2016 PROFESSIONAL LIABILITY UPDATE

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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 Joshua Kirsch, Joshua Hill, Kevin Harden, Casey Coyle, Brittany Wakim and Brett Kaminsky have been solid contributors. I thank them for their effort. Last, but not least, Ms. Lisa Gervasi, my loyal and long suffering assistant, deserves special praise.

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


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 by the Superior Court in Thierfelder v. Wolfert, 978 A.2d 361 (Pa. Super. Ct. 2009), vacated and remanded, 52 A.3d 1251 (Pa. 2012). 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 that she 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.

The Supreme Court of Pennsylvania granted a Petition for Allowance of Appeal on the following 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 2012, the Pennsylvania Supreme Court vacated the Superior Court’s holding, declining to impose the “specialist duty” applicable to mental health professionals on a general practitioner who may incidentally treat a patient’s mental health issues. Thierfelder, 52 A.3d 1251.

The Court first made two assumptions for purposes of deciding the case. First, that medical specialists may properly be held to a particularized standard of care for their area of specialty, and second, that Pennsylvania would hold mental health professionals to a duty to avoid sexual contact with their patients. The Court then turned to the issue of whether the same duty should be applied to non-mental health practitioners who incidentally provide mental and emotional care to patients, including counseling or prescribing common medications for depression or anxiety.

The Court considered the five Althaus factors, infra, of: 1) relationship between the parties; 2) the social utility of the actor’s conduct; 3) the nature of the risk involved and foreseeability of the harm incurred; 4) the consequences of imposing a duty on the actor; and 5) the overall public interest in the proposed solution. In considering the factors, the Court declined to expand to general practitioners the duty to avoid sexual relations with their patients in circumstances where they render some degree of mental treatment to the patient.

As to the relationship factor, the Court noted that patients are on an unequal playing field with physicians, which disparity can give rise to a relationship of trust. The Court also noted that when a relationship centers on psychotherapy, the patient is particularly vulnerable, as the mental
health professional often utilizes transference, in which the patient displaces onto the therapist feelings, attitudes, and attributes which properly belong to a figure in the patient’s past. This particularly vulnerable state has caused courts to recognize a duty on the part of mental health professionals to refrain from actions that would worsen the patient’s insecurities and fears. The Court then stated that the relationship and the vulnerability of the patient is not the same when mental health treatment is incidental and rendered by a general practitioner as opposed to a mental health professional. As such, the Court found that this relationship factor weighed against holding general practitioners to the same standard as mental health professionals.

The Court also found the remaining factors to weigh against holding general practitioners to the same standard as mental health professionals. The Court noted that general practitioners increasingly often treat patients’ mental health issues, because of familiarity, convenience, or insurance requirements that make a general practitioner the necessary first stop. The Court found that this incidental treatment of mental health issues by general practitioners has social utility and value. The Court also found that to hold general practitioners to the same standard as mental health professionals would discourage relatively routine attention to patients’ mental and emotional health.

As the Court declined to impose a duty on general practitioners to avoid sexual contact with their patients, the Court determined that the Defendant-physician did not violate any duty of care when he engaged in sexual relations with Plaintiff-wife, and vacated the Superior Court’s decision.

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).

In K.H. v. Kumar, 122 A.3d 1080 (Pa. Super. Ct. 2015), the Superior Court reversed the trial court’s decision granting summary judgment after the trial court found that neither the Child Protective Services Law ("CPSL"), 23 Pa.C.S. §§ 6301, et seq., nor
Pennsylvania common law created a duty on a physician to discover and report cases of possible child abuse. In the underlying action, minor plaintiff, KH asserted negligence claims against a number of his treating physicians alleging that they were negligent in misreading plaintiff’s medical imaging and in failing to report plaintiff’s abuse pursuant to the CPSL. The Superior Court held that that once plaintiff had established that a physician-patient relationship existed between plaintiff and the defendant physicians, the defendants owed plaintiff a physician’s “general duty.” The Superior Court went on to explain that whether or not the failure of defendants to identify and report plaintiff’s child abuse constitutes medical negligence is a standard of care question which must be decided by a jury. The Superior Court reasoned that because plaintiff had presented expert testimony that the standard of care required defendants to recognize and report plaintiff’s child abuse and that defendants breached the standard of care causing plaintiff’s injury, plaintiff had presented a *prima facie* case of medical negligence.

