. § **1303.711(d), 712(c)-(d).**

The MCARE fund generally functions as excess coverage for medical providers. However, section 715 of the MCARE Act provides an exception, requiring the MCARE fund to act as primary insurer and provide first-dollar indemnity and defense to providers for eligible claims. 40 Pa. Cons. Stat. § 1303.715. To be eligible for this first-dollar indemnity of MCARE, also known as extended claims, section 715 requires the claim be made against an eligible provider more than four years after the alleged malpractice, and filed within the applicable statute of limitations.

**In Polyclinic Medical Center v. MCARE Fund, No. 399 M.D.2010, 2011 WL 9270 (Pa. Cmmw. Ct. Jan. 4, 2011), the Pennsylvania Commonwealth Court held that the MCARE Fund (the “Fund”) is only required to provide coverage for injuries caused by health care providers as a result of providing medical services, not for injuries caused by third parties, even if the health care provider is responsible for the third party.**

The suit stemmed from an underlying case in which a psychiatric patient sued Polyclinic Medical Center (the “Medical Center”) for failing to properly supervise its employees. The employees allegedly failed to properly supervise an “unruly and violent” psychiatric patient. The unruly patient gained access to a wheelchair that was easily accessible from the psychiatric unit, and crashed the wheelchair into the back of another patient’s leg, causing her “permanent debilitating pain.” The Fund denied the Medical Center’s claim for excess coverage, and the Medical Center appealed. The issue went to the Insurance Commissioner; however, before the Commissioner ruled, the matter was transferred to the Commonwealth Court pursuant to Fletcher v. Pa. Property and Casualty Guaranty Assoc., 985 A.2d 678 (2009).

The Fund argued that, in order to be eligible for MCARE coverage, the claim must involve the provision of medical services, which the instant claim did not. The Medical Center argued that the claim did, in fact, involve the provision of medical services, including negligent hiring and supervision of employees, specifically “a failure to render adequate medical services.”

The court noted that there was no authority on the issue of whether an injury caused by a third party resulted from the provision of medical services. Therefore, the court examined the actual MCARE Act. Section 102 of the Act stated the purpose of the Act to be the creation of “a system through which a person who has sustained injury or death *as a result of tort or breach of contract by a health care provider* can obtain a prompt determination of his claim.” (quoting 40 P.S. § 1301.102) (emphasis in original). The court then examined Section 103 of the Act, and determined that “a health care provider is a health center or its equivalent or an agent thereof.” Therefore, the court held, MCARE coverage is available only when a patient is injured by “a health center or its equivalent or an agent thereof,” which the unruly patient was not. In other words, the Fund is not required to provide coverage when the alleged injury was the result of a tort by a fellow patient.

In West Penn Allegheny Health System v. MCARE, No. 101 M.D. 2010, 2010 WL 5156806 (Pa. Commw. Ct. Dec. 21, 2010), the Commonwealth Court was called upon to determine the aggregate liability limit under Section 715 extended claims. The MCARE Fund accepted a suit against West Penn as an extended claim under section 715. However, the Fund noted that the aggregate limit for that year was \$2,700,000 (set by the Malpractice Act and CAT Fund, as the cause of action arose in 1998), and that the Fund would only pay \$394,917 of the judgment against West Penn, as that amount would cause the yearly aggregate limit to be met.

Section 715 of the MCARE Act sets the Fund’s liability limit in extended claims as \$1,000,000 per occurrence. Nowhere is an annual aggregate limit set for extended claims. However, section 712 sets forth both a per occurrence limit and an annual aggregate limit for MCARE’s normal excess coverage claims. The Fund argued that extended claims are subject to section 712’s aggregate yearly limit, while West Penn argued that they are not, and that MCARE must pay the \$1,000,000 per occurrence limit in this judgment against West Penn.

**The court agreed with West Penn, finding that the Pennsylvania General Assembly created a difference between excess and extended claims. The court looked to the CAT Fund's per occurrence and annual aggregate liability limits, and found that while the limits were set out for excess claims, no limits were set out for extended claims, which meant that to find the liability limits for extended claims under the CAT Fund, one had to look to the excess claims limits. The court noted that MCARE differs from the Malpractice Act's CAT Fund, in that Section 712 of MCARE sets forth per occurrence and annual aggregate limits for excess coverage claims, but Section 715 also sets forth a per occurrence limit for extended claims, which is different than the per occurrence limit for excess claims. Therefore, the court concluded that, "unlike in the Malpractice Act, there is no need to resort to Section 712 to find limits on liability for extended claims," and that an annual aggregate liability limit for excess claims does not apply to extended claims, so the Fund is required to pay the full \$1,000,000 towards satisfying the judgment against West Penn.**

Also, for the Fund to provide section 715 coverage, the Fund must receive a written request for coverage within 180 days of an eligible provider's first notice of the claim. The Commonwealth Court examined whether a Writ of Summons constitutes adequate notice to a provider by which the 180 day statutory period begins to run. See Cope v. Ins. Comm'r of the Commw., 955 A.2d 1043 (Pa. Commw. Ct. 2008). In Cope, the eligible healthcare provider was served with a Writ of Summons containing no factual information. See id. Approximately nineteen months later, on February 1, 2006, Plaintiffs filed and served a professional liability Complaint alleging malpractice between April and June, 2000. See id. On February 12, 2006, the Fund received an MCARE claim from the provider requesting section 715 coverage. See id. The Fund denied coverage on the basis that the provider had not notified it of the claim within the timeframe required by section 715. See id. The provider appealed this decision.

At issue before the Commonwealth Court was whether the Fund erred as a matter of law in finding that the medical provider's 180-day statutory period to request section 715 benefits began to run upon service of a bare writ of summons. See id. at 1047. In addressing this issue, the court first looked to the language of section 715. See id. at 1049. The court found that in section 715, the language "the claim" refers specifically to a medical malpractice claim subject to section 715 coverage. Id. The court contrasted the language of section 715 with that of section 714, which refers to "any claim." See id. at 1050. Because the legislature used "the claim" in section 715, the court determined that the statutory time period begins to run when the provider is first given notice that "the claim" against him is eligible for section 715 coverage. Id. Thus, the court held that the 180-day reporting period under section 715 does not begin to run until a provider receives notice that the claim against him is eligible for section 715 coverage, which, the court held, is not provided by a bare Writ of Summons. The bare Writ of Summons does not provide enough information for a provider to determine whether or not the claim is eligible for section 715 coverage and will not start the 180-day statutory reporting period. Id. at 1052; see also Upper Bucks Orthopedic Ass'n v. Ins. Comm'r of the Commw. of Pa., 2008 Pa. Commw. LEXIS 387 (Pa. Commw. Ct. Aug. 18, 2008).

MCARE also ensures that all health care providers may be afforded access to malpractice insurance through the creation of the Pennsylvania Liability Joint Underwriting Association. 40 Pa. Cons. Stat. § 1303.731. It is the purpose of the Joint Underwriting Association to offer malpractice insurance to physicians who cannot conveniently obtain insurance at reasonable



rates through ordinary methods. Id. The Joint Underwriting Association is comprised of all insurers authorized to write malpractice insurance in the Commonwealth. Id.

The Pennsylvania Senate voted in early November of 2007 to approve Senate Bill 1137, which would extend the MCARE abatement program for another year, while also preparing for its eventual elimination. **The MCARE abatement program was subsequently repealed. Act of Oct. 9, 2009, Pub. L. 537, No. 2009-50.** According to the Pennsylvania Insurance Department website, “[t]o date, legislation authorizing abatement of the MCARE assessment has not been enacted.” Pa. Ins. Dept., Expired Abatement Program, [http://www.portal.state.pa.us/portal/server.pt/community/additional\\_resources/12990/expired\\_abatement\\_program/608424](http://www.portal.state.pa.us/portal/server.pt/community/additional_resources/12990/expired_abatement_program/608424) (last visited December 22, 2010).

The Commonwealth Court has addressed two cases dealing with the Act of October 9, 2009, and issued both opinions on April 15, 2010. **Hospital and HealthSystem Association of Pennsylvania v. Commonwealth**, 997 A.2d 392 (Pa. Commw. Ct. 2010); **Pennsylvania Medical Society v. Department of Public Welfare**, 994 A.2d 33 (Pa. Commw. Ct. 2010). **Hospital** dealt with the transfer of \$100 million from the MCARE Fund to the General Fund pursuant to October 9, 2009’s Act No. 2009-50. After the Treasury Department effectuated the transfer, petitioners filed an application for summary relief, based on § 712(k) of the MCARE Act, which stated that when the MCARE Fund was phased out, any money remaining in the Fund would be returned to participating health care providers. After finding that the petitioners had standing to bring their claim, the Court found that they had a vested right in the monies in the MCARE Fund based on § 712(k)’s “*guarantee that . . . the money was to be returned to the contributing health care providers*” when the Fund was phased out. (emphasis added). The court therefore granted petitioners’ application for summary relief, and held that the transfer of money from the MCARE Fund to the General Fund was unlawful since it interfered with petitioner’s vested right to the money once the MCARE Fund is phased out.

In **Pennsylvania Medical Society**, the Commonwealth Court dealt with the Health Care Provider Retention (“HCPR”) program, which funded MCARE abatements. In 2004, HCPR transferred \$100 million from its account to the MCARE Fund, and in 2005, HCPR transferred \$330 million. MCARE continued to grant abatements after 2005, but HCPR did not make any transfers to the Fund after 2005, instead, petitioners claim, crediting “the abatements, without receipt of HCPR Account funds, against funds already in the MCARE Fund, thereby improperly paying the assessment abatements with MCARE funds supplied in part by Petitioners, rather than with funds transferred from the HCPR Account.” Petitioners therefore brought suit. The Commonwealth Court found that the Commonwealth had a duty to fund MCARE abatements through transfers from the HCPR Account to the MCARE Fund, basing this finding on a statutory interpretation of the HCPR statute. The Court also found that, as the undisputed facts showed that the Commonwealth failed to fully fund the MCARE abatements, there were no genuine issues of material fact and that petitioners were entitled to judgment as a matter of law. Finally, the Court addressed the Commonwealth’s assertion that the elimination of the HCPR program and Account, passed in late 2009, abolished petitioners’ right to relief. The Court held that vested interests cannot be extinguished by subsequent legislation, and as

petitioners had a vested right to HCPR funds in the amount of the abatements granted prior to the program's abolishment, petitioners were still entitled to relief.

**B. Rules**

**1. Certificate of Merit**

The court promulgated Rules 1042.1 through 1042.8, which relate to the requirement found in new Rule 1042.3 that a certificate of merit must be filed within sixty days of the filing of the Complaint in any professional liability case in which it is alleged that a professional deviated from the required professional standard. In a medical malpractice case, the certificate of merit must state one of three things: 1) that an "appropriate licensed professional" has supplied a written statement that the treatment or work at issue was below the required standard of care and caused the plaintiff harm, or 2) the claim that the defendant deviated from the standard of care is based solely on allegations that other professionals for whom that defendant is responsible deviated from the required standard of care, i.e. the claim is one of vicarious liability, or 3) that expert testimony is not needed for prosecution of the claim.

Pennsylvania Rule of Civil Procedure 1042.3, entitled "Certificate of Merit" provides:

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

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

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

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

(b)(1) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

**(2) If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file**

**(i) a separate certificate of merit as to each claim raised,  
or**

**(ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2).**

**(c)(1) A defendant who files a counterclaim asserting a claim for professional responsibility shall file a certificate of merit as required by this rule.**

**(2) 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 need not file a certificate of merit unless the joinder or cross-claim is based on acts of negligence that are unrelated to the acts of negligence that are the basis for the claim against the joining or cross-claiming party.**

**(d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. A motion to extend the time for filing a certificate of merit must be filed by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6(a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater. The filing of a motion to extend tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.**

**Pa.R.C.P. 1042.3 (Official notes omitted).**

A separate certificate of merit must be filed as to each professional against whom a claim is asserted. Also, 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. If a plaintiff files a certificate of merit stating that no expert testimony is required, the plaintiff will be precluded from presenting expert testimony regarding the standard of care and causation. 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 notice. See Pa. R. Civ. P. 1042.6.

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. See Pa. R. Civ. P. 1042.5.

The “appropriate licensed professional” referred to in the certificate of merit does not have to be the same person that the plaintiff uses as an expert at trial, but this “appropriate” person must, in a medical malpractice case, meet the qualifications for an expert set forth in Section 512 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 Pa. Cons. Stat. § 1303.512.

In connection with the certificate of merit requirement, the court also amended several other miscellaneous Rules, specifically Pa. R. Civ. P. 229, 1026, and 4007.2, which relate to discontinuance, time for filing, and when leave of court is required for discovery, respectively.

(a) **Amendments to Rule 1042.1, 1042.2, and 1042.3; Renumbering of Rule 1042.6 as 1042.7, Renumbering of Rule 1042.7 as 1042.8; Renumbering of Rule 1042.8 as 1042.9; and Promulgation of New Rule 1042.6**

Rule 1042.1 was rewritten to clarify that the rule applies to organizations responsible for the actions of a licensed professional, including partnerships, unincorporated associations, corporations, or similar entities. Rule 1042.1 also makes it explicit that the claim of lack of informed consent is a claim for professional liability. The note to Rule 1042.2 was rewritten to take account for the new procedure created by Rule 1042.6, which is discussed below.

Rule 1042.3 was also amended to take into account the new procedure created by Rule 1042.6. Rule 1042.3 now provides that a motion to extend the time for filing a certificate of merit must be filed “by the thirtieth day after the filing of a notice of intention to enter judgment of non pros . . . or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater.” The Rule still provides for the tolling of the time period to file a certificate of merit until the court rules upon the motion to extend time to file a certificate of merit.

The newly created 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.C.P. 1042.6 (Official notes omitted). Rule 1042.6 provides a sample form for the Rule 1042.6 notice.**

The renumbered rule 1042.7 (formerly 1042.6) was changed to reflect the new requirements for the form of the praecipe to enter judgment of *non pros*, which takes into account the new rule changes. Importantly, the praecipe for entry of judgment of *non pros* cannot be filed until thirty days after the filing of a notice of intention to enter judgment of *non pros*. Rule 1042.7 also requires the moving party to attach the certificate of service of the notice of intention to enter judgment of *non pros*. Rule 1042.7 additionally provides a new form for the praecipe for entry of judgment of *non pros*.

The new rules provide a mechanism to deal with the situation where a plaintiff believes a certificate of merit is not necessary and where no notice has been given before the entry of a judgment of *non pros*. The new rules retain the sixty day period for filing a certificate of merit, but now require the defendant to give a thirty day notice of the intention to seek a judgment of *non pros*. The amendments apply to all pending actions in which *non pros* has not yet been entered.

Since the 2005 amendments, there have been many reported decisions from Pennsylvania appellate courts interpreting and applying the Rules of Civil Procedure that require a plaintiff to file a certificate of merit in professional negligence cases within sixty days of filing the complaint, and that allow for judgment of *non pros* to be entered if a certificate is not filed. These are summarized below.

**(b) Failure to Timely File/Substantial Compliance**

**(i) Failure to Timely File/Excuses for Delay**

In Womer v. Hilliker, 908 A.2d 269 (Pa. 2006), Plaintiff filed a medical malpractice complaint in August of 2003. He did not, however, file a certificate of merit within sixty days of filing the complaint as required under Pa. R. Civ. P 1042.3. He also did not file a motion to extend the time for filing the certificate of merit as permitted under Rule 1042.3(d). Defendant then filed a Praecipe for Entry of Judgment of *Non Pros* in accordance with Rule 1042.6 for failure to file the certificate of merit. Judgment in Defendant's favor was entered that day. Two days later Plaintiff filed a motion to open the judgment and to allow the filing of a certificate of merit *nunc pro tunc*. Plaintiff argued, among other things, that he had served an expert report on Defendant in discovery before the deadline for filing the certificate of merit that included all the information required to be in a certificate of merit. He contended that the purpose of Rule 1042.3 had thus been served. He also attached a certificate of merit to his motion dated one day after the filing deadline. Plaintiff cited Rule 126 and argued that strict adherence to Rule 1042.3 would undermine the Supreme Court's purpose to eliminate the filing of non-meritorious professional liability claims.

The trial court denied Plaintiff's motion as well as a subsequent motion for reconsideration. On appeal, the Superior Court found that Plaintiff's contention that he complied with Rule 1042.3 by supplying an expert report was not unreasonable given the lack of case law on the issue at that time. The Superior Court reversed the trial court order and remanded the case with instructions that the court vacate the judgment of *non pros* if there was adequate proof that Plaintiff had supplied the expert report to Defendant. The Supreme Court then granted Defendant's petition for allowance of appeal.

The Supreme Court stated that its focus was on whether Rule 1042.3 is subject to equitable exceptions, and noted at the outset of this discussion that the rule as written contains no such exceptions. The court then considered whether Rule 126 should play any part in excusing Plaintiff's failure to file a certificate of merit. The court noted that Rule 126 provides in relevant part that a court "may disregard error or defect of procedure which does not affect the substantial rights of the parties." The court explained that while they "look for full compliance with the terms of our rules, we provide a limited exception under Rule 126 to those who commit a misstep when attempting to do what any particular rule requires."

After reviewing previous pertinent cases, the Supreme Court concluded, as the trial court had done, that Rule 126 should not be considered because plaintiff had not attempted to comply with Rule 1042.3 and made some procedural error, but rather had taken no steps at all to comply with the Rule. Pointedly, the court stated that the "equitable doctrine we incorporated into Rule 126 is one of *substantial* compliance, not one of *no* compliance." Consequently, the Supreme Court held that the Superior Court had erred in considering Rule 126 and ordered the trial court's order denying Plaintiff's motion to open the judgment to be reinstated.

The court also explained, however, that a plaintiff who fails to file a certificate of merit as required is not without any remedy to save his action. Specifically, the court stated that under Rule 3051, which allows a trial court to grant relief from a judgment of *non pros*, a plaintiff

might be able to demonstrate that his failure to follow Rule 1042.3 should be excused. In stating this, the court noted that some lower court cases, such as Hoover v. Davila, 64 D. & C. 4th 449 (Lawrence Co. 2003), aff'd on other grounds, 862 A.2d 591 (Pa. Super. 2004), have incorrectly held that a Rule 1042.6 judgment of *non pros* may not be opened under Rule 3051. The Supreme Court held to the contrary and explicitly disapproved of Hoover and similar cases.

In Sabo v. Worrall, 959 A.2d 347 (Pa. Super. Ct. 2008), the Superior Court examined whether Plaintiff had a reasonable excuse for Plaintiff's failure to timely file certificates of merit. Plaintiff alleged that certificates of merit were prepared within a few days of filing the Complaint, but due to counsel's oversight were never in fact filed. Counsel for Plaintiff alleged he believed his paralegal had filed the certificates of merit, but learned the certificates of merit were not filed when he received notice of the entry of judgment of *non pros*. The court focused on Rule 126, to determine whether Plaintiff's late filing of the certificates of merit was excusable.

The court distinguished Womer, noting that while Plaintiff's action was not a procedural mistake, it certainly was not "a wholesale failure to take *any* action required by the Rules of Civil Procedure." The court explained that unlike in Womer, counsel for Plaintiff prepared a certificate of merit, and the failure to file the certificate of merit was "an inadvertent mistake or oversight by counsel's paralegal." The court emphasized that, in Womer, counsel for Plaintiff "took it upon himself to conclude that submitting an expert's report to the opposition 'substantially complied with Rule 1042.3.'"

The court reasoned Defendants were not prejudiced by Plaintiff's untimely filing of a certificate of merit, and the spirit of Rule 1042.3 was not compromised. The court explained, the "filing was not impeded by any intent to substitute an alternative document under the guise of our Rules of Civil Procedure." The court further held the inadvertent mistake or oversight by counsel for Plaintiff in preparing, but forgetting to file the certificates of merit was a reasonable explanation or legitimate excuse for the delay.

At first glance the opinions of Sabo and Womer seem at odds with one another. The courts have held obtaining an expert opinion and providing it to opposing counsel will not avoid dismissal for failure to file a certificate of merit; however, obtaining an expert's report and preparing certificates of merit which are not sent can avoid dismissal for failure to file a certificate of merit. Based upon the court's holdings in Sabo and Womer, it appears the court will excuse a minor oversight of an attorney who intends on complying precisely with the rule, while the court will not excuse the actions of an attorney who complies with the intent of the rule, but who intentionally ignores following the exact steps required by the Pennsylvania Rules of Civil Procedure.