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 2012, the Court of Common Pleas of Westmoreland County dealt with another case involving a methadone prescription causing injury to a non-patient, and found that a prescribing physician may have a duty to the public if the risks are reasonably foreseeable under the circumstances. In Kobayashi v. The Estate of Holland, No. 3549 of 2007, 2012 Pa. Dist. & Cnty. Dec. LEXIS 132 (Ct. Com. Pleas, May 22, 2012), Defendant Debra Holland lost consciousness while driving and struck Daisuke Kobayashi, who became incapacitated. Daisuke’s guardian, Miki Kobayashi, brought suit against defendant Holland and her physician, Dr. Whitten. Plaintiff alleged that Dr. Whitten saw Ms. Holland in his office one hour before the accident. During the visit, Ms. Holland lost consciousness and Dr. Whitten provided another prescription for methadone. Ms. Holland then left Dr. Whitten’s office, drove, and hit Daisuke with her car.

Ms. Holland was consuming twice her prescribed dose of methadone. However, the court found that Dr. Whitten may have had a duty to the public, as he may have aggravated Ms. Holland’s condition, thereby contributing to the accident. Dr. Whitten prescribed medications in escalating doses, which may have contributed to Ms. Holland’s impaired ability to drive. Also, Ms. Holland was not necessarily aware that her medications might impair her ability to drive, as she testified that she asked whether she could drive and was told that she could if she felt okay. For his part, Dr. Whitten testified that he never asked Ms. Holland whether she was driving, and never told her not to do so. Further, Dr. Whitten had actual knowledge of a threat to the public if Ms. Holland were to drive, as Ms. Holland was lethargic in his office. “The threat of harm was neither remote nor speculative; it was foreseeable and instant.”

The court held that:

Ms. Holland's irresponsible and uncontrolled drug use led to the injuries sustained by Plaintiff Kobayashi. However, there exists a question of fact as to whether Dr. Whitten's treatment also was a substantial factor in contributing to Plaintiff's harm. Considering the knowledge Defendant Whitten had of Holland's condition, there appears to be a question of fact concerning whether Defendant Whitten caused or aggravated Holland's condition as a
result of his negligence in prescribing a regimen of medication in 
estimating doses. Accordingly, the [Court will deny] Defendant's 
Motion for Summary Judgment.


(Pa. 2013), the Pennsylvania Superior Court again analyzed the Althaus factors and held that a 
physician owed a duty of care to a third party. In Matharu, defendant Dr. Muir did not 
administer plaintiff-mother with an injection of RhoGAM during her pregnancy. RhoGAM is 
administered in cases in which a pregnant mother’s blood is Rh-negative and the father’s blood 
is Rh-positive. In these circumstances, future-conceived children may have a Rh-positive blood 
type, which may cause the mother to create antibodies against the fetus. The administration of 
RhoGAM can prevent harm in future pregnancies. Id. at 378. The plaintiff-mother became 
pregnant again, treated again with Dr. Muir, and had no issues. In March 2003, Dr. Muir sent a 
letter to the plaintiff-mother ending the treatment and relationship. Then, in 2005, the plaintiff-
mother again became pregnant, and this time did not treat with Dr. Muir. The child was 
delivered early by C-section and died two days later. Plaintiffs sued claiming that Dr. Muir and 
other defendants failed to administer RhoGAM, which in turn caused the issues with this last 
pregnancy. Id. at 380-81.