**In Aranda v. Yacovelli, 2009 WL 4350256 (Pa. Super. Ct. Dec. 3, 2009), the Superior Court held the trial court abused its discretion in finding that Plaintiff did not provide a reasonable excuse for failing to file a timely certificate of merit. The trial court noted that the only explanation for not timely filing a certificate of merit was a "mere administrative mishap." The Superior Court stated that Plaintiff timely filed fourteen certificates of merit and that the failure to file one additional certificate of merit was oversight, which is a**

**reasonable excuse. While the court noted that Plaintiff was not aware of the failure to file one additional certificate of merit until receiving the notice of an entry of *non pros*, the court did not specifically state whether Plaintiff possessed an expert report at the time the fifteen certificates of merit were required to be filed. The court did not offer any in-depth reasoning why administrative oversight is a reasonable excuse or define the parameters of what types of administrative oversight constitute a reasonable excuse.**

In Almes v. Burket, 881 A.2d 861 (Pa. Super. Ct. 2005), a legal malpractice case, the client/Plaintiffs filed their complaint in late October 2003. Four days before the deadline for filing the certificate of service, the attorney/expert who had reviewed the case mailed the completed certificate of merit to the client/Plaintiffs' lawyer. That same day the lawyer's mother-in-law died, a few days later was Christmas and he did not return to the office until four days after the deadline for filing the certificate. On that day he discovered the certificate of merit at his office and a praecipe for *non pros*. Judgment of *non pros* was entered the same day. Within a few days, plaintiffs filed a petition for relief from the judgment, which had attached to it a copy of the certificate of merit and an affidavit of the lawyer explaining why he did not file it on time. The trial court denied the petition.

The Superior Court, on appeal, reversed and held that the trial court had abused its discretion in denying Plaintiffs' petition because the petition established a reasonable excuse for the delay, in accordance with Rule 3051(b)(2), which governs relief from judgment of *non pros*. The court found that where a lawyer experienced a death in the family, the delay of one week in filing the certificate did little to damage the goals of Rule 1042.3, namely by helping to eliminate frivolous malpractice cases and minimizing costs to defendants.

In Atamian v. Gentile, No. 07-cv-00241-JF, 2007 U.S. Dist. LEXIS 25542 (E.D. Pa. Apr. 4, 2007), the court held that a *pro se* Plaintiff, who was fully qualified and a duly licensed physician, was not required to file a Rule 1042.3 Certificate of Merit when most of Plaintiff's claims did not involve professional malpractice. Plaintiff, a licensed physician, filed suit against a dentist and the dentist's secretary asserting numerous claims, including professional malpractice. Plaintiff failed to file a certificate of merit within sixty days of filing the complaint as required by Rule 1042.3. Defendants filed a motion to dismiss the complaint due to Plaintiff's failure to comply with the Rule. The court concluded that "[b]y filing his *pro se* complaint in this case, plaintiff has, in effect, provided a certification that, in his opinion, the conduct of the defendant dentist did not comport with applicable professional standards." As a result, the court denied Defendants' motion.

The *pro se* plaintiff in Bifulco v. SmithKline Beecham, No. 06-3657, 2007 U.S. Dist. LEXIS 68850 (E.D. Pa. Sept. 18, 2007), alleged that medication he was prescribed caused his alcoholism to relapse, resulting in the car accident. Consequently, Plaintiff filed suit against various Defendants, including the prescribing physician. Plaintiff filed a certificate of merit within the sixty day window, but the certificate of merit failed to conform to Rule 1042.3. Following Plaintiff's failure to file a conforming certificate of merit, Defendant physician filed a motion to dismiss the medical malpractice allegation. The court stated that Plaintiff "[conceded] that he possesses no written statement by a licensed medical professional verifying the merits of his malpractice claim." Accordingly, the court granted Defendant physician's motion.



Interestingly, the court noted that although Plaintiff had no reasonable excuse, it would grant Plaintiff an opportunity to cure the defect. The court explained that it was giving Plaintiff the opportunity because he is *pro se*. “Should [Plaintiff] independently obtain a medical expert who is willing to supply the written statement required under Rule 1042.3(a)(1), [Plaintiff] may file a motion for leave to reinstate his medical malpractice claim against [Defendant physician] within thirty (30) days . . . “ But see Maruca v. Hynick, No. 3:06-cv-00689, 2007 U.S. Dist. LEXIS 13302 (M.D. Pa. Feb. 27, 2007) (*pro se* Plaintiff’s argument he was unaware of certificate of merit requirement and explaining that to grant him another opportunity “would completely contradict the purpose of [Rule 1042.3], which is to prevent frivolous [lawsuits] against professionals[.]”).

(c)     **Substantial Compliance**

In Booker v. U.S., 366 Fed. Appx. 425, 429 (3d. Cir. 2010), the Third Circuit reversed a trial court’s order granting a motion to dismiss for failure to timely file a certificate of merit and held that the *pro se* prisoner plaintiff’s actions were “a substantial attempt to conform to the requirements of the rule.” Plaintiff was a prisoner who the trial court gave several extensions to file a certificate of merit. Id. at 426. Within the time the trial court gave plaintiff to file a certificate of merit, plaintiff filed a letter from a physician, along with an accompanying document entitled “Notice of Filing of Certificate of Merit.” Id. at 427. The letter stated that the physician reviewed plaintiff’s medical records and essentially concluded that plaintiff’s medical care “warrants a closer look.” Id. Importantly, plaintiff also requested in his filing, guidance in properly phrasing the certificate of merit and, if necessary, an extension of time to satisfy the certificate of merit requirements. The court noted that, unlike in Womer, where the plaintiff took no action or ignored his obligations to the court, the plaintiff, “while incarcerated and proceeding *pro se* and *in forma pauperis*, has located a qualified physician, compiled his medical records, timely filed the necessary requests for extensions of time and attempted to provide the Court with a compliant COM.” Id. at 429. The court found these actions constituted substantial compliance with the rules governing certificates of merit. Id. The court vacated the district court’s judgment, noting that plaintiff should be given the opportunity to file a compliant certificate of merit. Id.

In Cuevas v. U.S., No. 09-43J, 2010 WL 1779690, \*3 (W.D. Pa. April 29, 2010), the court addressed whether a *pro se* prisoner plaintiff substantially complied with the certificate of merit requirement. The court noted that, in his answers to defendant’s expert interrogatories, plaintiff stated the names of three physicians who would testify as expert witnesses. Id. Plaintiff further stated in the answer to interrogatories that two physicians would testify that the incident in question caused plaintiff’s fractures and the third physician would testify that defendant did not act responsibly in treating plaintiff. Id. The court stated that plaintiff did not produce any written report from the physicians. Id. at \*4. Further, the court noted that one of the physicians submitted a declaration to defendant that she opined that plaintiff received appropriate treatment from defendant. Id. The court granted defendant’s motion for summary judgment and explained that plaintiff did not set forth a *prima facie* case of medical malpractice and failed to comply with the certificate of merit requirements. Id.

Plaintiff in Shon v. Karason, 920 A.2d 1285 (Pa. Super. Ct. 2007), appeal denied, 936 A.2d 41 (Pa. 2007), brought a medical malpractice action against Defendants, a podiatrist and a podiatry center. Defendant doctor performed surgery to remove a neuroma on plaintiff's foot. After the surgery, Plaintiff's foot did not heal as expected. Plaintiffs then requested the pre-surgery MRI study from Defendant. Plaintiffs alleged that the MRI showed no signs of neuroma. Plaintiffs filed the complaint, but failed to file a certificate of merit. Defendants filed a Praecipe for Judgment of *Non Pros*, which was not docketed until a day later. Hours after Defendants filed the praecipe but before it was docketed, Plaintiffs filed a certificate of merit. About a week later, Plaintiffs filed a Motion to Open or Strike *Non Pros* for Failure to File Certificate of Merit. The trial court denied the motion and Plaintiffs appealed.

Plaintiffs argued that they should be excused from the certificate of merit requirement because Defendants had access to the MRI and pathology reports. Plaintiffs asserted that these medical records were the equivalent of the required certificate of merit. Relying on Womer v. Hilliker, 908 A.2d 269 (Pa. 2006), the court held that Plaintiffs' assertion was flawed. The Court noted that where a plaintiff takes no steps to comply with Rule 1042.3, the plaintiff is not entitled to open a judgment of *non pros* granted because of the plaintiff's failure to file a certificate of merit.

Plaintiffs further asserted that Rule 1042.3 does not apply to the podiatry center because it is not a licensed professional. The court held that the podiatry center is a health care provider for purposes of the certificate of merit requirement. The court explained that Rule 1042.1 refers to the MCARE act in defining a "health care provider." MCARE defines a "health care provider" to include a corporation or professional partnership. A health care provider need not be licensed; mere state approval is sufficient. Thus, the court held that the podiatry center is a health care provider and Rule 1042.3 applied.

Lastly, Plaintiffs contended that their certificate of merit was timely filed because it was docketed before Defendants' Praecipe for Judgment of *Non Pros*. The court, however, indicated that Plaintiff's certificate of merit was not timely; it was about two months overdue. Additionally, Rule 1042.6 requires the prothonotary to enter a Judgment of *Non Pros* for failure to file a certificate of merit within the specified time so long as there is no pending motion to extend the time to file a certificate of merit. Furthermore, Defendants filed their Praecipe for Judgment of *Non Pros* before Plaintiffs filed their certificate of merit. The court also noted that there was no pending motion for an extension of time to file a certificate of merit. Accordingly, the court affirmed the trial court's ruling.

In Ditch v. Waynesboro Hospital, 917 A.2d 317 (Pa. Super. Ct. 2007), appeal granted, 934 A.2d 1150 (Pa. 2007), the complaint alleged that the decedent, who had suffered a stroke and been taken to the emergency department at the Defendant hospital, fell from her hospital bed, struck her head on the floor and suffered a fractured skull and subdural hematoma from which she died three days later. Plaintiff, the administratrix of the patient's estate, alleged that the patient's death was caused by the negligence of the hospital, in failing to properly restrain the patient, failing to train the staff on proper procedures in transporting patients and in leaving the patient alone while she was being transported.

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

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

The Superior Court also disagreed with Plaintiff’s arguments that Defendant was required to raise by preliminary objections on the issue of whether the complaint asserted a professional claim, and that the amended complaint served to withdraw the original complaint and to foreclose all challenges against that first complaint. Finally, the Superior Court held that equitable considerations did not require that the judgment of *non pros* be opened and that the trial court had not abused its discretion in refusing to do so. The court noted that while Womer v. Hilliker, 908 A.2d 269 (Pa. 2006), had held that Rule 1042.3 is subject to equitable considerations, Rule 126 applied only where a plaintiff had substantially complied with Rule 1042.3, not where a plaintiff had failed entirely to file a certificate of merit. Therefore, in this case Rule 126 did not apply. Moreover, when the case was evaluated under Rule 3051, Plaintiff’s argument failed because the reasons she offered for not having filed the certificate did not constitute a reasonable excuse. Consequently, the decision of the trial court was affirmed.

The Pennsylvania Supreme Court has granted appeal limited to the issues of 1) whether a certificate of merit must be filed within sixty days of the filing of the original complaint, notwithstanding the filing of preliminary objections and/or an amended complaint and 2) whether the complaint and amended complaint raise a professional negligence claim which requires the filing of a certificate of merit.

On December 19, 2007, in light of the Supreme Court’s comment in a footnote in Womer, 908 A.2d 269 n.10, in a non-precedential, unpublished opinion the Harris court reversed its 2005 decision and remanded back to the trial court for the entry of judgments of *non pros* in favor of appellants, Jefferson, Weiss, and Neuburger.

Previously, in Harris, 877 A.2d 1275, the Superior Court held that the trial court had not abused its discretion in opening judgments of *non pros* where Plaintiff had not filed certificates of merit within sixty days of filing a medical malpractice complaint, but had, in that time period, provided Defendants with actual expert reports and CV’s. Despite having received these expert reports, which did state that Defendants had deviated from the standard of care and that such

deviations caused Plaintiff harm, the appellants Jefferson, Weiss, and Neuburger filed praecipes for *non pros*, on the basis of which judgment had been entered in their favor in accordance with Rule 1042.6. However, appellant Childers failed to seek a judgment of *non pros* at that time. Plaintiff petitioned to have the judgments opened, arguing substantial compliance with Rule 1042.3(a). The trial court granted the petition.

On initial appeal, the Superior Court in its 2005 opinion held that this was proper because the underlying purpose of Rule 1042.3 was to prevent the filing of baseless medical malpractice claims and plaintiff had satisfied this purpose by supplying the actual expert reports. The court further stated that Plaintiff had reasonably explained the lack of technical compliance with Rule 1042.3 in that it was not unreasonable for him to believe that his actions constituted substantial compliance with the Rule. Given the facts of the case, the Superior Court concluded, he should not be barred from his day in court. Accordingly, the Superior Court relinquished jurisdiction and the matter was returned to the trial court.

Following the Supreme Court's decision in Womer, appellants filed motions in trial court for reconsideration of the earlier decision to open the judgment of *non pros*. In denying these motions, the trial court indicated that it was unable to entertain such motions based upon the Superior Court's earlier decision. Appellants filed interlocutory appeals.

Relying on the language of Womer, the Superior Court on December 19, 2007 reversed its earlier decision and remanded the case to the trial court for the entry of judgments of *non pros* in favor of appellants Jefferson, Weiss, and Neuburger. However, with regard to appellant Childers, the Superior Court remanded the case back to the trial court for reconsideration of its decision to deny the judgment of *non pros*. The Superior Court explained that Childers failed to seek a judgment of *non pros* until after plaintiff filed a certificate of merit and after a great deal of time had been spent litigating the case. Therefore, the Court reasoned, "[t]here is not the total 'non-compliance' that was present in Womer, and there are undeniable equities to be evaluated by the fact finder in considering whether a judgment of *non pros* is warranted and equitable."

Interestingly, in a footnote, the Court in its December 2007 Opinion states: "[a] decision by this court to stubbornly adhere to a precedent that has since been disapproved by the highest Court in the Commonwealth, would merely delay the inevitable reversal of this Court's decision by the Supreme Court."

In Weaver v. University of Pittsburgh Medical Center, No. 08-411, 2009 U.S. Dist. LEXIS 57988 (W.D. Pa. July 30, 2008), the District Court examined whether Plaintiff substantially complied with the certificate of merit requirement. Defendant filed a Motion to Dismiss, arguing Plaintiff's corporate negligence claim should be dismissed because Plaintiff's certificate of merit only supported a claim of vicarious liability against the hospital and not a direct claim of corporate negligence. Plaintiff conceded the certificate of merit only contained language supporting a claim of vicarious liability, but claimed she simply checked the wrong box when completing the certificate of merit.

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

Plaintiff relied heavily on the recent opinion in Stroud, 546 F. Supp. 2d 238, where counsel for Plaintiff checked the vicarious liability box on the certificate of merit, not the box for corporate liability. The court distinguished Stroud, noting the Plaintiff in Stroud could not re-file the Complaint with a proper certificate of merit because the statute of limitations had run, but that in the present case Plaintiff was able to re-file a new Complaint with a proper certificate of merit. The court also explained that in Stroud, Plaintiff failed to check *both applicable boxes* on the certificate of merit (only checking box for vicarious liability); however, in the present case, Plaintiff checked the *wrong box*, which is clearly supported by Plaintiff's Complaint and expert report. The court noted "[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*." 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.

**(d) Applicability of the Rule**

**(i) Is It a Professional Negligence Claim?**

In Dental Care Associates, Inc. v. Keller Engineers, Inc., 954 A.2d 597 (Pa. Super. Ct. 2008), appeal denied, 968 A.2d 233 (Pa. 2009) the Superior Court determined whether a certificate of merit was needed for a cause of action filed against an incorporated engineering firm. The court stated 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." The court placed particular emphasis on the expert report Plaintiff attached to the Petition to Open Judgment of *Non Pros* that stated Defendant's storm management report for the property was found to be "thorough in scope and of sound engineering methods." The court explained that the excerpt from the expert report addressed "topics 'beyond the realm of common knowledge and experience' that would require expert testimony to explicate." 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 Garland v. Chandragiri, 2008 Phila. Ct. Com. Pl. LEXIS 186 (Phila. Cty. Ct. Com. Pl. July 10, 2008) (stating a judgment of *non pros* for a failure to file a proper certificate of merit is proper where Plaintiff claimed "there was no basis to involuntarily commit [sic] the Plaintiff to a mental facility" and explaining that Plaintiff's claim clearly required expert testimony to determine the standard and duty owed by a psychiatrist to a patient.)

In French v. Commonwealth Associates, Inc., 980 A.2d 623 (Pa. Super. Ct. 2009), the court addressed whether a certificate of merit was required in a death action brought against an engineering firm alleging negligence, products liability, and breach of warranty. The Superior Court found that the trial court erred in dismissing Plaintiff's entire complaint, without evaluating which claims sounded in professional negligence and which ones sounded in products liability/breach of warranty, to ensure that only the professional negligence claims were dismissed. The court rejected the trial court's legal generalization that "if an expert is needed to sustain any cause of action included in the complaint, then the entire complaint is necessarily one for professional liability. Such a blanket statement is too inclusive, where expert opinion is often relevant and admissible in a variety of contexts, not just in claims for professional negligence." The court vacated the trial court's order and remanded to the trial court to determine which counts of the complaint sounded in professional negligence.

In Zokaite Contracting, Inc. v. Trant Corp., 968 A.2d 1282 (Pa. Super. Ct. 2009), the court addressed whether a certificate of merit was required for allegations against an engineering firm, whether Plaintiff provided a reasonable excuse for failing to timely file a certificate of merit, and whether Plaintiff substantially complied with the rules covering certificates of merit. The court found that Plaintiff's complaint sounded in professional liability, not breach of contract because the Complaint's averments related to the engineering firm's overall exercise of care and professional judgment, not specific contractual duties and obligations. The court noted that a certificate of merit was required because to hold otherwise would allow Plaintiff to circumvent the mandates of Pa. R. Civ. P. 1042.3 by recasting a negligence claim into a breach of contract claim.

The Zokaite court noted, "[i]n a breach of contract action against a professional, the professional's liability must be based upon the terms of the contract." The court also held that plaintiff did not offer a reasonable excuse by stating they relied upon Judge Wettick's decision in Merrmann v. Pristin Pines of Franklin Park, Inc., Pa. D & C 4th 14 (Allegheny Cty. Ct. Com. Pl. 2003), which provides that a defendant waives the requirements of Pa. R. Civ. P. 1042.3 if he does not raise the failure to file a certificate of merit by way of preliminary objections. The court stated that the Merrmann case was criticized, if not overruled in subsequent cases. Finally, the Zokaite court ruled that plaintiff did not substantially comply with Pa. R. Civ. P. 1042.1 by filing an untimely motion to extend and serving an expert report shortly before trial.

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

On appeal, Plaintiff maintained that the trial court erred in refusing to open the judgment of *non pros*. Specifically, she argued that she was asserting an ordinary negligence claim, not professional liability as the trial court had indicated. In addressing this argument, the Superior Court noted that it had embraced the Michigan Supreme Court's method of distinguishing ordinary negligence from medical malpractice as illustrated in Bryant v. Oakpointe Villa Nursing Center, 684 N.W.2d 854 (Mich. 2004). The court applied the Bryant method to apply to professional negligence, explaining:

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

In its examination of Plaintiff's allegations, the court reiterated Varner v. Classic Communities Corp., 890 A.2d 1068 (Pa. Super. Ct. 2006), and explained that it is the substance of the allegations, rather than the form that is important in this analysis. 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. Therefore, the court reasoned that plaintiff was simply asserting a trespass claim. Although expert testimony may have been required to establish the property rights at issue, no expert testimony was necessary to establish a breach of the duty not to trespass. Thus, the court concluded that a certificate of merit was not necessary. Accordingly, the court reversed the trial court's order denying plaintiff's petition to open judgment of *non pros*.

**The Supreme Court affirmed the judgment of the Superior Court. Merlini v. Gallitzin Water Auth., 980 A.2d 502 (Pa. 2009). The court focused on Plaintiff's failure to allege that the Defendant's actions fell below a professional engineering standard. The court stated Plaintiff's allegations essentially constituted ordinary negligence and trespass. The court explained that the issues raised by Plaintiff were not issues involving professional judgment beyond the scope of common knowledge and experience, despite the fact that the alleged negligence occurred during the performance of professional services. Accordingly, no certificate of merit was required. See also Smith v. Friends Hosp., 928 A.2d 1072 (Pa. Super. Ct. 2007) (holding no certificate of merit required against defendant hospital where plaintiff's allegations relate merely to the failure to properly supervise and employ its employees).**

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

On appeal, the court found that the complaint did not raise any claims concerning the attorney's duties as a licensed professional attorney. The allegations against him in the complaint were in connections with claims for negligent misrepresentation, intentional misrepresentation, promissory estoppel and tortious interference with contractual relations. These allegations did not assert that he had deviated from an acceptable professional standard, and so did not set forth a professional liability claim. Consequently, no certificate of merit was required. The court also noted that a claim against a lawyer for legal malpractice could be brought only by a client of that lawyer. The order of the trial court was reversed.

In Perez v. Griffin, No. 1:06-CV-1468, 2008 U.S. Dist. LEXIS 45240 (M.D. Pa. June 9, 2008), aff'd, 304 Fed. Appx. 72 (3d Cir. 2008) (not precedential), Plaintiff, while incarcerated at the Schuylkill Federal Correctional Institution, suffered a severe asthma attack and alleged that he received inadequate treatment. Plaintiff allegedly retained an attorney to pursue a claim against federal prison officials for the medical treatment administered during the asthma attack. Plaintiff commenced the suit *pro se* and the attorney never entered an appearance. A summary judgment was filed against the Plaintiff and he forwarded the papers to the attorney. The motion was extended after the attorney failed to oppose the motion and the Plaintiff eventually prepared and filed an opposition without the attorney's assistance. The court entered summary judgment against the Plaintiff. Plaintiff then commenced an action, *pro se*, for legal malpractice, breach of contract and fraud against the attorney and failed to file a certificate of merit or a motion for an extension within the sixty-day period following the complaint filing.

The District Court examined whether a certificate of merit is necessary where Plaintiff alleges that his attorney breached a contract and committed fraud. The court explained that Plaintiff had attempted to "cloak a claim based upon breach of professional negligence in the language of ordinary negligence, breach of contract, or fraud." The court held a certificate of merit was needed for Plaintiff's claims of fraud and breach of contract because the claims arose from the professional duties defendant owed to Plaintiff and were "beyond the realm of common knowledge and experience of laypeople." **See also Levi v. Lappin, 2009 WL 1770146 (M.D. Pa. June 22, 2009) (stating Plaintiff prisoner's mistaken belief he was proceeding on Eighth Amendment claim of denial of medical care, not medical malpractice claim, and erroneous belief a certificate of merit claim was not required, is not a reasonable excuse for not timely filing a certificate of merit). But see Davis v. U.S., 2009 WL 890938 (M.D. Pa. March 31, 2009) (holding a certificate of merit was not needed to proceed on a claim against a prison warden, when plaintiff alleged MRSA infection was caused by the warden's failure to follow guidelines and provide a reasonably safe place of confinement).**

In Campbell v. Sunrise Senior Living Management, 2009 WL 4258070 (E.D. Pa. Nov. 29, 2009), the court addressed whether Plaintiff, an independent contractor of the Defendant long-term care facility, asserted a claim for professional liability. Plaintiff was a certified nursing assistant who was attacked by a patient of the long-term care facility. Plaintiff alleged the long-term care facility knew of a patient's violent propensities, but failed to correct them. The court stated that the long-term care facility's professional duties are to its patients, not every invitee who enters their building. The court noted the long-term care facility only owed ordinary duties to Plaintiff, which only required a duty to



warn of a known danger or to take steps to prevent injury from a known danger. The court denied the long-term care facility's motion to dismiss, holding Plaintiff's lawsuit sounded in ordinary negligence and did not require the filing of a certificate of merit. See also Zatuschi v. Richman, 2009 WL 1886118 (E.D. Pa. June 30, 2009) (stating intermediate care facility resident did not need to file certificate of merit for claim against care center operator, who was not a health care provider, which alleged that Plaintiff was entitled to more therapy and support than she received—including a power wheelchair and augmentive communication device).

In Quinn Construction, Inc. v. Skanska USA Building, Inc., No. 07-0406, 2008 U.S. Dist. LEXIS 45980 (E.D. Pa. June 10, 2008), the District Court examined whether a certificate of merit is needed in a case involving claims of negligent misrepresentation against an architect. The District Court explained that merely suing an architect does not mandate the filing of a certificate of merit. The court stated the key issue was whether Plaintiff alleged the architect deviated from any professional standard, which would mandate the filing of a certificate of merit. The court examined Section 522 of the Restatement (Second) of Torts, which Pennsylvania has adopted "to clarify the tort of negligent misrepresentation as it applies to those in the business of supplying information where it is foreseeable that the information will be relied on by third parties." The court opined that "the tort will serve the overall public interest by discouraging negligence among design professionals, while not requiring any more of them than is required by the traditional reasonable man and foreseeability tort paradigm applicable to others." The court held, the tort of negligent misrepresentation does not require expert testimony because the applicable standard of care is the traditional reasonable man standard. Thus, a certificate of merit is not needed to support a claim of negligent misrepresentation against a design professional.

In Stroud v. Abington Memorial Hospital, 546 F. Supp. 2d. 238, (E.D. Pa. 2008), the Court examined whether an entry of judgment of *non pros* for a corporate negligence claim against a hospital was proper, where Plaintiff only filed a timely certificate of merit setting forth claims of vicarious liability against the hospital. The court explained that while Plaintiff filed an amended certificate of merit, supporting the corporate negligence claims, this certificate of merit was filed after the defendant hospital filed a motion to dismiss (which is the federal mechanism for enforcing the failure to file a certificate of merit). The court found that Plaintiff had properly pleaded a claim of corporate negligence against the hospital, but Plaintiff's certificate of merit supporting a corporate negligence claim was filed more than sixty days after the filing of the Complaint and after Defendant's motion to dismiss. The Court held Plaintiff did not file a timely certificate of merit regarding the corporate negligence claim, and the claim would be dismissed unless Plaintiff could establish a reasonable explanation or legitimate excuse for not timely filing a certificate of merit. The court granted Plaintiff's corporate negligence claim without prejudice, and allowed Plaintiff leave to seek reinstatement to present evidence of a reasonable explanation or legitimate excuse for not filing the certificate of merit.

In Pollock v. Feinstein, 2006 Phila. Ct. Com. Pl. LEXIS 167 (Phila. Cty. Ct. Com. Pl. Mar. 28, 2006), aff'd, 917 A.2d 875 (Pa. Super. Ct. 2007), Plaintiff brought suit against her physician after sustaining a laceration to her anterior abdominal wall during a laparoscopic tubal ligation and IUD removal. Plaintiff claimed that Defendant failed to provide her with material

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

In response, Defendants argued that failing to obtain informed consent constitutes a deviation from acceptable medical standards, and that Plaintiff was therefore required to file a certificate of merit in order to maintain her cause of action. Given that Plaintiff failed to timely file a certificate of merit, in turn, Defendant moved for the entry of a judgment of *non pros*. Plaintiff countered by arguing that she *was not* required to file a certificate of merit because her malpractice action was based solely on lack of informed consent. The court, in turn, was confronted with the question of whether “a claim for lack of informed consent constitutes a deviation from ‘an acceptable professional standard’ warranting the filing of a certificate of merit pursuant to the rules of civil procedure.”

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

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

Plaintiff appealed to the Superior Court, 917 A.2d 875 (Pa. Super. Ct. 2007). On appeal, the court affirmed the lower court’s decision. The court explained that “[a]t its core, this action required a showing that [defendants] failed to conform to a specific acceptable professional standard, namely ‘[to] provide patients with material information necessary to determine whether to proceed with the surgical or operative procedure, or to remain in the present condition.’” Thus, the trial court correctly found that a Rule 1042.3 certificate of merit was required for a claim of lack of informed consent.

(ii) **Applicability of Federal and State Law in Federal Court**

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

**Iwanejko v. Cohen & Grigsby, P.C.**, 249 Fed. Appx. 938 (3d. Cir. 2007) (not precedential), involved an attorney, who had a psychotic breakdown at work. He was involuntarily committed to a mental health center. After a brief stay, Plaintiff attorney returned to work subject to a work agreement, but was subsequently terminated for violating the

agreement. Plaintiff filed suit against multiple Defendants, including the mental health center. Defendant filed a motion to dismiss based upon Plaintiff's failure to file a certificate of merit and the trial court dismissed Plaintiff's claims against the mental health center. On appeal, Plaintiff argued that his claim did not invoke Rule 1042.3. Additionally, Plaintiff maintained that Defendant waived the certificate of merit defense by failing to raise it in a previous Rule 12(b)(6) motion.

The Third Circuit affirmed the District Court's decision and held that the District Court had correctly applied Rule 1042.3 as substantive law. The Third Circuit further held that the decision to involuntarily commit an individual is a question of medical judgment and Defendant's conduct in admitting Plaintiff constitutes "an integral part of the process of rendering medical treatment." As a result, Rule 1042.3 was applicable. The Court further noted that at the time Defendant filed its Rule 12(b)(6) motions, the sixty-day window for filing a certificate of merit had not yet closed. Therefore, even if the Rule 1042.3 defense were required to be raised in a Rule 12(b)(6) motion, Defendant did not waive it. The defense was not "then available" to Defendant under Rule 12(g). Accordingly, Defendant was entitled to raise it in a separate motion. Thus, Rule 1042.3 applied and Plaintiff was required to file a certificate of merit.

In Lopez v. Brady, No. 4:CV-07-1126, 2008 U.S. Dist. LEXIS 73759 (M.D. Pa. Sept. 25, 2008), Plaintiff, a prisoner, filed a claim against the United States pursuant to the Federal Tort Claims Act, alleging he failed to receive proper medical care while incarcerated. The court noted that the government's duty of care was one of ordinary diligence, but Plaintiff's claims constituted allegations of medical malpractice, triggering the need for filing a certificate of merit. The court noted "Plaintiff's incarceration or *pro se* status is not a viable basis upon which to excuse compliance with Rule 1042.3." The court dismissed Plaintiff's claims, finding that Plaintiff needed to file a certificate of merit and failed to present a reasonable explanation or legitimate excuse for not timely filing a certificate of merit. See also Glenn v. Mataloni, 949 A.2d 966 (Pa. Commw. Ct. 2008) (holding Plaintiff's motion to extend time to file a certificate of merit was properly denied where Plaintiff's motion only stated there was a "difficulty" in securing a certificate of merit and did not set forth any specific actions Plaintiff took to secure a certificate of merit).

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

The court also examined Plaintiff's argument Rule 1042.3 is pre-empted by §1983. The court further examined whether a state procedural rule, such as a notice of claim provision, was applicable to §1983 actions brought in federal court. The specific question for the court was "whether the state statute was 'indispensable' to the federal scheme of justice, requiring the federal court to borrow it under 42 U.S.C. § 1988."

The court followed the three step analysis required by §1988, for determining whether Rule 1042.3 is indispensable to the federal scheme of justice. The court stopped their analysis at step one, finding step one was met because "this state rule is not vital to the adjudication of federal issues because the federal laws address the same concern through F.R.C.P. Rule 11(b), and F.R.C.P. Rule 26(a)(2)." The court reasoned, 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 nonmeritorious lawsuits early in the litigation process," Rule 1042.3 does not need to be imported into the federal judicial system.

Likewise, in Staten v. Lackawanna County, No. 4:07-CV-1329, 2008 U.S. Dist. LEXIS 6539 (M.D. Pa. Jan. 29, 2008), the District Court examined whether a certificate of merit needed to be filed in cases involving claims under 42 U.S.C. §1983. Specifically, in cases where Plaintiff alleged Defendant violated her constitutional rights by acting with deliberate indifference to Plaintiff's medical needs. The court held a certificate of merit was not required because Plaintiff did not allege a state law negligence claim and instead claimed her constitutional rights were violated. The court noted, even if the certificate of merit rule could be deemed applicable to a claim under the Eighth Amendment, the Supremacy Clause would be violated for a federal or state court to require a certificate of merit to be filed in a case involving a claim under 42 U.S.C. §1983. The court explained, if the certificate of merit requirement was applied to causes of action based solely on federal law, it would interfere with federal law by creating a barrier to plaintiffs pursuing their rights under 42 U.S.C. §1983. Therefore, a certificate of merit does not need to be filed to support a claim for a violation of constitutional rights brought under 42 U.S.C. §1983, even if the claim alleges defendant violated Plaintiff's constitutional rights by acting with deliberate indifference to Plaintiff's medical needs.

In US Airways, Inc. v. Elliot Equipment Co., Inc., No. 06-CV-1481, 2007 U.S. Dist. LEXIS 78332 (E.D. Pa. Oct. 22, 2007), Plaintiff filed a complaint against various Defendants for damage sustained to an aircraft. Subsequently, Plaintiff filed an amended complaint naming an additional third party Defendant. The allegations against the third party Defendant included a claim the defendant negligently provided professional services.

Plaintiff failed to file a certificate of merit within the sixty day time frame. The third party Defendant filed a Rule 12(b)(6) Motion to Dismiss based upon Plaintiff's failure to file a certificate of merit. In response, Plaintiff argued that Defendant's motion should be denied because: (i) Rule 1042.3 had not yet been held applicable to a federal court sitting in diversity; (ii) the delay in filing the certificate of merit was reasonable due to lead counsel being out on maternity leave; (iii) third party Defendant waived its objection because it failed to raise the objection in its answer; and (iv) Plaintiff's failure to file a certificate of merit did not prejudice

additional Defendant; third party Defendant remained a party to this action because other defendants have filed certificate of merits to support their claims.

At the outset, the court found that Rule 1042.3 does not conflict with the Federal Rules of Civil Procedure. As such, the rule must be applied by the federal courts sitting in diversity. The court held that the claims against third party Defendant essentially amounted to a claim that this Defendant rendered professional services; therefore, Plaintiff was required to file a certificate of merit. The court found Plaintiff's inability to file a certificate of merit due to lead counsel being out on maternity leave unpersuasive. Additionally, the court noted that Rule 1042.3 does not require a defendant to assert the rule in its answer. Finally, the court held that the fact that other claims and cross-claims remain against the third party defendant had no bearing on Rule 1042.3. Accordingly, the third party defendant's motion to dismiss was granted.

In contrast, the District Court in Guynup v. Lancaster County Prison, No. 06-4315, 2007 U.S. Dist. LEXIS 63412 (E.D. Pa. Aug. 17, 2007), held that where jurisdiction lies solely in federal question, Rule 1042.3 is inapplicable. Thus, a certificate of merit was not required.

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

(iii) **Expert Testimony**

**In Quinn Construction, Inc. v. Skanska USA Building Inc., No. 07-406, 2009 U.S. Dist. LEXIS 45247 (E.D. Pa. May 27, 2009), the court addressed a defense motion for the preclusion of expert testimony, on the basis that the trial court ruled at an earlier stage that Plaintiff was not asserting a claim for professional liability. Plaintiff was a subcontractor who brought claims against the general contractor and architect alleging negligent misrepresentation and breach of contract. The defense argued that based upon the comment to Rule 1042.3, Plaintiff cannot present expert testimony at the time of trial. The court explained that the comment to Rule 1042.3 only addresses the situation where a plaintiff certifies that he/she is bringing a claim for professional liability, but that expert testimony is not required where the court finds that Plaintiff is bringing a claim for ordinary negligence. Plaintiff had not yet produced any expert reports, so the court abstained from making any ruling on what expert testimony would be permitted at the time of trial, noting Fed. R. Evid. 702 would govern the admission of such testimony. See also McCool v. Department of Corrections, 2009 WL 3462498 (Pa. Commw. Ct. July 29, 2009), appeal denied, 742 A.2d 678 (Pa. 2009) (dismissing Plaintiff's complaint when certificate of merit stated that expert testimony was not required and noting the damages of mastocytosis and esophageal dysphagia are complex and little known diseases requiring expert testimony).**

(iv) Dragonetti Act Claims

In Sabella v. Milides, 992 A.2d 180 (Pa. Super. 2010), the court addressed whether a Dragonetti claim against an attorney required the filing of a certificate of merit. The trial court ruled that the Dragonetti claim required a certificate of merit, finding that plaintiff's allegations that defendant filed an unfounded complaint constituted an averment that defendant deviated from an acceptable professional standard. Id. at 189. 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. The Superior Court noted that based upon the uncontroverted facts, "Pennsylvania law makes clear that [plaintiff] could not sue [defendant] for legal malpractice." Id. (citations omitted). The Superior Court reversed the trial court's order, finding that "[t]he gist of the allegations involves actions [defendant] took as opposing counsel, not [plaintiff's] counsel." Id.

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

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

On January 27, 2003, the Supreme Court of Pennsylvania issued two Orders, effective that date, promulgating new Rules of Civil Procedure and amending some existing Rules, all of which relate specifically to professional liability cases. As mentioned above, on June 16, 2008, the Supreme Court of Pennsylvania made significant amendments to the rules governing the Certificate of Merit requirement.

**C. Amendments to the Pennsylvania Rules of Civil Procedure Governing Professional Liability**

**1. Certificate of Merit**

In 2005 and again in 2008 the Pennsylvania Supreme Court amended the Certificate of Merit rules. A full discussion of the Rules and the amendments is contained in the Certificate of Merit section.

**2. Venue – Pa. R. Civ. P. 1006**

The Court also amended Pa. R. Civ. P. 1006 regarding venue, and established that a medical professional liability claim may only be brought in the county in which the cause of action arose. In a case involving multiple health care providers, the case may be brought in any county where venue may be laid against at least one of the providers. If it is a multiparty action that includes non-health care provider defendants, the action cannot be brought in a county where venue may not be laid against a health care provider defendant. See section regarding “Venue” specifically herein for more information regarding this recent amendment of the Rules.

By an Amendatory Order dated March 3, 2003, the Pennsylvania Supreme Court ruled that Pa. R. Civ. P. 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.”

The Medical Care Availability and Reduction of Error (“MCARE”) Act revised existing law regarding venue. Specifically, section 5101.1 of the Act relates to venue in medical malpractice actions. See 42 Pa. Cons. Stat. § 5101.1. While previous venue principles essentially permitted an action to be filed in a county in which any defendant conducted business or had sufficient contacts, section 5101.1(b) specifically provides that a medical professional liability action may only be filed in the county in which the cause of action arose. See id.

Additionally, the Rules of Civil Procedure have recently been revised to conform to the General Assembly’s changes set forth in MCARE. 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. See Pa. R. Civ. P. 1006(a.1). Moreover, 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). See Pa. R. Civ. P. 1006(c)(2). Section (f)(2) of the rule also sets forth 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). See Pa. R. Civ. P. 1006(f)(2). The revisions to Rule 1006 as applied to individual defendants are incorporated into the following other Rules of Civil Procedure: 2130 (Partnerships as Parties); 2156 (Unincorporated Associates as Parties); and 2179 (Corporations and Similar Entities as Parties).

By an Amendatory Order dated March 3, 2003, the Pennsylvania Supreme Court ruled that Pa. R. Civ. P. 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.”

One recent venue case of interest, however, does not involve a medical malpractice claim. In Zappala v. Brandolini Property Management, Inc., 849 A.2d 1211 (Pa. Super. Ct. 2004), aff'd & remanded, 909 A.2d 1272 (Pa. 2006), **rev'd sub nom. Zappala v. The James Lewis Group**, 982 A.2d 512 (Pa. Super. Ct. 2009), the Philadelphia Court of Commons Pleas initially transferred a slip and fall case to Chester County based upon *forum non conveniens* and improper forum shopping, holding that the forum of Philadelphia was “vexatious, being designed to harass.” Plaintiff, a Delaware County resident was injured in a slip and fall accident that occurred in Chester County. Plaintiff sued two groups of defendants, one set from Chester County who owned the land in Chester County, and another set of defendants from Philadelphia who were allegedly responsible for maintaining the land in Chester County. After discovery was completed, all of the Philadelphia Defendants were dismissed from the case pursuant to unopposed motions for summary judgment, and only the Chester County Defendants remained.