Defendants claimed that the trial court’s denial of their motion for summary judgment 
was improper because no duty between defendants and plaintiff-mother was established for the 
pregnancy at issue. The court applied the five-factor Althaus test and concluded that Defendants 
did have a duty. The court reviewed the DiMarco v. Lynch Homes-Chester County, Inc., 583 
A.2d 422 (Pa. 1990) opinion, in which the Supreme Court of Pennsylvania concluded that in a 
case involving a communicable and/or contagious disease, a physician’s duty encompassed third 
parties, whose health could be threatened by contact with the diseased patient. In so holding, the 
Supreme Court extended the duty of the physician to those within the foreseeable orbit of the risk 
of harm. Matharu, 29 A.3d at 386. The Matharu court concluded that the deceased child was in 
the class of persons whose health and life was likely to be threatened by Defendants’ failure to 
administer RhoGAM to plaintiff-mother during a previous pregnancy, and that it was reasonably 
foreseeable that the failure to administer RhoGAM in a previous pregnancy could cause injury to 
future unborn children. Id. at 387. The court further found that although imposing a duty on 
physicians in these circumstances could subject physicians to liability for years or even decades, 
the consequences and overall public interest of imposing the duty would prevent deaths and 
advance the public policies of the Commonwealth. Id. at 387-88.

In August of 2013, the Pennsylvania Supreme Court vacated the holding in Matharu, 
remanding the case back to the Superior Court for reconsideration in light of Seebold v. Prison 
Health Servs., 57 A.3d 1232 (Pa. 2012) (prison physician had no affirmative duty to warn and 
advise a third-party non-patient (prison security guard) of the risks of contracting a contagious 
bacterial infection as a result of contact with the inmates).

In Seebold, the plaintiff was a corrections officer at a prison. Twelve inmates were 
infected with MRSA, a contagious bacterial infection. The plaintiff became infected as a result
of her contact with the inmates. The plaintiff claimed the Prison Health Services staff knew of the infection and had a duty to warn the corrections officers and the inmates.

The Supreme Court found the Prison Health Services staff did not have such a duty. It distinguished DiMarco v. Lynch Homes-Chester County, Inc., 583 A.2d 422 (Pa. 1990) and Troxel v. A.I. duPont Institute, 675 A.2d 314 (Pa. Super. 1996), noting the decisions in those cases delineated a duty to advise a patient, not to identify, seek out and provide information to third-party non-patients. The Court noted there was a difference between advising a patient within the contours of the physician-patient relationship and disclosing protected medical information to a third party. The Court also distinguished Emerich v. Philadelphia Center for Human Development Inc., 720 A.2d 1032 (Pa. 1998), as that case involved a duty of a mental health professional when there was a threat of imminent violence.

The Court noted that limiting the existence of a duty to actions or inaction within the context of the physician-patient relationship is consistent with Section 324A of the Second Restatement, which provides, subject to limitations, that one who undertakes to render services they should recognize as necessary for the protection of others, is subject to liability for harm “resulting from his failure to exercise reasonable care to protect his undertaking.” For a physician, the original undertaking is the entry into the physician-patient relationship for treatment purposes.

The Court noted it would not impose new affirmative duties unless “the justifications for and consequences of judicial policymaking are reasonably clear with the balance of factors favorably predominating.” Further, the Court noted that the following considerations potentially impede a physician’s ability to provide third-party warnings: “physician-patient confidentiality; protection of the physician-patient relationship; maintenance of prison order and security; the burden of identifying individuals in prisons at elevated risk for transmission; and practical barriers to physician access to, and ability to disseminate, information in the prison setting.” The Court concluded the plaintiff’s request for the imposition of a new, affirmative common law duty in tort on the part of a physician to undertake third-party interventions required a broader policy assessment and, the trial court did not err in applying the default approach of declining to impose a new affirmative duty.