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

The Supreme Court stated there are only three bases which a defendant can challenge venue: (1) improper venue by preliminary objection; (2) *forum non conveniens*; and (3) inability to hold a fair and impartial trial. Zappala v. Brandolini Prop. Mgmt., Inc., 909 A.2d 1272, 1281 (Pa. 2006). The court explained that when examining improper venue by preliminary objection, the court must examine whether venue is proper by taking a snapshot at the time the Complaint is filed. Id. The court stated if venue is proper at the time the Complaint was filed, then venue technically remains proper throughout litigation. Id. The court noted that challenges to venue via *forum non conveniens* and inability to hold a fair and impartial trial can be raised at any time before trial. Since the Chester County Defendants did not challenge venue pursuant to *forum non conveniens*, the Supreme Court remanded the case to the trial court to proceed, stating in a footnote that:

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

Id. at 1285. The Supreme Court also stated in another footnote that “[w]e disapprove of forum shopping and explain in detail that a defendant aggrieved by such a strategy has recourse either



through *forum non conveniens* in accord with Rule 1006(d)(1) or through averment that absent a transfer there cannot be a fair and impartial trial. See Pa. R. Civ. P. 1006(d).” Id. at 1286.

Upon remand to the trial court, Judge Arnold L. New granted the Chester County Defendants’ Petition to Transfer Venue pursuant to *forum non conveniens*. The court noted that the forum on Philadelphia was vexatious, even considering the extent of the court’s involvement with the case. The court stated that “Plaintiff’s claims against the Philadelphia County Defendants were tenuous at best when this action was brought.” The court also stated that Plaintiff claimed both the Philadelphia and Chester County Defendants had a responsibility or ownership interest in the land where the accident occurred, but “[n]othing on the record, beyond Plaintiff’s bald assertions in her complaint, supports this claim against [the Philadelphia] Defendants.” The court only pointed to one defendant, who stated “trial in Philadelphia County would create problems with staffing and unnecessary costs and time expenditure.” The court also stressed that it is important to note that the summary judgment motions against the Philadelphia Defendants were dismissed without opposition. Additionally, the court noted, but did not comment upon Defendants’ argument that Philadelphia County juries are more liberal in awarding damages to Plaintiffs in personal injuries suits, which results in cases settling at higher figures.

The court acknowledged that there is a right to “legitimate” forum shopping, but that the Plaintiff here “created” a forum by suing an unwarrantedly broad choice of parties. The court stated even if Plaintiff had support for her claims against the Philadelphia Defendants, the consideration of forum shopping would still be an appropriate factor to consider in deciding a petition to change venue based upon *forum non conveniens*. Id. This statement by the trial court is by far the most significant part of the opinion because it opens the door for non-Philadelphia Defendants to successfully transfer venue whenever Philadelphia Defendants are dismissed from a case, even if Defendants cannot argue that the Philadelphia Defendants were “sham” defendants. The court also stated that even if defendants do not allege forum shopping, it is proper for a court to address forum shopping to determine whether the forum was designated to harass Defendants.

**In Zappala v. The James Lewis Group, 982 A.2d 512 (Pa. Super. Ct. 2009), the Superior Court reversed Judge New’s decision on remand and transferred the case back to Philadelphia. While the Superior Court agreed with Judge New’s analysis that improper forum shopping can provide a basis for a change of venue *forum non conveniens* under Rule 1006(d)(2), the court held that the Chester County Defendants failed to present sufficient evidence to the trial court demonstrating that venue in Philadelphia County was harassing, oppressive, or vexatious such that transfer to Chester County was warranted. More specifically, the court held that, despite their assertions to the contrary, the Chester County Defendants failed to present sufficient evidence to support their claim that Plaintiffs had initially named the Philadelphia Defendants as parties to the action solely for the purpose of obtaining venue in Philadelphia, with the expectation that the Philadelphia Defendants would ultimately be dismissed without opposition. In short, the Superior Court found that the Chester County Defendants failed to make a *prima facie* showing of improper forum shopping on the part of Plaintiff to support a finding of *forum non conveniens* in Philadelphia County under Rule 1006(d)(2). However, it should be noted the**

**court reiterated that, as a matter of law, improper forum shopping *can* provide grounds for *forum non conveniens* if the proper evidentiary showing is made.**

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

The Superior Court held, however, that "for venue purposes the cause of action arose in the county where the negligent act or omission of failing to provide the needed care occurred." 873 A.2d at 731. In this case, 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 Lehigh County. As such, St. Luke's was the location of the negligent act or omission, even though the cardiologist had given orders over the phone from his Northampton County home. Those orders were to be carried out in Lehigh County. Venue was only proper, therefore, in Lehigh County.

In Forrester v. Hanson, 901 A.2d 548 (Pa. Super. Ct. 2006), Plaintiff motorist brought a personal injury action against the driver of a commercial vehicle and driver's employer. Defendants subsequently filed a joinder complaint against Plaintiff's treating physician, alleging that physician's negligent treatment of plaintiff was the true cause of plaintiff's injuries. Critically, it must be noted that Defendants did not assert a separate cause of action against physician, but rather sought a jury determination of physician's portion of the liability should Defendants be found negligent. After joinder was granted, physician objected to venue, arguing that the case should be transferred from Philadelphia County to Montgomery County because all of the allegedly negligent acts as set forth in the joinder complaint took place at physician's office in Montgomery County. The court granted physician's motion and transferred the case to Montgomery County pursuant to Rule 1006(a.1). Plaintiff appealed, arguing that the trial court abused its discretion by transferring the case because Defendants did not bring any "medical professional liability claim" in the joinder complaint as defined by the MCARE legislation.

Rule 1006(a.1) provides that,

(a.1) Except as otherwise provided by subdivision (c), a medical professional liability action may be brought against a health care provider for a *medical professional liability action* only in a county in which the cause of action arose.

Pa. R. Civ. P. 1006(a.1) (emphasis added). The explanatory note to 1006(a.1) explains that the definition of “medical professional liability action” for purposes of 1006(a.1) can be found in section 5101.1(c) of the MCARE Act.

MCARE defines a “medical professional liability claim” as,

[a]ny claim seeking the recovery of damages or loss from a healthcare provider arising out of any tort or breach of contract causing injury or death resulting from the furnishing of health care services which were or should have been provided.

42 Pa. Cons. Stat. § 5101.1(c).

The Superior Court determined that Defendants in Forrester did *not* assert a “medical professional liability claim” against physician because “[Defendants’] joinder complaint did not seek to recover damages or loss directly from [Defendant].” Rather, the Court noted that Defendants merely sought a jury determination of physician’s portion of the liability. Given, in turn, that Defendants’ joinder complaint did not assert a medical professional liability claim within the meaning of the statute, the Superior Court determined that Rule 1006(a.1) did not apply and that the trial court misapplied the law when it transferred the case to Montgomery County.

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

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

The Superior Court held that the trial court properly transferred venue to Montgomery County because all of the medical care was furnished to the patient in Montgomery County and therefore the “cause of action arose” in Montgomery County. In so holding, the Court examined Rule 1006. The Court also looked at the MCARE Act, which defines “medical professional liability claim”, in part, as “resulting from the furnishing of health care services”. The 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.”

In Searles v. Estrada, 856 A.2d 85 (Pa. Super. Ct. 2004), appeal denied, 871 A.2d 192 (Pa. 2005), the parties all resided in Pennsylvania. The surgical procedure from which the action arose occurred in a New Jersey hospital. Plaintiffs filed their complaint in Pennsylvania and

Defendant doctor filed preliminary objections in the nature of a motion to dismiss on the basis of improper venue. The trial court denied this motion.

On appeal, Defendant contended that the court had erred in failing to dismiss the action pursuant to Rule 1006(a.1). The Superior Court concluded that the newly amended Rule 1006 applied to the case and that because the cause of action arose in New Jersey venue was not proper in any county in Pennsylvania. Because there was no county in Pennsylvania to which the trial court could properly transfer the case, the only alternative available was dismissal. Consequently, the trial court erred in failing to sustain the doctor's preliminary objections based on improper venue and in failing to grant his motion to dismiss.

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

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

On appeal, the Superior Court stated the issue was where the cause of action arose and noted that Pennsylvania Courts have defined "cause of action" to mean the negligent act or omission, as opposed to the injury which flows from the tortious conduct. The 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. The court held that the correct county for venue is the venue where the alleged negligence occurred and ordered the case transferred to Montour County.

The Philadelphia Court of Common Pleas, citing Olshan, recently held that venue does not lie in the county where corporate action took place, but in the county where the action affected the patient. See Cohen v. Maternal Wellness Center, et al., 2007 Phila. Ct. Com. Pl. LEXIS 265 (Phila. Ct. Com. Pl. Aug. 22, 2007). In Cohen, Plaintiff developed pregnancy complications around the thirty-second week of her pregnancy. Id. In response to these complications Plaintiff consulted with Defendant The Maternal Wellness Center and Defendant "Certified Childbirth Educator" ("Philadelphia Defendants"), both located in Philadelphia County. At the thirty-fourth week of her pregnancy, following the advice of the Philadelphia Defendants, Plaintiff decided to treat with the Defendant Gynecologists and to plan to deliver her baby at Lankenau Hospital. Defendant Gynecologists and Lankenau Hospital are located in Wynnewood, Montgomery County.

When Plaintiff's contractions began, she traveled to Lankenau Hospital for labor and delivery of her child. Plaintiff gave birth, but after suffering numerous post-partum complications, her son died at Thomas Jefferson University Hospital. Thomas Jefferson University Hospital was not named as a defendant in the suit.

Plaintiffs filed their complaint alleging negligence, medical malpractice and wrongful death against the Philadelphia Defendants, defendant Gynecologists, Lankenau Hospital, and other defendants that provided pre- and post-natal care. Plaintiffs filed their Complaint in Philadelphia County. Defendants filed timely Preliminary Objections in the form of a Motion to Transfer Venue to Montgomery County.

The court held that proper venue lay in Montgomery County. The court determined that there was, at best, a tenuous connection with Philadelphia County based on the conversations with, and advice received from, the Philadelphia Defendants. Although Plaintiff, as a result of this advice, decided to deliver her baby at Lankenau Hospital and receive pre-natal care from defendant Gynecologists, the court found that she did not actually receive any medical care in Philadelphia County. The court, relying on the Superior Court's decision in Olshan, held that the alleged negligent advice provided by the Philadelphia Defendants is exactly the type of "non-medical care activity which cannot be the basis for venue under the MCARE Act." Further, the court stated that Plaintiffs had not alleged that any medical care had been provided in Philadelphia County. Therefore, the court held that venue was proper in Montgomery County as that is where the plaintiff was "furnished" medical care. See also O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312 (3d Cir. 2007), in which the Third Circuit held that Defendant hotel in Barbados had enough litigation-specific contacts with Pennsylvania to justify the exercise of personal jurisdiction where the hotel sent mailings and Plaintiff, who fell off a massage table while at the hotel, had made her reservation for the massage at the hotel after receiving one of the brochures.

For additional venue cases not involving medical malpractice, see Zampana-Barry v. Donaghue, 921 A.2d 500 (Pa. Super. Ct. 2007) (discussed in detail in the "Legal Malpractice" section of these materials); Walls v. The Phoenix Ins. Co., 979 A.2d 847 (Pa. Super. Ct. 2009) (holding defendant failed to present sufficient evidence in *forum non conveniens* petition to demonstrate that venue in Philadelphia was both oppressive and vexatious such that case should be transferred to Monroe County); McMillan v. First Nat'l Bank of Berwick, 978 A.2d 370 (Pa. Super. Ct. 2009) (holding trial court did not abuse its discretion in finding that proper venue in malicious prosecution case against bank was in county where bank brought underlying claim against plaintiff).

### **3. Other Rules**

#### **(a) New/Amended Rules of Civil Procedure - Effective Since Last Update**

##### **(1) New Pennsylvania Rule of Civil Procedure 234.2 -- Effective September 1, 2009**

Entitled "Subpoena. Issuance. Service. Compliance. Fees. Prisoners.", this rule addresses the issuance and service of a subpoena. The amendment affords greater protection to minors.

(2) **New Pennsylvania Rule of Civil Procedure 1036.1 --  
Effective March 1, 2009**

By Order dated January 22, 2009, Rule 1036.1, entitled “Reinstatement of Claim Dismissed Upon Affidavit of Noninvolvement, was created, to become effective March 1, 2009. The Rule sets forth the procedure for a party to reinstate a claim that has been dismissed through an affidavit of non-involvement.

Rule 1036.1 provides that if a party is dismissed through an affidavit of noninvolvement pursuant to Rule 1036, any party can file a motion to reinstate the dismissed party. The motion to reinstate must set forth facts showing that the statements made in the affidavit of noninvolvement were false or inaccurate. Any party can respond to the motion to reinstate.

After the court reviews the motion and responses, if the court determines there is a *prima facie* case of involvement of the dismissed party, the court shall enter an order allowing any party to either: (1) conduct limited discovery solely regarding the involvement of the dismissed party, and (2) file affidavits, depositions and other evidence that would allow a jury to find that the dismissed party was involved in the actions upon which the claim is based. Additionally, the court shall schedule an argument to decide the motion, limiting the sole issue to whether the moving party has produced evidence, that when considered in a light most favorable to the moving party, would require the issue of the involvement of the dismissed party to be submitted to a jury.

## **VII. MISCELLANEOUS ISSUES**

### **A. Discovery of Experts**

#### **1. FRCP 26 – 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) compensation for the expert's study or testimony; (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 a greater level of proficiency and candor of the expert witnesses during the trial preparation period. Also, the protection afforded will allow the judicial process to flow more freely and remove the focus from the actions of the attorneys to the issues of dispute.

Under the amended rule:

The practical effect 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 the 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.

#### **2. Pa. R. Civ. Pro. 1036.1 – Reinstatement of a Party to a Negligent 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 newly created rule provides a procedure to reinstate a claim previously dismissed by an affidavit of noninvolvement, pursuant to R. 1036. Pursuant to 1036.1, subsequent to the dismissal, any other party to the suit may file a motion for the reinstatement of the dismissed party. The motion must set forth facts showing false or inaccurate statements were included in the affidavit of noninvolvement. Any party to the suit may respond to this motion to reinstate.

Next, the court will review both the motion and responses to determine if a *prima facie* case of involvement of the dismissed party exists. If the court finds there is a *prima facie* case, then the court shall issue an order allowing 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. Also, the court shall schedule an argument prior to the motion being decided. It is important to note that the argument shall be limited to whether the moving party has presented evidence 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.

3. Rule 10.05(4)(m) - Amendments of the Wisconsin Rules of Civil Procedure – Professional Assistance Program Guidelines – Mandated and Voluntary – Board of Governors. State Bar Assistance Programs

Effective July 1, 2010, Rule 10.05(4)(m), this newly created rule establishes a program to assist law offices, attorneys, judges, law students and their families in coping with a myriad of problems related to or affecting the practice of law. These problems may include, but are not limited to, alcoholism, addiction, mental illness, or physical disability. The newly elected board is established with developing and implementing appropriate policies and procedures to further the public interest in the competence and integrity of the state bar. Pursuant to this rule, all communications made by committee or staff members, and volunteers that are made in good faith while providing program information are deemed both privileged and confidential. Specifically, confidentiality is applicable except when: (1) the program participant provides express consent; (2) necessary to prevent death or substantial bodily harm to the program participant or another; (3) necessary to prevent child or elder abuse; (4) the law mandates reporting; and (5) a condition of monitoring as mandated by the state bar.

The Director of the state bar may refer an attorney to participate in the assistance program if: (1) the attorney agrees to enter as an alternative to discipline by the state bar; (2) as a condition to continue to practice or be reinstated to practice law; (3) the attorney has pleaded impairment or mental incapacity in response to an investigation or complaint; and (4) the attorney has exhibited behavior that is reasonably perceived as a manifestation of an impairment or incapacitation. See, R. 21.03 (9).

4. Civil Procedure Case Law

(a) Discovery of Experts

(i) Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 5 A.3d 404 (Pa. Super. 2010), opinion withdrawn, reargument granted (Nov. 19, 2010)

In Barrick, the Superior Court of Pennsylvania considered whether correspondence between attorneys and experts was beyond the scope of permissible discovery.

In this issue of first impression, the Court reviewed the Court of Common Pleas decision that the trial court examined in determining that the correspondence was discoverable. The Court concluded that the situation in Barrick was nearly identical to that of Pavlak v. Dyer, 59 Pa. D. & C.4<sup>th</sup> 353 (Pike Cty. Ct. Com. Pl. 2003). Plaintiff sought to use its examining physician as its expert witness at trial. Defendant then sought discovery of the written correspondence between plaintiff's counsel and the expert. The



Court concluded that Pavlak was useful as guidance, but created its own bright-line rule in concluding that “attorney work-product must yield to the disclosure of the basis of a testifying expert’s opinion.” Barrick, at 12. The Court justified this decision with the rationale that parties need to know the basis for an expert’s professional conclusions and to what extent counsel’s opinion has swayed the expert’s anticipated testimony. Furthermore, the Court concluded that because of this newly created rule, “in camera inspection[s] would be duplicative and a waste of judicial resources.” Id. at 14.

Put another way, the discovery of the basis of expert opinion under Rule 4003.5(a) trumped the attorney work-product protection under R. 4003.3.

It should be noted that Barrick is the opposite of new Fed. R. 26(b)(3).

As a further note, the Court granted request en banc, and consequently, the opinion has been withdrawn.

## **B. Release**

### **1. Maloney v. Valley Med. Facilities, Inc., 984 A.2d 478 (Pa. 2009)**

This important case held that a release of a principal, who was only liable under vicarious liability, does not release the agent. In Mamalis v. Atlas Van Lines, 560 A.2d 1380 (Pa. 1989), the Supreme Court held that release of the agent operated to release the principal who was liable for vicarious liability. The release of the active tortfeasor released the passive tortfeasor. Later in Pallante v. Harcourt Brace Jovanovich, 629 A.2d 146 (Pa. 1993), the court held that the opposite was also true.

In Maloney, the plaintiff settled with the vicariously liable principal, and the release attempted to carve out the agent. The agent moved for summary judgment citing Pallante, and the trial court granted the motion. The Superior Court affirmed, reasoning that there was a single act that caused the damage. The Supreme Court reversed, essentially reversing Pallante, and holding 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.

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

The court addressed the issue of whether a release including language that explicitly reserves the right of the plaintiff to pursue excess insurance policy coverage applies to the MCARE fund. It is well settled Pennsylvania law that the court will scrutinize release agreements to a contract law analysis. Here, the plaintiff brought a medical malpractice claim against multiple parties including Dr. Schweitzer, the physician responsible for the reading of the MRI. Specifically, the plaintiff alleged that Dr. Schweitzer failed to follow the primary care physician’s orders to analyze the plaintiff’s MRI results for a calcified hematoma or a neoplasm, the latter being cancerous. Due to this failed procedure, the cancer diagnosis was delayed and the plaintiff endured an increased injury, additional medical costs, and a number of avoidable injuries. Before the trial commenced, the

plaintiff agreed to a partial release of Dr. Schweitzer that provided in exchange for \$400,000, the primary medical insurance coverage limit, his personal assets would not be pursued. Further, the release agreement expressly stated that the plaintiff reserved the right to pursue Dr. Schweitzer and all other defendants to collect primary and excess insurance policies regarding this matter.

The trial court concluded that for all intents and purposes, the MCARE fund acts as an insurance provider for medical professionals and institutions. It is undisputed that the purpose of the MCARE fund is to pay medical malpractice claims for losses or damages incurred in excess of the basic professional insurance coverage. Further, medical professionals and institutions are required by law to contribute to the MCARE fund annually. The court reasoned that the MCARE fund was functionally equivalent to an excess insurance policy. The court, however, did not take into consideration the express language of the release agreement reserving the right of the plaintiff to pursue excess insurance policies.

In Mamalis, the court held that the release of a principal would then automatically release the agent from any further exposure to liability. See Mamalis v. Atlas Van Lines, Inc., 560 A.2d 1380 (Pa. 1989). Here, the Superior court distinguished Mamalis on the grounds that this is not a full release agreement but instead merely intended and expressly stated as a partial release of a portion of the defendants exposure of liability. Therefore, the court held that the plaintiff was entitled to continue to pursue the MCARE fund as it was not restricted by the release agreement.

3. Zaleppa v. Seiwell, 2010 Pa. Super. 208 (Pa. Super. Ct. 2010)

In Zaleppa v. Seiwell, the court held that the Medicare Secondary Payer Act (“MSPA”) allows only the United States government to recover outstanding conditional Medicare payments, and that private entities may not file lawsuits on behalf of the government. In Zaleppa, the trial court returned a verdict against the defendant to a car accident suit. The defendant filed a post-trial motion, which the trial court denied, to include not only Zaleppa, but also Medicare, as payees when satisfying her verdict, because, she claimed, the MSPA requires parties to litigation to protect Medicare’s interests.

The Superior Court, in reviewing the defendant’s appeal of the trial court’s denial of the post-trial motion, answered the question of “whether the MSPA either requires or allows a private entity to assert the rights of the United States government regarding a potential claim for reimbursement of a Medicare lien.” The court found that the express language of the MSPA imposes a duty on the primary insurance plan to reimburse Medicare for payments Medicare made that the primary insurer was actually responsible for. The primary insurance plan’s duty only arises after Medicare issues a recovery demand letter. The court found that only after issuing this demand letter may the United States government, and only the United States government, bring an action for the reimbursement. A primary plan cannot assert Medicare’s right to reimbursement to guard itself against future liability to Medicare.

## **VIII. LEGAL MALPRACTICE**

### **A. Elements of a Cause of Action for Legal Malpractice – Negligence**

In Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998), the Supreme Court reiterated the elements for a cause of action for legal malpractice based on negligence in Pennsylvania. They are as follows: (1) employment of the attorney or other basis for a duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of the damage to Plaintiff. The court went on to state that Plaintiffs must prove that they had a viable cause of action against the party they wished to sue in the underlying action and that the attorney they hired was negligent in prosecuting or defending that underlying case. Thus, the court noted, Plaintiffs must prove “a case-within-a-case” in that they must initially establish by a preponderance of the evidence that they would have recovered a judgment in the underlying action. Consequently,

[i]t is only after the Plaintiff proves he would have recovered a judgment in the underlying action that the Plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent in the handling of the underlying action and that such negligence was the proximate cause of the Plaintiff’s loss since it prevented the Plaintiff from being properly compensated for his loss.

Id. at 1030; see also Still v. Saul Ewing, L.L.P., 2009 Phila. Ct. Com. Pl. LEXIS 190 (Phila. Cty. Ct. Com. Pl. Sept. 10, 2009) (granting summary judgment when plaintiff did not have a viable cause of action at the time he was represented by Defendants); Weller v. Ransom-Garner, No. 05-cv-2758, 2008 U.S. Dist. LEXIS 49953 (E.D. Pa. June 27, 2008) (granting summary judgment where Plaintiff fails to provide any support beyond speculation, conclusory allegations and mere denials for contention that trial judge would have reached different conclusion had attorney-Defendants acted differently); aff’d, 338 Fed. Appx. 249 (3d Cir. 2009) (not precedential); Garland v. U.S. Airways, Inc., 2006 WL 2927271 (W.D. Pa. 2006) (under first prong of legal malpractice test, no duty owed by attorney to adverse party), reconsideration denied, 2007 WL 433178 (W.D. Pa. 2007), aff’d, 270 Fed. Appx. 99 (3d Cir. 2008) (not precedential), cert. denied, 129 S.Ct. 125 (2008); CBC Innovis, INC. v. Federman & Phelan, LLP, 2009 Phila. Ct. Com. Pl. LEXIS 50 (Phila. Cty. Ct. Com. Pl. Feb. 18, 2009) (Defendant attorney did not owe a duty to confirm payoff data provided by Plaintiff in connection with a foreclosure action); Windward Agency, Inc. v. Russell, 2009 Phila. Ct. Com. Pl. LEXIS 196 (Phila. Cty. Ct. Com. Pl. Oct. 1, 2009) (forgoing the right to name an arbitrator and losing all right to participate in naming a neutral arbitrator is clearly below the professional standard of care).

In Stacey v. City of Hermitage, 2008 WL 941642 (W.D. Pa. 2008), the court set forth the requirements for establishing a legal malpractice claim and discussed whether Plaintiff’s allegations regarding breach and causation were legally sufficient. The court stated there must be “proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm.” (quoting Kituskie v. Corbman, 714 A.2d at 1030). The only reference to legal malpractice in Plaintiffs’ Amended Complaint stated

“[b]ecause of the actions and omissions of the ‘malpractice’ Defendants (Attorney Ferry and his firm Watts & Pepicelli, and Attorney Cartwright) injured their respective clients ... Plaintiff seek damages for those injuries.”

The court characterized Plaintiff’s allegations as bare and conclusory and found they were not sufficient facts pled regarding a failure to exercise ordinary professional skill and knowledge. The court also explained the failure to file a complaint, without more “may be ‘consistent with’ wrongful conduct, but it is not ‘suggestive’ of misconduct.” (quoting Bell Atlantic Corp v. Twombly, 550 U.S. 554 (2007)). The court further noted that a failure to file a complaint is not suggestive of misconduct because attorneys have an independent professional obligation to undertake a reasonable investigation prior to filing suit and to avoid filing frivolous claims. The court found that there were no allegations to satisfy the causation requirement, as Plaintiff did not allege how the attorneys’ alleged breach caused any actual loss. The court also noted that Plaintiff could not avoid the two year statute of limitations for negligence actions by characterizing the negligence action as a breach of contract action.

A notable case regarding a plaintiff’s burden to prove a “case within a case” is Barcola v. Hourigan, Kluger & Quinn, 82 Pa. D. & C. 4th 394 (Lackawanna Cty. Ct. Com. Pl. Dec. 29, 2006). In this case, Plaintiffs brought a legal malpractice action against their former lawyers, the law firm of Hourigan, Kluger & Quinn, P.C. (“HK&Q”), who had been unsuccessful in litigating a medical malpractice claim for them. Plaintiffs claimed that while HK&Q was working on their malpractice case, HK&Q had allowed the statute of limitations on their related products liability claim to expire.

Plaintiffs served requests for admissions, in which they asked HK&Q to admit the nature and extent of Plaintiffs’ injuries and the resulting damages based on the assertions made in the medical malpractice case filings and other submissions. HK&Q did not respond with the admissions Plaintiffs sought. Plaintiffs then filed a motion seeking to compel HK&Q to make these admissions without qualifications. HK&Q argued that they were not precluded from advocating a different position in the legal malpractice case than they had advocated on Plaintiffs’ behalf in the medical malpractice case, when both positions could be supported by competing evidence. Furthermore, HK&Q argued that in order to recover in the legal malpractice case, Plaintiffs must prove that they would have prevailed in a products liability suit and were trying to circumvent this burden to establish the “case within the case” by trying to bind HK&Q to positions it had asserted on Plaintiffs’ behalf in the medical malpractice case.

In denying the motion to compel, the court focused on the “case within a case” requirement and found that Plaintiff’s burden to prove this could not be fulfilled by statements and submissions made by HK&Q in the medical malpractice case. He noted that although a lawyer must, under the applicable ethical rules, make a reasonable pre-filing inquiry before signing a court document and may not knowingly make a false representation to the court, this does not mean that a lawyer guarantees the veracity of assertions made on behalf of a client. Also, he noted that in proving the “case within the case,” Plaintiffs were limited to introducing only evidence that HK&Q could have offered in a products liability action and would have been required to present expert testimony establishing that Plaintiffs’ claimed injuries were caused by the product at issue. In the medical malpractice case, the expert reports submitted had opined that Plaintiffs’ injuries were caused by malpractice, and so could not fulfill this requirement.

In cases involving negligent representation in a criminal proceeding the Pennsylvania Superior Court has set forward the following elements needed to establish a legal malpractice claim:

- (1) The employment of the attorney;
- (2) Reckless or wanton disregard of the defendant's interest on the part of the attorney;
- (3) The attorney's culpable conduct was the proximate cause of an injury suffered by the defendant/plaintiff, i.e., "but for" the attorney's conduct, the defendant/plaintiff would have obtained an acquittal or a complete dismissal of the charges.
- (4) As a result of the injury, the criminal defendant/plaintiff suffered damages.
- (5) Moreover, a plaintiff will not prevail in an action in criminal malpractice unless he has pursued post-trial remedies and obtained relief which was dependant on attorney error, additionally, although such finding may be introduced into evidence in the subsequent action it shall not be dispositive of culpable conduct in the malpractice action.

Bailey v. Berger, 250, 621 A.2d 108 (Pa. Super. Ct. 1993); see also Telepo v. Martin, 2009 257 F.R.D. 76 (E.D. Pa. 2009) (case remanded to state court to determine if a cause of action exists when attorney negligence causes sentencing error.)

#### **B. Elements of a Cause of Action for Legal Malpractice – Breach of Contract**

In Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. Ct. 1997), appeal denied, 701 A.2d 577 (Pa. 1997), the court noted that a claim of legal malpractice can be based on a breach of contract theory. See also Meyers v. Sudfeld, 2006 WL 401855 (E.D. Pa. 2006) (Pennsylvania law allows a client to bring a legal malpractice claim in both assumpsit (contract) and trespass (tort)). The court stated that in such an action the attorney's liability must be assessed under the terms of the contract (i.e., did the attorney contract to bring about a specific legal result/event and fail to do so?). Similarly, a legal malpractice action can be based on a breach of contract theory if "the attorney agrees to provide his or her best efforts and fails to do so." Id. at 213; see also Sherman Indus., Inc. v. Goldhammer, et al., 683 F. Supp. 502, 506 (E.D. Pa. 1988) (legal malpractice action can be based on breach of contract theory if Defendant/attorney breached specific contractual term, made and breached a specific promise upon which Plaintiff/client reasonably relied to their detriment, or failed to follow specific instructions from Plaintiff/client); Costello v. Primavera, 39 Pa. D. & C. 4th 502 (Phila. Cty. Ct.Com. Pl. 1998), aff'd without published opinion, 748 A.2d 1257 (Pa. Super. Ct. 1999), appeal denied, 760 A.2d 854 (Pa. 2000); Red Bell Brewing Co. v. Buchanan Ingersoll, P.C., 51 Pa. D. & C. 4th 129 (Phila. Cty. Ct. Com. Pl. 2001) (Plaintiff allowed to proceed to trial on breach of contract theory where complaint alleged facts that would establish breach of Defendant's contractual promises to

“deliver to [Plaintiff] quality legal services” and to handle Plaintiff’s account “with the utmost of professionalism and proficiency at all times”); Jackson v. Ferrera, No. 01-5365, 2002 U.S. Dist. LEXIS 12731 (E.D. Pa. Apr. 16, 2002) (while both contract and tort theories provide an appropriate framework for legal malpractice claims, Plaintiff may combine them in one malpractice complaint only by asserting that Defendants have breached specific contractual terms as well as the attorney’s general duty of care); Edwards v. Duane, Morris & Heckscher, LLP, No. 01-4798, 2002 U.S. Dist. LEXIS 16301 (E.D. Pa. Aug. 15, 2002) (to sustain a claim of legal malpractice based upon breach of contract, Plaintiff must “raise an issue as to whether it specifically instructed the Defendant to perform a task that the Defendant failed to perform, or as to whether the Defendant made a specific promise upon which Plaintiff reasonably relied to its detriment”) (citing Sherman Indus., 683 F. Supp. at 506); Gorski v. Smith, 812 A.2d 683 (Pa. Super. Ct. 2002), appeal denied, 856 A.2d 834 (Pa. 2004) (breach of contract claim can be premised on attorney’s failure to fulfill contractual duty to provide the agreed upon legal services in “a manner consistent with the profession at large”); **Burns v. Drier, 12 Pa. D. & C.5th 479 (Centre Co. June 6, 2010) (court dismissed defendant’s preliminary objections that Plaintiff did not allege violation of a specific provision noting that “averments that the attorney violated specific instructions are not necessary in a breach of contract action for legal malpractice.”).**

**C. The “Increased Risk of Harm” Standard Does Not Apply To Legal Malpractice Actions**

In Myers v. Seigle, 751 A.2d 1182 (Pa. Super. Ct. 2000), appeal denied, 795 A.2d 978 (Pa. 2000), the Superior Court addressed the novel issue of whether the “increased risk of harm” standard should be applied to a legal malpractice cause of action. Plaintiff in this case alleged that the lawyers who represented her in the underlying personal injury suit had been negligent in failing to conduct an adequate investigation of her accident and in failing to have her car inspected for design and manufacturing defects. Summary judgment had been entered in favor of the car manufacturer because she could not offer any evidence of the cause of the accident.

In her subsequent legal malpractice action, Plaintiff claimed that her lawyers’ negligent spoliation of the evidence (her car) had precluded any possibility that she would prevail in the breach of warranty and products liability action. The Superior Court held, however, that the increased risk of harm standard, defined at The Restatement (Second) of Torts, § 323, was inapplicable to a legal malpractice action. Rather, proof of actual loss is required. To prove such loss, Plaintiff “must demonstrate that she would have prevailed in the underlying action in the absence of [her lawyers’] alleged negligence.” Id. at 1185. Finding that she had suffered no actual injury from the alleged negligent conduct, the Court affirmed the grant of summary judgment in favor of Defendants.

**D. Settlement**

In Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346, 1348 (Pa. 1991), reargument denied, 598 A.2d 27 (Pa. 1991), cert. denied, 502 U.S. 867 (1991), the Pennsylvania Supreme Court decided “we will not permit a suit to be filed by a dissatisfied Plaintiff against his attorney following a settlement to which that Plaintiff agreed, unless that Plaintiff can show he was fraudulently induced to settle the original action.”

In Wassall v. DeCaro, 91 F.3d 443 (3d Cir. 1996), the Third Circuit held that Plaintiffs could maintain their legal malpractice action against their former attorney even though they agreed to a dismissal because of the attorneys' failure to prosecute the action. The court observed that the policies expressed in Muhammad would be served by allowing this action to go forward because the attorney's failure to settle the matter, as the clients wished, ran counter to the policy of encouraging settlements. Id. at 449. The Wassall Court noted that where an attorney delays inordinately in prosecuting a claim "forc[ing] a client to accept a dismissal of the case, allowing a subsequent malpractice action serves as a systemic deterrent for this behavior and thus promotes the policies articulated in Muhammad." Id. at 449.

In McMahon v. Shea, 688 A.2d 1179 (Pa. 1997), the Supreme Court was presented with an issue involving the application of the Court's decision in Muhammad to a legal malpractice action based upon alleged attorney negligence in the drafting and execution of a property settlement agreement in a domestic relations matter. Specifically, Defendant-attorneys advised Mr. McMahon to enter into a written settlement agreement which was incorporated but not merged into a final divorce decree. The agreement provided that half of Mr. McMahon's payments to his ex-wife were deemed to be child support and the other half was deemed alimony. The only provision for termination of these payments is a clause referring to the time when the "youngest living child reaches the age of twenty-one, is emancipated or finishes college, whichever occurs last." Id. at 1180. As a result of this advice, the Court directed Mr. McMahon to continue to pay alimony to his former wife even after she had remarried, holding that the parties' agreement had survived the decree of divorce.

Mr. McMahon thereafter filed a legal malpractice action alleging that Defendant-attorneys' failure to merge the alimony agreement with the final divorce decree constituted a breach of their duty to exercise reasonable care on his behalf. Defendants contended that the decision in Muhammad precluded Mr. McMahon's action. The majority, however, rejected this contention, and held that the reasoning of Muhammad has no application to these facts. Specifically, the court noted that Mr. McMahon was not attempting to attack the settlement value, but was alleging that his counsel failed to advise him as to the possible consequences of entering into this settlement. Accordingly, the Court found that the analysis of Muhammad is limited to the facts of that case, and that the preliminary objections to Mr. McMahon's action should have been dismissed. The concurring opinion joined the majority except to the extent that the majority limits Muhammad to its facts. Specifically, the concurrence emphasized that the policies underlying Muhammad are as necessary and valid today as they were when the decision was rendered five years ago and, therefore, Muhammad should not be limited to its facts.

The court distinguished Muhammad from McMahon v. Shea, 547 Pa. 124, 688 A.2d 1179 (1997), on the grounds that the issue in McMahon was solely the failure to correctly advise the client on legal principles, not a challenge to the amount received. The court held that the plaintiffs' challenge in this case was "at its core, a challenge to the attorney's judgment regarding an amount to be accepted in settlement." Moon 2009 Pa. Super LEXIS 7016 at \*18.

In Banks v. Jerome Taylor & Associates, 700 A.2d 1329 (Pa. Super. Ct. 1997), appeal denied, 723 A.2d 668 (Pa. 1998), the Pennsylvania Superior Court held that a negligence action may not be maintained against an attorney on the ground that the settlement amount obtained was too small. The Court reasoned that in cases where a dissatisfied litigant merely wishes to

second guess his decision to settle in the hope that he may have been able to “get a better deal,” the Muhammad rule applies to bar that litigant from suing his counsel for negligence.

Following Muhammad, in Piluso v. Cohen, 764 A.2d 549 (Pa. Super. Ct. 2000), appeal denied, 793 A.2d 909 (Pa. 2002), the Superior Court affirmed the trial court’s entry of summary judgment in favor of the attorney-Defendant. In the underlying medical malpractice action, the attorney had settled claims against some defendants for \$100,000 and had proceeded to trial on the claim against one remaining doctor. Plaintiff was aware of the settlement, although it had occurred outside her presence, and she did not repudiate it. Rather, she permitted the trial to continue against only the one remaining defendant. The jury returned a verdict in the amount of \$1,500,000, but apportioned no liability to the sole non-settling doctor. Plaintiff thereafter filed a legal malpractice action against her attorney and claimed that she had not consented to the settlement.

Citing Muhammad, the Superior Court in Piluso held that by failing to promptly repudiate her attorney’s actions Plaintiff had ratified them, and was foreclosed from later filing suit against her attorney since there was no allegation of fraud. Additionally, Plaintiff’s claimed damages were purely speculative, as the outcome of the trial was likely to have been different if the settling Defendants had been present and defended the claims against them.

In Red Bell Brewing Co. v. Buchanan Ingersoll, P.C., 51 Pa. D. & C. 4th 129 (Phila. Ct. Ct. Com. Pl. 2001), the Court of Common Pleas for Philadelphia County held that Muhammad did not bar Plaintiff’s negligence action against his former attorneys where Plaintiff alleged that Defendant-attorneys failed to provide accurate material facts on which its decisions were made and to adequately disclose a conflict of interest between Plaintiff and one of the firm’s other clients. The Court reasoned that the facts of Muhammad had no application to the case. Rather, the facts of the case were more similar to those in McMahon.

In Capital Care Corp. v. Hunt, 847 A.2d 75 (Pa. Super. Ct. 2004), the Superior Court applied the rationale of Muhammad to its damage analysis to allow a corporation to prove that the attorney’s fraudulent misrepresentation induced it to sell its corporate assets for less than fair market value, resulting in the corporation realizing a much lower amount than it would have in a future sale or upon liquidating its assets via Chapter 11 bankruptcy. Id. at 85.

More recently, the court in General Nutrition Corp. v. Gardere Wynne Sewell, LLP., No. 2:08-cv-831, 2008 U.S. Dist. LEXIS 64585 (W.D. Pa. Aug. 20, 2008), permitted Plaintiff to maintain a legal malpractice suit despite settlement of the underlying case. By way of background, Plaintiff, GNC, and the attorney-Defendants entered into a contract for legal advice regarding the termination of a contract with Franklin. Attorney-Defendants advised GNC that the contract was governed by the UCC and, therefore, exposure for termination of its contract with Franklin would not exceed \$3 million. Based upon Defendants’ advice, GNC terminated its contract with Franklin. As a result, Franklin sued for breach of contract. The court found that the contract was not governed by the UCC and damages could exceed \$34 million. Due to the potential for large exposure, GNC settled with Franklin and then GNC filed the instant suit against attorney-Defendants. Citing Muhammad, attorney-Defendants argued that GNC’s claims are barred due to its settlement with Franklin. Without providing further explanation, the court determined that “[t]he settlement of the underlying case by GNC . . . resulted in its alleged



damages being made actual and concrete.” Therefore, the court concluded that the settlement did not act to bar a subsequent malpractice action.

In Hauber v. Mudy, 2009 Phila Ct. Com. Pl. LEXIS 183 (Phila. Cty. Ct. Com. Pl. Sept. 1, 2009), the court, citing Muhammad, granted Defendants’ preliminary objections and dismissed Plaintiff’s complaint holding that Plaintiff, while being represented by Defendants, had knowingly entered into a voluntary settlement and therefore could not maintain a legal malpractice claim against these same defendants.

In Moon v. Ignelzi, No. 260 WDA 2008, 2009 Pa. Super LEXIS 7016, (Dec. 11, 2009), the court looked at whether Plaintiff’s legal malpractice claims for negligence, breach of contract and breach of fiduciary duty could be sustained when the allegations were for failure to inform and explain the effect of entering into a binding settlement agreement. Plaintiffs claim that the Defendants should have educated them on the issue of subrogation liens and the effect it would have on the actual amount Plaintiffs would receive. Defendant filed preliminary objections arguing that Plaintiffs had not alleged causation or damages. The court quoted language from the Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, 526 Pa. 541, 587 A.2d 1346, cert. denied, 502 U.S. 867, 112 S. Ct. 196, 116 L.Ed. 2d 156 (1991), which notes that “we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle.” The court determined that the case created a bright-line rule that “shield[s] attorneys from malpractice claims sounding in negligence or contract in cases concluded by settlement.” Moon 2009 Pa. Super LEXIS 7016 at \*15. Therefore, Plaintiffs were required to file a claim of fraud to sustain the allegation.

#### **E. Damages**

The legal malpractice plaintiff must prove actual loss and often will find this to be a difficult task. As stated in Duke & Co. v. Anderson, 418 A.2d 613, 617 (Pa. Super. Ct. 1980), “when it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action . . . is proof of actual loss.” 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 (Pa. 1989) (quoting Pashak v. Barish, 450 A.2d 67, 69 (Pa. Super. Ct. 1982).

In Ammon v. McCloskey, 655 A.2d 549 (1995), appeal denied, 670 A.2d 139 (Pa. 1995), the court held that Plaintiff in a legal malpractice action could prove economic harm simply by showing that judgment had been entered against him in the underlying case. Under Rizzo v. Haines, a case in which the recovery was lost by the attorney’s acts or omissions, a successful legal malpractice plaintiff is entitled to receive as damages the difference between the actual recovery and what would have been recovered absent attorney negligence. Rizzo, 555 A.2d at 68-69.

In Carnegie Mellon University v. Schwartz, 105 F.3d 863 (3d Cir. 1997), the Third Circuit reiterated that under Pennsylvania law, an action for professional negligence requires proof of actual loss. Relying on Duke & Co., the court concluded that “the mere breach of a

professional duty, causing only nominal damages, speculative harm or threat of future harm, not yet realized, does not suffice to create a cause of action for negligence.” See also Int’l Land Acquisitions, Inc. v. Fausto, 39 Fed. Appx. 751, (3d Cir. 2002) (not precedential) (to show actual damages, Plaintiff must prove that he had a viable cause of action against the party he wished to sue in the underlying case).

In Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998), the Pennsylvania Supreme Court reiterated the rule that a Plaintiff in a legal malpractice action can only be compensated for his actual losses. Such losses “are measured by the judgment the Plaintiff lost in the underlying action.” Id. at 1030.

In Trauma Service Group, P.C. v. Hunter, MacLean, Exley & Dunn, P.C., No. 99-CV-5979, 2000 U.S. Dist. LEXIS 3712 (E.D. Pa. Mar. 24, 2000), Plaintiff was a medical provider that had hired Defendant law firm as local counsel to help defend a medical malpractice action. The law firm, in the course of the defense, prepared a motion for summary judgment, which was granted and all claims against the medical provider were thereby dismissed.

Subsequently, a dispute arose about the law firm’s bill, which the medical provider at first promised to pay, but then did not. The law firm eventually obtained a judgment for its fees, but the medical provider then filed a suit against the firm alleging negligence, fraud and breach of contract. The District Court ruled, however, that the negligence claim was barred by the statute of limitations, and that the breach of contract claim was meritless. Furthermore, the Court noted that Plaintiff’s malpractice action must fail because “[Plaintiff] cannot prove that it would have prevailed in the [underlying] action because it did prevail, a fact which would appear to yield the logical conclusion that no malpractice occurred.” Id. at \*10. Summary judgment was entered in favor of Defendant law firm.

To sustain a malpractice claim against his trial counsel, a criminal defendant must first secure post-conviction relief and demonstrate his actual innocence. Hull v. Mallon, et al., No. 00-5698, 2001 U.S. Dist. LEXIS 12758 (E.D. Pa. Aug. 21, 2001). However, a breach of contract claim may still prove viable for a criminal defendant who has not secured post-conviction relief. Bailey v. Tucker, 621 A.2d 108 (Pa. 1993).

In Abood v. Gulf Group Lloyds, No. 3:2007-299, 2008 U.S. Dist. LEXIS 51406 (W.D. Pa. July 1, 2008), the court addressed whether a declaratory judgment action brought by an attorney against his insurer, regarding the applicability of malpractice insurance coverage, exceeded the federal jurisdictional requirement that the amount in controversy exceed \$75,000. The court determined there were three categories of damages presented in the malpractice insurance coverage dispute that could be included in calculating the amount in controversy. The court stated the first category of damages is limited to the amount Plaintiff could have won in the underlying lawsuit, but for the negligence of the attorney. The second category of damages is the cost necessary to defend the malpractice action. The court explained the cost necessary to defend the malpractice action could only be included in the calculation of the amount in controversy if the costs were a “necessary part of the amount in controversy.” (quoting Suber v. Chrysler Corp., 104 F.3d 578, 585 (3d Cir. 1997)). The court explained the costs of litigation include the costs for attorney’s fees, expert’s fees, depositions, and other trial-related costs. The third and final category of damages includes the cost of other benefits provided by the

professional liability insurance policy. The court noted the professional liability policy included a provision providing payment for lost wages due to time off from work to assist in the defense of the claim. The court held that the amount in controversy exceeded \$75,000 for jurisdictional purposes, reasoning that through the three sources of money, “it cannot be shown to a legal certainty that the jurisdictional amount will not exceed \$75,000.” (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938)).

**In Giesler v. 1531 Pine St. Ass’n, L.P., 2010 Phila. Ct. Com. Pl. LEXIS 152 (Feb. 2, 2010) the court held that an attorney could not be joined as a defendant in the instant action because that action, in which the client was a defendant, would determine whether the client suffered an actual loss. As no liability had yet been found, nor any damages yet assessed, joinder of the attorney was inappropriate. The court noted that Defendant was not precluded from filing a separate legal malpractice claim at a later time.**

**In General Nutrition Corp. v. Gardere Wynne Sewell, LLP., No. 2:08-cv-831, 2010 U.S. Dist. LEXIS 73654 (W.D. Pa. Aug. 20, 2010), Plaintiff alleged that it had entered into a settlement agreement based on faulty advice of the defendant attorneys. The Court granted summary judgment in favor of Defendants based on the fact that a separate corporate entity had paid the settlement on behalf of Plaintiff and that no reimbursement would ever be made. The Court reasoned that because reimbursement of the settlement funds would never be made that plaintiff never suffered an “actual loss”.**

#### **F. Collectability**

In Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998), the Supreme Court recognized the affirmative defense of non-collectability in legal malpractice actions. The court held the following:

[t]he collectability of damages in an underlying case is a matter which must be considered in a legal malpractice action and the Defendant/lawyer bears the burden of proving by a preponderance that the underlying case which formed the basis of the damages award in a legal malpractice action would not have been fully collectible.

Id. at 1030. After all, the Kituskie court noted, “it would be inequitable for the Plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the Plaintiff could have collected from the third party; the Plaintiff would be receiving a windfall at the attorney’s expense.” Id. Finally, the court noted in a footnote that collectability is a jury question. Id. at n.5.

#### **G. Privity**

In Cost v. Cost, 677 A.2d 1250 (Pa. Super. Ct. 1996), appeal denied, 689 A.2d 233 (Pa. 1997), the court granted Defendants’ demurrer. Specifically, the court found that the allegations in Plaintiff’s complaint failed to allege that the Plaintiff “sought” legal assistance which Defendants either expressly or impliedly agreed to render. Consequently, since the requisite element of privity was missing, the court held that Plaintiff failed to aver facts sufficient to establish grounds for a legal malpractice suit. Id.

In a case of first impression, the court in Erwin v. Clark, 38 Pa. D. & C. 4th 170, (Dauphin Ct. Ct. Com. Pl. 1997), ruled that an attorney working for a corporation may be sued by its shareholder for legal malpractice.

In Silver v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, No. 03-4393, 2004 U.S. Dist. LEXIS 14651 (E. D. Pa. July 28, 2004), the court had to determine whether an allegedly champertous assignment was valid. Because the assignee communicated with Defendant law firm on behalf of the assignor and had paid a portion of the retainer fee, the assignment was deemed not champertous and, therefore, valid. Id. at \*10-11.

In the absence of an express contract, an attorney-client relationship will be found if it can be shown that

- (1) the purported client sought advice or assistance from the attorney;
- (2) the advice sought was within the attorney's professional competence;
- (3) the attorney expressly or impliedly agreed to render such assistance; and
- (4) it was reasonable for the putative client to believe the attorney was representing him.

Capital Care Corp., 847 A.2d at 83 (citing Minnich v. Yost, 817 A.2d 538, 542 (Pa. Super. Ct. 2003), appeal denied, 827 A.2d 1202 (Pa. 2003)).

In Capital Care Corp., the Superior Court was presented with the issue of whether a cause of action for legal malpractice could lie against an attorney who formally withdrew from representation of a client corporation, but who continued to assist in handling the corporation's legal affairs. At trial, Plaintiff corporation asserted that Defendant attorney made false representations to the corporation at a shareholders' meeting prior to its sale, which resulted in the corporate assets being sold for an inadequate price. The jury found in favor of Plaintiff corporation and awarded \$2.5 million in damages for the claim. Defendant attorney filed for post-trial relief, requesting judgment notwithstanding the verdict, and the trial court granted the relief.

On appeal, Plaintiff corporation asserted that the trial court erred in entering judgment notwithstanding the verdict because it had presented sufficient evidence to prove that the attorney provided legal services during the corporate shareholders' meeting. The Superior Court agreed, finding that while Defendant attorney had formally withdrawn from representation of the Plaintiff corporation, it continued to provide legal services with respect to matters of corporate governance, and in representing the corporation in hearings before the United States Securities and Exchange Commission. Id. at 83.

The court maintained that despite the Defendant attorney's formal withdrawal from representation, he continued to assist in corporate legal matters, his area of expertise, and that it was reasonable for Plaintiff to believe that the attorney was still representing the corporation at the time of the shareholders' meeting. Id.

In Capitol Surgical Supplies, Inc. v. Casale, 86 Fed. Appx. 506 (3d Cir. 2004) (not precedential), the United States Court of Appeals for the Third Circuit held that there was no

attorney-client relationship when an attorney drafted an exclusive distribution agreement between a corporation and a product manufacturer on behalf of the manufacturer, but included provisions proposed by the corporation. The Third Circuit reasoned that there was never communication between the corporate representatives and the attorney that indicated an attorney-client relationship and that while the attorney added to the agreement the provisions set forth by the corporate representatives, he had never discussed with them the legal ramifications of those provisions or commented on them. The subjective belief of the corporate representatives that an attorney-client relationship existed was not sufficient to establish privity.

#### **H. Waiver of Meritorious Defense**

In Ammon v. McCloskey, 655 A.2d 549 (Pa. Super. Ct. 1995), appeal denied, 670 A.2d 139 (Pa. 1995), the court ruled that waiver of a viable release defense, resulting in the entry of a judgment against the client, constituted a viable cause of action for legal malpractice which might subject the attorney to damages for the underlying judgment. However, the court further stated that the issue of whether a waiver had actually occurred had never been fully litigated against the lawyer, and therefore remained a valid factual question to be resolved in litigation of the legal malpractice case. Id. at 553-54.

#### **I. Duty to Keep Client Informed**

In Perkovic v. Barrett, 671 A.2d 740 (Pa. Super. Ct. 1996), Plaintiffs sued their attorney for legal malpractice based on the following fee agreement:

CLIENTS expressly retain Attorney [\*\*\*] for the handling of the appeal of this matter to Superior Court which has been timely filed; ATTORNEY is to prepare and prosecute said appeal in a diligent and professional manner;

CLIENTS agree to pay ATTORNEY the sum of \$15,000 to prepare and prosecute this appeal; this includes the preparation and filing of the proper notices of appeal, preparation, legal research and legal writing necessary for the Legal Brief. . . ATTORNEY agrees to represent CLIENTS at any oral argument that may be necessitated by the Superior Court in the perfecting of this appeal.

The court held that this fee agreement required Defendant-attorney to notify the client of the results of the appeal. The court also held, however, that the fee agreement did not impose upon Defendant-attorney a duty to continue representation following the remand of the case as it only contemplated the appeal referenced therein. Id. at 744.

#### **J. Statute of Limitations**

A legal malpractice action founded upon negligence is subject to the two-year statute of limitations while such an action founded upon breach of contract is subject to the four-year statute of limitations. See, e.g., Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. Ct. 1997), appeal denied, 701 A.2d 577 (Pa. 1997). It should also be noted, that the courts have rejected attempts to “[r]e-package a negligence-based malpractice claim under an [contract] theory to

avoid the statute of limitations.” The court, citing Sherman Industries, Inc. v. Goldhammer, 683 F. Supp. 502 (E.D. Pa. 1988), explained, “[a] malpractice plaintiff may not sidestep the two-year limitation on tort actions by pleading tort claims as breaches of contract.” Id.

The Pennsylvania Supreme Court recently held in Steiner v. Markel, 968 A2d. 1253 (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.

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) (a cause of action for legal malpractice accrues on the date the harm is suffered and not on the date that the attorney-client relationship ends); Tower Investments, Inc. v. Rawle & Henderson, LLP, 2009 Phila Ct. Com. Pl. LEXIS 18 (Phila. Cty. Ct. Com. Pl. Apr. 7, 2009) (holding “[t]he statute of limitations in legal malpractice actions begins upon the happening of an alleged breach of duty and is tolled only when the client, despite the exercise of due diligence, cannot discover the injury or its cause”).

To date, Pennsylvania courts have expressly rejected the “continuing representation exception” under which a claim for malpractice accrues upon termination of the professional relationship which gave rise to the alleged malpractice. See, e.g., Glenbrook Leasing Co. v. Beausang, 839 A.2d 437, 441-42 (Pa. Super. Ct. 2003), appeal granted, 870 A.2d 318 (Pa. 2005), aff’d, 881 A.2d 1266 (Pa. 2005); see also Ward v. Knox McLaughlin Gornall & Sennett, No. 09-68, 2009 U.S. Dist. LEXIS 86058 (W.D. Pa. Sept. 21, 2009) (citing Glenbrook, court refused to apply “continuous representation rule”). It is noteworthy, however, that after the Superior Court’s discussion of the continuous representation rule in Glenbrook, and acknowledgment there that adoption of this rule would have to come from the Supreme Court, the Pennsylvania Supreme Court has granted an appeal in this case limited to the issue of “[w]hether the continuous representation rule should be adopted in Pennsylvania to toll the applicable statute of limitations in an action for legal malpractice.” Glenbrook Leasing Co. v. Beausang, 870 A.2d 318 (Pa. 2005). Without issuing a written opinion, the Supreme Court affirmed the Superior Court’s decision. Glenbrook Leasing Co. v. Beausang, 881 A.2d 1266 (Pa. 2005).

If the discovery rule applies, the statutory period commences at the time the alleged malpractice is discovered. Davis v. Grimaldi, Haley & Frangiosa, P.C., PICS 98-2158, p. 4 (Pa. Super. Ct. 1998) (citing Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993)). The discovery rule “provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible.” Id. at 4-5 (citing Dalrymple v. Brown, 701 A.2d 164, 167 (Pa. 1997)). The Dalrymple Court discussed the standard for the application of the discovery rule:

The party seeking to invoke the discovery rule bears the burden of establishing the inability to know of the injury despite the exercise of reasonable diligence. The standard of reasonable diligence is objective, not subjective. It is not a standard of reasonable diligence unique to a particular Plaintiff, but instead, a standard of reasonable diligence as applied to a “reasonable person.”

Id. at 167; see also Radman v. Gaujot, 53 Fed. Appx. 606 (3d Cir. 2002) (not precedential) (the happening of the breach and the injured party’s awareness of the breach, not his knowledge of the resulting damage, is the focus of Pennsylvania law) Igbonwa v. Cameron, 2004 U.S. Dist. LEXIS 2128 (E.D. Pa. 2004) (in order to qualify for the discovery rule, a plaintiff must have made reasonable efforts to protect his own interests, and must show why he was unable to discover the facts necessary to plead the cause of action); Foueke v. Dugan, 187 F. Supp. 2d 253 (E.D. Pa. 2002) (to bring a claim outside of the statute of limitations, a plaintiff faces the burden of demonstrating that his claim falls into one of the exceptions to the occurrence rule); Amoroso v. Morley, No. 00-3496, 2002 U.S. Dist. LEXIS 4989 (E.D. Pa. Mar. 25, 2002) (the statute of limitations is tolled only if a person in the plaintiff’s position exercising reasonable diligence would not have been aware of the salient facts) (citing Baily v. Lewis, 763 F. Supp. 802, 806 (E.D. Pa. 1991), aff’d, 950 F.2d 721 (3d Cir. 1991); Edwards v. Duane, Morris & Heckscher, LLP, et al., No. 01-4798, 2002 U.S. Dist. LEXIS 16301 (E.D. Pa. Aug. 15, 2002) (discovery rule may be applied to breach of contract actions “where the injured party is unable, despite the exercise of due diligence to know of an injury or its cause”); cf. Ward v. Rice, 870 A.2d 850 (Pa. 2005) (medical malpractice case in which Supreme Court held that “discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises” and rejected argument that rule should not extend statute of limitations in any case where cause of injury is discovered within original statutory period.)

In Whitley v. Allegheny County, No. 07-403, 2008 U.S. Dist. LEXIS 28739 (W.D. Pa. Mar. 24, 2008), Plaintiff filed the instant action in March 2007 and asserted, *inter alia*, a state law claim for professional negligence against his criminal defense attorney (“Defense attorney”). By way of background, Defense attorney represented Plaintiff in the first of two petitions of post-conviction relief (“PCRA”) and not the underlying criminal trial. The initial PCRA petition was denied. Id. Plaintiff subsequently filed a second PCRA petition. Plaintiff informed the court that he was no longer represented and requested appointment of counsel. Different counsel was appointed; but Defense attorney did not formally withdraw. Plaintiff alleged that the criminal Defense attorney disregarded his duty to Plaintiff by failing to communicate with Plaintiff and failing to perform a proper investigation, which resulted in Plaintiff suffering a prolonged incarceration.

The court noted, “[the parties] agree[d] that the appropriate starting point for a legal malpractice action arising for an underlying criminal representation commences at the termination of the attorney-client relationship.” However, the parties disagreed as to when the attorney-client relationship terminated. Defense attorney maintained that the relationship ended when the first PCRA petition was dismissed and new counsel was appointed; therefore, Plaintiff’s claims fell outside the two year statute of limitations. In response, Plaintiff contended

that the relationship continued until the denial of the second PCRA petition, approximately ten months prior to Plaintiff filing the instant action.

In finding Plaintiff's claims barred, the court noted that Plaintiff petitioned the court to appoint new counsel to represent him in the appeal of the first PCRA petition in 1999. After new counsel was appointed in December 1999, Plaintiff was no longer represented by Defense counsel. Therefore, the court noted that the termination of the attorney-client relationship occurred on the date of appointment of new counsel. Accordingly, the court found Plaintiff's claims against Defense attorney were barred by the statute of limitations.

In Wachovia Bank, N.A. v. Ferretti, 935 A.2d 565 (Pa. Super. Ct. 2007), the Superior Court examined when a cause of action for legal malpractice accrues when an attorney failed to mark a judgment as satisfied. The Superior Court reiterated that "the trigger for the accrual of a legal malpractice action, for the statute of limitations purposes, is not the realization of actual loss, but the occurrence of a breach of duty." Id. at 572. The court explained that an exception to the occurrence rule is the equitable discovery rule, which provides the statute of limitations is tolled when the "injured party is unable, despite the exercise of due diligence, to know of the injury or its cause." The court cautioned, "[l]ack of knowledge, mistake or misunderstanding will not toll the running of the statute." Id. The Superior Court stressed that Pennsylvania does not follow the actual loss rule, where the statute of limitations is tolled in the legal malpractice suit until a final judgment is entered in the underlying lawsuit. Id.

The Superior Court explained that the statute of limitations began to run when the attorney failed to mark the judgment as satisfied, that is, when the attorney breached a duty. Id. Furthermore, the court stated that the equitable discovery rule could only toll the statute of limitations until the time when the client was informed that a proceeding was being instituted against them regarding judgment that their attorney failed to mark as satisfied. Id. at 574. The court recognized that the occurrence rule requires the filing of a legal malpractice claim before the client in the underlying claim knows whether he will suffer any damages as a result of his attorney's negligence. Id. at 574. The court stated while there is a dilemma in taking competing positions in the underlying claim and the legal malpractice claim, the public policy concern of avoiding stale claims must prevail over the public policy concern over having two cases simultaneously proceed with inconsistent positions. Id. The court reasoned, "[t]he purpose of the statute would not be served if an attorney is kept in the state of breathless apprehension while a former client pursues appeal from the trial court, to the Court of Appeal, to the Supreme Court . . . during which time memories fade, witnesses disappear or die, and evidence is lost. Id. In sum, the public policy concern of raising stale legal malpractice claims requires the filing of a claim for legal malpractice at the time of the breach of a duty. The statute of limitations will only be tolled under the doctrine of equitable discovery until the time clients are made aware of proceedings against them, even if the clients are uncertain whether they will prevail in defending the underlying claim."



## **K. Contributory Negligence Defense**

In KBF Associates L.P. v. Saul Ewing Remick & Saul, 35 Pa. D. & C. 4th 1 (Phila. Cty. Ct. Com. Pl. 1998), the court, per Judge Bernstein, held that contributory negligence is not a viable defense in a legal malpractice action. In KBF, Plaintiff-client alleged that Defendant law firm was negligent in failing to advise them of a late fee incurred by the postponement of a bond redemption, which was part of a larger and complex bond reoffering transaction. Defendant law firm asked the court “to rule that a client may be barred from suing his attorney for malpractice with respect to errors within the scope of the attorney’s engagement where it can be demonstrated that the client had the capability and expertise to have independently determined the error.” Id. at 3. The court found no support in Pennsylvania law for such a proposition and soundly rejected it. Citing cases from other jurisdictions, the court reasoned as follows:

[T]he [instant] legal malpractice action cannot be defended on the basis of contributory negligence upon the allegation that the client itself was sophisticated enough to do its own legal work and correct the error.

\* \* \*

The Plaintiff had a right to rely on the advice of experienced bond counsel without the risk that the consequences of Defendants’ negligence would be shifted to the partnership because of the sophistication or experience of its general partner. . . Counsel may not shift to the client the legal responsibility it was specifically hired to undertake because of its superior knowledge.

Id. at 5, 7-8.

In Gorski v. Smith, et al., 812 A.2d 683 (Pa. Super. Ct. 2002), appeal denied, 856 A.2d 834 (Pa. 2004), the Pennsylvania Superior Court 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. The client’s negligence, once proven, will serve as a complete bar to recovery. Since 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 and the doctrine of Contributory Negligence applies. The Comparative Negligence statute is not applicable to claims brought to recover pecuniary loss.

## **L. Subrogation**

In a case of first impression, the Pennsylvania Supreme Court in Poole v. Workers’ Compensation Appeal Board (Warehouse Club, Inc.), 810 A.2d 1182 (Pa. 2002), held that proceeds from a legal malpractice action are subject to subrogation pursuant to 77 Pa. Cons. Stat. § 671. Plaintiff Poole was injured when he slipped on a patch of ice in front of his employer’s building. Poole received worker’s compensation benefits from his employer. Poole attempted to file a complaint against the owner of the property on which he fell, but his attorney filed the complaint against the wrong persons. The complaint was dismissed and Poole’s cause of action against the owner was barred by the statute of limitations.

Poole filed a legal malpractice action against his former counsel. The malpractice action settled and Poole's employer sought subrogation from the proceeds of the settlement for the amounts it had paid. The Supreme Court held that the employer was entitled to subrogation under 77 Pa. Cons. Stat. § 671, which provides for subrogation where the compensable injury is caused in whole or in part by the act or omission of a third party. Because a plaintiff must demonstrate not merely an injury as a result of the negligence of his former attorney, but also the negligence of the third party which resulted in the underlying injury, an employer may rely on the employee's legal malpractice action to demonstrate that the compensable injury was caused by a third party. Id.

#### **M. Venue**

In Zampana-Barry v. Donaghue, 921 A.2d 500 (Pa. Super. Ct. 2007), appeal denied, 596 Pa. 709, 940 A.2d 366 (Pa. 2007), the Superior Court affirmed the trial court's order refusing to transfer venue in a legal malpractice case from Philadelphia to Delaware County. Plaintiff in this case brought claims in the Philadelphia Court of Common Pleas against a lawyer who had represented her in personal injury against K-Mart and who she claimed had negligently failed to preserve her right to proceed against K-Mart after it filed for bankruptcy. Defendants, the lawyer and his firm, filed preliminary objections arguing that venue was improper pursuant to Rules 1006(b) and 2179(a)(2) of the Pennsylvania Rules of Civil Procedure, which pertain to venue over a corporation or similar entity. After conducting a hearing, the trial court determined that Defendants regularly conducted business in Philadelphia and overruled the objections.

On appeal the Superior Court first noted that it was unable to ascertain if Defendant law firm was a corporation or a partnership and further noted that Rule 2130 contains the provisions relating to venue over partnerships and Rule 2179 the provisions relating to venue over corporations. Both rules, however, allow for venue in a county where the entity "regularly conducts business" and so the court's ignorance on this point did not impact the appeal.

The court next noted that although Defendants voiced many arguments relating to a request to transfer venue based on *forum non conveniens*, i.e. under Rule 1006(d), their motion actually was based only on improper venue, i.e. Rule 1006(b). Consequently, the court would consider only whether the trial court abused its discretion under Rule 1006(b).

In addressing this question the court applied the required qualitative/quantitative analysis. It noted that Defendant lawyer testified that he and the firm were in the business of providing legal representation, that he appeared and would continue to appear in federal courts in Philadelphia as a solicitor for several townships, and that he appeared and would continue to appear in state courts in Philadelphia as a litigator. The firm also submitted an affidavit stating that for the past two years no more than three to five percent of the firm's gross revenue was generated by Philadelphia cases. Based on this information, the Superior Court ruled that the trial court had not abused its discretion in determining that the firm's acts were of sufficient quality and quantity to qualify as regularly conducting business, and so to sustain venue, in Philadelphia.

**N. Certificate of Merit**

Pennsylvania Rule of Civil Procedure 1042.3 provides in pertinent part:

- (a) In any action based upon an allegation that a license professional deviated from an acceptable professional standard, the attorney for the plaintiff, ..., shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney ... that either
  - (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm ....

Pa. R. Civ. P. 1042.3.

In Parkway Corp. v. Margolis Edelstein, 861 A.2d 264 (Pa. Super. Ct. 2004), appeal denied, 912 A.2d 1293 (Pa. 2006), the Superior Court addressed whether a judgment of *non pros* is properly entered upon Plaintiff when the Complaint was unaccompanied by a Certificate of Merit, and Plaintiffs failed to request an extension of the filing period.

Plaintiffs instituted a claim for legal malpractice after a verdict in a wrongful death action was rendered against them for approximately \$7 million. The complaint was unaccompanied by a certificate of merit, and appellants never requested an extension of time in which to file one. Defendants successfully moved for judgment of *non pros*. Thereafter, Plaintiffs filed a Petition to Open and/or Strike, which was denied by the trial court.

On appeal, Plaintiffs claimed that they had substantially complied with the certificate of merit requirements because two partners in the law firm had outlined the bases for legal malpractice in the underlying wrongful death suit, and that such an outline satisfied the requirement of a written statement by “an appropriate licensed professional.” In addition, Plaintiffs asserted that verification submitted by their attorney constituted substantial compliance because it was served the same function as the certificate of merit. Id.

The Superior Court disagreed, reasoning that Plaintiffs’ interpretation of “appropriate licensed professional” was overly broad in that it would encompass almost every member of the firm representing appellants, and would allow certification by parties who have a vested interest in the case. Moreover, the court asserted that attorney verifications are not sufficient substitutes for certificates of merit. Verifications can be submitted by any person with sufficient knowledge, information and belief. Pa. R. Civ. P. 1024(c). Therefore, if verifications were

appropriate substitutes for a certificate of merit, the requirement that the certificate be submitted by an “appropriate licensed professional” would be nullified.

In Moore v. John A. Luchsinger, P.C., 862 A.2d 631 (Pa. Super. Ct. 2004), the Superior Court determined that a praecipe for *non pros* cannot be filed for failure to timely file a certificate of merit, or a petition to extend the time for filing, after a certificate of merit has already been filed, regardless of whether the certificate was filed late.

In Scaramuzza v. Sciolla, 345 F. Supp. 2d 508 (E.D. Pa. 2004), the United States District Court for the Eastern District of Pennsylvania, sitting in diversity, declared that Rule 1042.3 was controlling substantive state law. The court further concluded that Plaintiff’s failure to file a certificate of merit within sixty days of filing original complaint did not warrant dismissal with prejudice where Defendants did not show prejudice from the delay and responded to Defendants’ motion to dismiss by filing a proper certificate. The court found that Plaintiff was entitled to the relief provided by Rule 3051 (relief from entry of judgment for *non pros*) and denied Defendants’ motion to dismiss.

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 U.S. Dist. LEXIS 20302 (W.D. Pa. Mar. 13, 2009).

In Perez v. Griffin, No. 1:06-CV-1468, 2008 U.S. Dist. LEXIS 45240 (M.D. Pa. June 9, 2008), aff’d, 304 Fed. Appx. 72 (3d Cir. 2008) (not precedential), cert. denied, 129 S.Ct. 2439 (2009), the *pro-se* Plaintiff failed to file a certificate of merit in accordance with Rule 1042.3. The court noted that Plaintiff failed to file a certificate of merit or request an extension and explained that “[f]ailure to file either a certificate of merit under Rule 1042.3(a) or motion for extension under Rule 1042.3(d) is fatal unless the plaintiff demonstrates that his or her failure to comply is justified by a ‘reasonable excuse.’” Plaintiff maintained that the attorney-Defendant’s actions constitute common law fraud, not legal malpractice, and as such no certificate of merit is required. In dismissing Plaintiff’s legal malpractice claim, the court reasoned that Plaintiff’s allegations of fraud cannot serve as a ‘reasonable excuse’ for his failure to file a certificate of merit.

**The certificate of merit requirement applies regardless of whether Plaintiff styles the claim as a malpractice action or as or as one for fraud or breach of contract. Donnelly v. O’Malley & Langan, P.C., 370 Fed. Appx. 347 (3<sup>rd</sup> Cir. 2010).**

**Further discussion of the certificate of merit requirement is contained at the beginning of this publication.**

## **O. Requirement and Substance of Expert Testimony / Expert Qualifications**

In the context of legal malpractice under Pennsylvania law, the plaintiff must put on expert testimony to establish the relevant standard of care and noncompliance therewith. Int'l Land Acquisitions, Inc. v. Fausto, 39 Fed. Appx. 751 (3d Cir. 2002) (not precedential); see also Ballinger v. Bock & Finkelman, 823 A.2d 1020 (Pa. Super. Ct. 2003), aff'd, 823 A.2d 1020 (Pa. 2003) (trial court properly granted summary judgment due to Plaintiff's failure to present expert testimony).

Only where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of ordinary experience and comprehension of non-professional persons, are expert witnesses unnecessary. Antonis v. Liberati, 821 A.2d 666 (Pa. Commw. Ct. 2003), appeal granted, 842 A.2d 407 (Pa. 2004) (no expert needed to establish that attorney failed in duty to secure proper recording of client's mortgage); see also Amoroso v. Morley, No. 00-3496, 2002 U.S. Dist. LEXIS 4989 (E.D. Pa. Mar. 25, 2002); Philadelphia Waterfront Partners, L.P. v. Churchill Dev. Group 2009 Phila Ct. Com. Pl. LEXIS 16 (Phila. Cty. Ct. Com. Pl. Jan. 21, 2009) (expert testimony required in case involving complex real estate transactions and an attorney's duties in representing a client in said real estate transactions) **see also Vadovsky v. Treat, 2010 U.S. Dist. LEXIS 99099 (M.D. Pa. 2010) (expert testimony required when plaintiff's allegations were that defendant attorney breached "the duty to timely resolve the case, the duty of diligence and the duty of honest and timely dealing with the client")**.

Expert testimony is also required to demonstrate that Plaintiff would have won the underlying case had Defendant not been negligent. Int'l Land Acquisitions, 39 Fed. Appx. 751.

Expert testimony in a legal malpractice case must be based on facts in the record, and exclusion of expert testimony that is without proper foundation is not error. Jones v. Wilt, 871 A.2d 210 (Pa. Super. Ct. 2005) (trial court correctly excluded expert testimony premised on fact for which there was no support in the record; order granting summary judgment in favor of defendant lawyer was affirmed).

In Miller v. Continental Casualty Co., 943 A.2d 330 (Pa. Super. Ct. 2007), appeal denied, 960 A.2d 841 (Pa. Nov 20, 2008), the Superior Court addressed multiple issues arising out of a legal malpractice claim, including issues regarding qualifications required for expert witnesses in legal malpractice cases.

By way of background, following a forty-two day trial in which the jury found in favor of Plaintiff, the trial court in Miller granted judgment notwithstanding the verdict on Plaintiff's legal malpractice claim based on its view that all three of Plaintiff's expert witnesses were not competent to testify as to the opinions they offered at trial.

At trial, the trial court initially found all three of Plaintiff's experts competent to render expert testimony. After considering Defendants' post-trial Motion, however, the trial court reconsidered and declared all three incompetent to testify as expert witnesses. The Superior Court held that the trial court erred in so holding.

The Superior Court stated that to be qualified to testify in a given field, a witness “need only possess more expertise than is within the ordinary range of training, knowledge, intelligence, or experience.” Upon review of the record, the court held that each of the three liability experts proffered by Plaintiff were competent to testify as expert witnesses as each possesses the requisite experience and training.

The Superior Court next addressed Plaintiff’s argument that the trial court erred when it concluded the evidence was not sufficient to support the verdict. The trial court found that Plaintiff failed to establish that the Defendant’s conduct fell below the applicable standard of care. The trial court, in reaching its decision, relied on its analysis of testimony of Plaintiff’s liability experts, and concluded that each of the three experts had based their opinions on speculation and conjecture.

The trial court had reasoned that Plaintiff’s experts were not qualified to offer their opinions regarding the standard of care applicable to insurance defense attorneys because they had either not been insurance defense attorneys or had ceased practicing insurance defense. The Superior Court rejected this contention and held that insurance defense attorneys “are not relieved of those minimum standards to which all attorneys are held, nor are they held to a separate and unique standard.” The court further stated that the testimony offered at trial established that the experts “clearly possessed more expertise than is within the ordinary range of training, knowledge, intelligence, or experience, even if . . . not actively practicing in the area of insurance defense . . . .” Thus, the Superior Court held that Plaintiff’s evidence did, in fact, support the verdict.

The Superior Court also reversed the trial court with respect to its judgment notwithstanding the verdict in favor of Defendants on Plaintiff’s breach of insurance contract claim, and remanded for reinstatement of the jury’s verdict.

Also, in an unpublished opinion in Rice v. Saltzberg, Trichon, Kogan & Wertheimer, 918 A.2d 799 (Pa. Super. Ct. 2006), appeal denied, 929 A.2d 1162 (Pa. 2007), the Superior Court held that the trial court had properly allowed Plaintiff’s attorney-expert to testify as to the settlement value of Plaintiff’s underlying slip and fall claim, which Defendant-attorney had failed to settle or file within the applicable statute of limitations. The court found that this testimony was relevant and material as it assisted the jury in assessing the value of the underlying claim, which would have been filed in New York. The court did not agree with Defendant’s argument that this testimony was impermissible as concerning an ultimate issue of the case that the jury should have decided. The expert testified that the underlying case was worth between \$75,000 and \$250,000. The jury in the legal malpractice case awarded Plaintiff \$282,000. In addition to giving a likely settlement range, the expert testified that ninety percent of similar cases in New York settle prior to trial. The court held that, given New York’s demonstrated desire to settle these types of cases, the possibility that the case would have settled was not speculative. The judgment in favor of Plaintiff was affirmed.

**In Frost v. Fox Rothschild, 2010 Phila. Ct. Com. Pl. LEXIS 346, No. 03292 (Nov. 12, 2010), Plaintiff alleged legal malpractice claims of negligence against his divorce attorney, as well as a claim of breach of fiduciary duty. Defendant filed a motion for summary judgment, which raised the issue of whether Plaintiff was required to provide an expert witness and report in support of his claims.**

**Noting that “expert testimony becomes necessary when the subject matter of the inquiry is one involving special skills and training not common to the ordinary lay person,” the court addressed each of the plaintiff’s claims to assess the need for an expert. Id. quoting Storm v. Golden, 371 Pa. Super. 368, 376, 538 A.2d 51, 64 (1988). The court determined that whether defendant’s analysis and recommendation of a settlement agreement was reasonable, whether Defendant failed to exercise reasonable care and skill in choosing not to obtain a vocational expert, whether Defendant should have filed a post-trial motion on the issue of the trial court’s right to impose an obligation of evaluation of Plaintiff’s business, whether Defendant should have had an expert do a valuation of Plaintiff’s personal effects were all issues that required an expert witness, which Plaintiff failed to produce. Therefore, the court granted summary judgment in Defendant’s favor on those claim.**

**Plaintiff’s remaining claims were determined to have no supporting evidence, or evidence that directly contradicted Plaintiff’s position and were, therefore, dismissed.**

**P. 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 at 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.

Shortly before the arbitration was to commence, Stefan contacted Ms. Carino to discuss the matter. 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. 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.

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) 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 U.S. Dist. LEXIS 42780 (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.

#### **Q. No Liability Under UTPCPL**

In Beyers v. Richmond, 937 A.2d 1082 (Pa. 2007), the Supreme Court of Pennsylvania recently 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 of her former attorneys and violation by them 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 for the first time the applicability of the UTPCPL to attorney conduct, the Supreme Court stated that “[a]lthough we find the egregious conduct of appellants in this case to be reprehensible, we decline to hold that Pennsylvania’s UTPCPL applies to an attorney’s



conduct in collecting and distributing settlement proceeds. Applications of the UTPCPL under these circumstances would encroach upon this Court's exclusive power to regulate the practice of law in this Commonwealth." Id. at 1085-86.

In reaching its holding, the Pennsylvania Supreme Court pointed out that the Superior Court of Pennsylvania has held that the UTPCPL does not apply to treatment provided by physicians and that it is clear that the legislature did not intend the Act to apply to medical services rendered by physicians. See id. at 1088. Extending this reasoning to professional services provided by attorneys, the Supreme Court held that the UTPCPL does not apply to services provided by attorneys. See id.

Additionally, to support its holding the Pennsylvania Supreme Court relied on the exclusive 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. The court relied on its exclusive constitutional authority to regulate the practice of law in the Commonwealth as support for its refusal to apply the UTPCPL to attorney conduct and, citing itself, reiterated that "[a]ny encroachment upon the judicial power by the legislature is offensive to the fundamental scheme of our government." See id. (citing Commonwealth v. Sutley, 378 A.2d 780, 783 (Pa. 1977)).

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 court found that the appellants' conduct in "collecting and distributing settlement proceeds does not fall within the purview of the UTPCPL, but rather within this court's exclusive regulatory powers." Id. at 1093.

In Strayer v. Bare, 2008 WL 1924092 (M.D. Pa. 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. Claims were filed with the PLFCS by these people and they received a portion of the funds which the Frankel firm allegedly misappropriated. Plaintiff Strayer was involved in a personal injury litigation which resulted in a settlement of \$530,000, which was paid to the Frankel firm, but, never properly paid out to Strayer. Plaintiffs brought suit against the Frankel firm and other defendants, alleging, *inter alia*, a claim under the UTPCPL. Defendants filed a motion to dismiss the complaint and the court, as to the UTPCPL claim, granted the motion to dismiss and held that the misappropriation of client funds "[d]oes not fall within in the purview of the UTPCPL, but rather within the Court's exclusive regulatory powers."

#### **R. Disciplinary Actions – Offensive Collateral Estoppel Applies**

In Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47 (Pa. 2005), the Pennsylvania Supreme Court held that, under the circumstances of the case, the doctrine of collateral estoppel could be applied offensively in a disciplinary matter against an attorney. The ODC's petition for discipline alleged that the respondent had engaged in fraud by

misappropriating family assets, and relied upon the civil verdict previously entered against the respondent. The civil litigation arose from a dispute between the lawyer and his sisters and involved the three siblings' inheritance. A jury found Defendant-attorney liable for breach of fiduciary duty, unjust enrichment and fraud. The trial court in the civil action ruled that the lawyer's total liability was over \$3.6 million, which included \$500,000 in punitive damages.

In the subsequent disciplinary action, the Hearing Committee ultimately ruled that the doctrine of collateral estoppel precluded the respondent from relitigating the issue of whether he had engaged in fraud, and recommended that he be disbarred. Respondent filed a brief on exceptions and requested oral argument. Following oral argument, the Disciplinary Board ruled that the doctrine of collateral estoppel from a civil verdict did not apply in a disciplinary proceeding. On the initial appeal, the Supreme Court vacated the Board's Order and remanded the matter to the Discipline Board and instructed the Board to apply the doctrine of collateral estoppel as set forth in ODC v. Duffield, 644 A.2d 1186 (Pa. 1994). On remand, the Board ruled that collateral estoppel applied to this case and that the misappropriation of \$2.4 million constituted dishonest and egregious conduct warranting disbarment. Respondent filed a request to present oral argument pursuant to Pa. Rule D. Ethics 208(e)(2), which the Supreme Court granted.

In its December 2005 Opinion, the court noted that it had previously ruled, in Duffield, that the doctrine of collateral estoppel could be asserted defensively in a disciplinary action. The court acknowledged it had not yet addressed whether the doctrine could be applied offensively to establish professional misconduct by a lawyer, but concluded that, when fairness dictated, there was no prohibition to doing so, even with respect to a civil case. Citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-331 (1979), the court noted that the United States Supreme Court had crafted four factors to examine to ensure fairness in application of the doctrine, and concluded that these factors were satisfied in this case. The court further emphasized that when the elements of the doctrine were satisfied, it then made its own determination as to whether the findings in the previous action constitute professional misconduct, and an independent determination as to what sanction is appropriate.

The court concluded that elements of the doctrine were satisfied in this case, and that the Disciplinary Board had properly applied it. It also determined that the facts found in the civil fraud case constituted professional misconduct and held, specifically, that the lawyer's actions in defrauding his sisters of family assets violated Pennsylvania Rule of Professional Conduct 8.4(c), which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit and misrepresentation. Finally, the court held that this misconduct warranted disbarment. It noted that an aggregating factor was that the lawyer had made no voluntary payment on the civil judgment, which had been final for several years.

#### **S. Suspension of License - Interplay Between State and Federal Authority**

In Surrick v. Killion, 449 F.3d 520 (3d Cir. 2006), the Third Circuit addressed the peculiar situation of an attorney who was licensed to practice before the District Court for the Eastern District of Pennsylvania, but was not licensed to practice before the Pennsylvania state courts.

In Surrick, a Pennsylvania attorney, Robert B. Surrick, was suspended from the Pennsylvania Bar for five years following disciplinary proceedings. Subsequently, the District Court ordered a reciprocal thirty-month suspension of his license to practice before the federal courts. Following his readmission to the Federal Bar (and while his Pennsylvania license was still suspended), Surrick sought a declaratory judgment from the District Court allowing him to open a law office in the state of Pennsylvania, for the sole purpose of supporting his practice before the federal courts, without fear of reprisal from the Pennsylvania Office of Disciplinary Counsel (ODC).

The ODC opposed Surrick's attempt to find relief before the federal courts, arguing that as a matter of state sovereignty, the Commonwealth of Pennsylvania retained the authority to regulate the practice of law within its borders without federal interference.

The District Court ultimately ruled in favor of Surrick, and allowed him to open a law office in Pennsylvania for the sole purpose of handling cases before the federal courts, subject to certain conditions (most notably, he was compelled to comply with all Pennsylvania procedures for reinstatement to the state bar, he was prohibited from posting signs outside of his office or anywhere else in public and he was required to indicate on his letterhead that he was not licensed to practice before the state courts in Pennsylvania). The ODC also raised several justiciability arguments in opposition to Surrick's argument for a declaratory judgment, which were denied.

Departing from (although not expressly overruling) the Pennsylvania Supreme Court's pronouncement in Office of Disciplinary Counsel v. Marcone, 855 A.2d 654 (Pa. 2004), cert. denied, 543 U.S. 1151 (2005), that an attorney is not permitted to open a law office in the state of Pennsylvania for the purpose of practicing before the federal courts if his Pennsylvania license is suspended, the Third Circuit Court of Appeals upheld the District Court's entry of a declaratory judgment in favor of Surrick (subject to the conditions noted above), and held that under the Supremacy Clause of the United States Constitution, a state may not prohibit an attorney admitted to the bar of a federal district court, but suspended from the state bar, from maintaining a legal office for the sole purpose of handling federal cases.

Arriving at this holding, the court explained that the central issue of this case was whether a state law prohibiting Surrick from maintaining a law office was preempted by the exclusive authority vested in the Eastern District of Pennsylvania, under federal law, to determine who may practice law before it. The court started with the proposition that the establishment of a law office is necessary for the effective practice of law. The court held, in turn, that the state law prohibiting Surrick from maintaining a law office in Pennsylvania would effectively prohibit him from practicing before the federal courts in Pennsylvania, and would thus place "additional conditions," not contemplated by congress, on the Eastern District's ability to determine who is permitted to practice before it. In other words, the court was concerned that if the state restriction were upheld, it would be necessary for Surrick to be admitted to practice in Pennsylvania before he could be permitted to practice before the federal courts in Pennsylvania, thus undermining the power retained by the District Court under federal law. Under principles of federalism, the Third Circuit thus reasoned that the Commonwealth of Pennsylvania could not wield such power over the United States Congress, and ruled that the Pennsylvania law

prohibiting Surrick from establishing a law office in Pennsylvania, under the facts of this case, was preempted by federal law.

It should also be noted that the Third Circuit gave no credence to the ODC's argument that Surrick should be prohibited from maintaining a legal office in Pennsylvania with a suspended Pennsylvania license because Surrick would be handling federal cases based predominantly on diversity of jurisdiction and would therefore essentially be practicing Pennsylvania law. Rejecting this argument, the court explained that it was not willing to base its decision whether or not to allow Surrick to open a law office in Pennsylvania on the particular facts of each case that Surrick might handle.

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

In Vaccone v. Syken, 899 A.2d 1103 (Pa. 2006), the Pennsylvania Supreme Court addressed the issue of whether an order disqualifying trial counsel in a civil case is an interlocutory order, which is not immediately appealable. In Vaccone, counsel for Plaintiffs in an attorney malpractice action was disqualified by the trial court because he was scheduled to appear as a witness in the case and because he had previously served as co-counsel with Defendant attorney in the underlying matter, thus giving rise to a conflict of interest. Plaintiffs appealed the trial court's order to the Superior Court, but the Superior Court quashed the appeal as interlocutory and unappealable. Plaintiffs then appealed to the Pennsylvania Supreme Court.

Upholding the Superior Court's Order quashing Plaintiff's appeal as interlocutory, the Pennsylvania Supreme Court explained that in determining whether the disqualification of trial counsel in a civil matter is immediately appealable, the court must determine whether such an order is a "collateral order" under Pennsylvania Rule of Civil Procedure 313, and therefore appealable before a final judgment is rendered. The Court explained that the collateral order doctrine allows for immediate appeal of an order which:

- (1) is separable from and collateral to the main cause of action; (2) concerns a right too important to be denied review; and (3) presents a claim that will be irreparably lost if review is postponed until final judgment in the case.

See Pugar v. Greco, 394 A.2d 542, 545 (Pa. 1978).

Holding that the disqualification of trial counsel in a civil case does not qualify as a collateral order, the Supreme Court first noted that under Pennsylvania law, an order removing counsel in a criminal case is interlocutory and not immediately appealable. See Commw. v. Johnson, 705 A.2d 830 (Pa. 1998). The court then analyzed the disqualification of trial counsel in a civil case in light of the three factors considered in determining whether an order is collateral to the proceeding, and concluded that: (1) in this case, an order disqualifying counsel could not be separated from the merits of the case; (2) although Plaintiffs would be inconvenienced if they were compelled to find new counsel, they would not be unable to find substitute counsel; and (3) Plaintiffs would not irreparably lose their right of review of the disqualification order, as the Superior Court could order a new trial on appeal if it saw fit to do so, with Plaintiffs free to choose their counsel as they pleased. The Supreme Court specifically held, in turn, that "a trial

court order disqualifying counsel in a civil case is an interlocutory order.” Vaccone, 890 A.2d at 1108.

**U. Attorney’s Untruthfulness and Deceit Warranted Disbarment**

In Office of Disciplinary Counsel v. Akim Frederic Czmus, 889 A.2d 1197 (Pa. 2005), the Pennsylvania Supreme Court considered the proper disciplinary action for an attorney who had lied about his background on his law school application and bar application, and was repeatedly untruthful before the Pennsylvania Office of Disciplinary Counsel (ODC), the Pennsylvania Board of Bar Examiners and various entities investigating his background on behalf of the New Jersey Board of Bar Examiners.

The facts of this case are critical. In 1977, respondent, Akim Frederic Czmus, received his degree in medicine from Brown University School of Medicine. Czmus subsequently completed a year of residency at Thomas Jefferson University in Philadelphia, and was issued a license to practice medicine in the state of New York in November 1978. After engaging in private practice in New York and serving as Assistant Clinical Professor of Ophthalmology at New York Medical College, St. Vincent’s Hospital and Medical Center and the New York Eye Infirmary, Czmus was granted a license to practice medicine and surgery in California in 1984, and moved there in 1985. On his applications to several hospitals in California, Czmus falsely represented that he was certified by the American Board of Ophthalmology. In 1986, upon learning of these false representations and Czmus’ grossly negligent treatment of six of his patients, the Attorney General of California revoked Czmus’ license to practice medicine in California. Czmus’ New York license was also revoked after a reciprocal disciplinary proceeding was conducted by the New York Licensing Board.

In 1992, unable to practice medicine, Czmus was accepted at Temple University School of Law. In his law school application, Czmus failed to disclose that he had attended medical school, received medical licenses, lived in California, worked as a physician, had disciplinary proceedings in California and New York and had both states’ medical licenses revoked. Furthermore, Czmus falsely represented in an application to a law firm that he held medical licenses in California and New York

In 1995, Czmus submitted applications to sit for the Pennsylvania and New Jersey bar examinations, and failed to include in either bar application any mention of his medical education, career, or disciplinary proceedings. Additionally, Czmus falsely represented that he lived in Delaware and worked for Kennard Lab Associates as a lab supervisor during the time he was actually working as a physician in California. Czmus passed both bar examinations, and each state’s character and fitness evaluation failed to reveal his falsifications.

In 1998, the New Jersey disciplinary authorities learned that Czmus was a former physician with a record of professional misconduct and discipline, and they began an investigation into Czmus’ background. During an interview with an investigator, Czmus lied about his past and attributed the discrepancies on his application to confusion.

In November 1999 and January 2000, Czmus began seeing two psychiatrists who diagnosed him with various psychiatric disorders. Although Czmus' psychiatrists attributed his falsifications, in part, to his psychiatric disorders, the New Jersey Supreme Court found that Czmus had violated two rules of professional conduct, and his license to practice law was revoked for two years.

Subsequently, the Pennsylvania Office of Disciplinary Counsel filed a petition for discipline charging Czmus with violations of Pennsylvania Rules of Profession Conduct 8.1(a) and 8.4(b)-(d). On June 5, 2001, a Hearing Committee appointed by the ODC recommended that Czmus' license to practice law be suspended for five years, followed by a two-year probationary period. The ODC rejected the recommendation of the Hearing Committee, however, and held that Czmus' violations "required disbarment."

The Supreme Court, reviewed the ODC's disciplinary actions, and upheld Czmus' disbarment, holding that, "we find respondent's level of fraud, which transcended professions and jurisdictions, requires disbarment." Czmus, 889 A.2d at 1205. Discussing the distinction between disbarment and suspension, the Court explained that disbarment is appropriate in cases of such blatant untruthfulness:

Only disbarment, which places a higher burden on respondent if he should seek readmittance, will properly protect the goals of the profession and require respondent to be totally candid to the reviewing tribunal before his readmittance will be considered.

Id.

Rejecting revocation and suspension of Czmus' license, the Pennsylvania Supreme Court held that disbarment is the best method of discipline for transgressions based upon such blatant and repeated episodes of deceit and untruthfulness.

## **V. Standing to Assert Claim**

In Hess v. Fox Rothschild, LLP, 925 A.2d 798 (Pa. Super. Ct. 2007), appeal denied, 945 A.2d 171 (Pa. 2008), the Superior Court was asked to determine whether Plaintiffs had standing to bring a legal malpractice action against Defendant law firm based on the estate planning advice and services provided by defendants to Plaintiffs' deceased step-mother.

Defendant law firm was retained by the deceased, Mr. and Mrs. Rosewater, to provide estate planning services, which included the drafting of their wills and the creation of various trusts. Plaintiffs, who are the stepsons of Mrs. Rosewater, brought an action against Defendant law firm sounding in negligence, breach of contract, intentional breach of the covenant of good faith and fair dealing. Plaintiffs also sought punitive damages. All of Plaintiffs' claims involved Mrs. Rosewater's will, which established several trusts including a marital trust and a residuary trust. Plaintiffs were named as beneficiaries of the residuary trust.

Shortly after Mrs. Rosewater died, Mr. Rosewater withdrew \$5 million from the marital trust. Mrs. Rosewater's will provided that her husband had the unlimited right to withdraw as

much of the principal as he wished from the marital trust during his lifetime, and provided him a testamentary power of appointment, which if not exercised, would result in the corpus remaining in the trust at his death to pass into the residuary trust and, therefore, to Plaintiffs. In their Complaint, Plaintiffs alleged that their inheritance was improperly diminished and that the withdrawal of funds from the marital trust was contrary to the testamentary wishes of Mrs. Rosewater. Defendant law firm filed preliminary objections to Plaintiffs' Amended Complaint averring that Plaintiffs lacked standing to raise their claims, and that Plaintiffs Amended Complaint was factually deficient. Following oral argument, the trial court sustained Defendant's preliminary objections.

The Superior Court, was presented with the following issues: (1) whether a plaintiff has standing to bring a malpractice suit against an attorney with whom they did not have an attorney-client relationship, and (2) whether Plaintiffs in Hess raised a cognizable claim sounding in negligence or contract.

In addressing the merits of Plaintiffs' claims, the Superior Court applied rule of Guy and its progeny, which stand for the proposition that although a plaintiff in a legal malpractice claim must generally show an attorney-client relationship (or analogous professional relationship), persons who are legatees under a will "and who lose their intended legacy due to the negligence of the testator's attorney should be afforded some remedy." (citing Guy v. Liederbach, 459 A.2d 744, 746, 750 (Pa. 1983)). The Supreme Court's holding in Guy carved out a narrow class of third-party beneficiaries of the contract between the testator and the attorney who have standing to assert a legal malpractice claim. To determine whether a particular legatee is an intended third-party beneficiary our Court has established a two-part test:

- (1) recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and
- (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promise 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. (citing Guy, 459 A.2d at 747).

The Superior Court recognized the class of legatees that may bring suit under the third-party beneficiary theory is narrow. Applying Guy to the case before the court, the Superior Court stated that Mrs. Rosewater's intentions under her will were clear and that the rule of Guy did not allow Plaintiffs to bring suit simply because they felt Mrs. Rosewater's intent was to bequeath them a greater legacy than they received.

Thus, the Superior Court held that Plaintiffs did not have standing to bring their legal malpractice action against plaintiffs and that the trial court properly dismissed their action.

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

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

On remand, the Superior Court considered three questions relating to the entry of *non pros*:

- (1) Where a case had been *non 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.



## **X. Insurance Coverage as to Professional Liability Claim**

In Post v. St. Paul Travelers Insurance Co., PICS No. 09-0094, Benjamin Post, Esquire, (“Post”) was hired by Mercy Hospital in Wilkes-Barre, Pennsylvania to defend a medical malpractice case. The plaintiffs in the medical malpractice suit, William and Tukishia Bobbett, claimed that their four year old son had died as a result of medical malpractice while at Mercy Hospital. The Bobbetts’ attorney claimed discovery abuses against Post. The case was settled, in part due to allegations against Post for improperly abusing discovery procedures.

After the medical malpractice action was settled, Post was put on notice from Catholic Health East Partners that Mercy Hospital intended to sue Post. Post then retained George Bochetto (“Bochetto”) as his attorney. The Bobbetts’ attorney filed a Sanctions Petition against Post for the alleged discovery violations which took place in the medical malpractice action. Mercy Hospital effectively joined in the petition against Post. Post notified his Professional Liability Insurance carrier, St. Paul Travelers Insurance Co. (“St. Paul”) of the pending Sanctions Petition against him, and they denied him coverage. It was St. Paul’s position that the Sanctions Petition only sought relief in the form of sanctions which are excluded under his Professional Liability Policy (“Policy”).

Post, through Bochetto, attempted to discuss coverage responsibilities with St. Paul regarding the Sanctions Petition. St. Paul offered to pay \$36,220.26 when Post had already accrued \$400,000 in attorneys’ fees. Post declined the offer and proceeded to file suit.

Post filed a Complaint against St. Paul alleging a breach of contract. He then filed a Motion for Partial Summary Judgment as to Count I, II and V in his Complaint. Those Counts alleged, a Breach of Contract as to the insurance policy, breach of contract as to the agreement to pay the costs of the sanctions proceeding and declaratory judgment, respectively. In analyzing Post’s Motion for Partial Summary Judgment the Court stated:

The sanctions exclusion in the Liability Policy, however, under the commonly understood definition of sanctions as discussed above, refers to sanctions motions brought by opposing counsel. This exclusion does not preclude from coverage a sanctions petition joined by a lawyer’s former client, particularly one brought in anticipation of a malpractice suit based on identical allegations of wrongdoing. The attorney-client relationship between Post and Mercy indicates that the damages Mercy requested in the sanctions petition were actually malpractice damages, though Mercy termed them “sanctions.” As Post’s former client, the fact alleged by Mercy in the sanctions petition sound in malpractice, even though brought under a cause of action for sanctions. It is the facts in the complaint that dictate whether the exclusion in the liability policy applies, not the cause of action selected by Mercy. If he sanctions petition were excluded from coverage, Mercy could choose whether to proceed with an action where Post was covered by his

insurance carrier, or an action where Post was not, and potentially be awarded similar relief in either action.

A professional liability insurance carrier should not be able to avoid coverage for what is essentially a malpractice claim simply because of how an attorney's former client chooses to term the requested relief. Because the sanctions exclusion in the liability policy was unclear, it must be construed in favor of the insured. Therefore, the sanctions petition was not excluded from coverage under the liability policy after Mercy joined the sanctions petition and St. Paul had a duty to defend Post at that time. St. Paul breached their duty to defend Post under the Liability Policy and are therefore liable for breach of contract.

Id. at 13.

The court proceeded to Grant Post's Motion for Partial Summary as to Count I and V, and denied relief as to Count II, with the amount of the reimbursement to be determined.

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