Polaski involved a decedent-child who died of hypertrophic cardiomyopathy (“HCM”), a genetic cardiac condition. Two years before decedent’s death, decedent’s father, the plaintiff in the action, had an electrocardiogram, ordered by Dr. Whitson. The electrocardiogram revealed results which plaintiff contends should have led Dr. Whitson to order further testing. Plaintiff contends that had further testing been ordered, it would have been discovered that plaintiff-father had HCM, and decedent-son would have been tested for HCM and his death would have been averted.
The court considered the five Ferrara factors in determining whether Dr. Whitson had a duty to the decedent based on his treatment of the father. In considering the “relationship” factor, the court cited to DiMarco and Matharu, noting that although “a physician may be liable to a third party who is injured because of the physician’s negligent treatment of a patient,” liability is limited to times when a physician has “undertaken to render services to another that he should recognize as necessary for the protection of a third person.” In determining whether Dr. Whitson should have “recognize[d] [further testing on plaintiff-father] as necessary for the protection of [decedent]”, the court distinguished decedent from the child in Matharu because in Matharu, the child had no other “possible protector,” while this decedent had physicians he presumably treated with, separate and apart from physicians that treated his parents. However, the court then determined that:

[i]f the Court were to find that a disease was appropriately asymptomatic, that the likelihood for detection was sufficiently low, and that the resulting harm was sufficiently high, the Court might conclude that a child suffering from that disease was more similar to the child in Matharu than children afflicted with the majority of diseases and conditions, in that the only probable chance of detection and treatment would come from diagnosis in a first-degree relative, such as a parent. In such cases, the child would be considered a foreseeable third party, in that a physician treating the first-degree relative of such a child should recognize that instruction to have the child tested for the disease is necessary for the protection of that child.

The court overruled Dr. Whitson’s Motion to Strike Plaintiff’s Complaint in the form of a demurrer.

Although the Supreme Court remanded the Matharu matter for reconsideration in light of its decision in Seebold, an en banc panel of the Superior Court again affirmed the trial court’s order, allowing plaintiffs to proceed with their claim against defendants because the defendants owed a duty to the plaintiff pursuant to Section 324A of the Second Restatement. Matharu, 86 A.3d 250, 260 (Pa. Super. 2014). The court distinguished Matharu from Seebold, reasoning that Seebold stood for the principle that physicians do not have a duty to undertake interventions outside the physician-patient relationship but that the law continued to impose a duty requiring physicians to treat their patients in a matter that protects specifically identifiable third parties who may be affected by the physician’s treatment. Id. at 260 (citing Seebold, 57 A.3d at 1244-45). “[W]hile liability cannot be based upon a failure to undertake interventions outside the physician-patient relationship, Section 324A of the Second Restatement continues to require physicians to provide reasonable care in the patient’s treatment as is necessary for the protection of others, and establishes liability to certain third-parties when such reasonable care is lacking.” Matharu, 86 A.3d at 260; see also Gillen v. Boeing, MDL No 875., No. 2:13-cv-03118-ER., 2014 WL 4211354 (E.D. Pa. Aug. 26, 2014) (holding that, under Pennsylvania law, an employer and premises owner owe no duty to a spouse of an employee to protect against or warn the spouse of the hazards of exposure to a hazardous substance).
Following up on Polaski, No. 2011-C-2583 (Lehigh Cty. Com. Pl. 2015), the reader may be interested to learn that the Court of Common Pleas has denied summary judgment to defendant doctor who was allegedly negligent for not diagnosing hypertrophic cardiomyopathy (HCM) in decedent’s father.

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. In Emerich, a third-party was shot by a psychiatrist’s patient, after the psychiatrist had warned the third-party to stay away from the patient’s apartment following a threat against the third-party by the patient. 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.

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.

The issue of privity has presented itself to the Federal Courts. In Collins v. Christie, No. 06-4702, 2007 U.S. Dist. LEXIS 61579 (E.D. Pa. Aug. 22, 2007), Plaintiff, a nursing assistant, was arrested after an elderly patient 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 the 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 against the VA and others, asserting claims, among others, of gross negligence, failure to warn, and negligent infliction of emotional distress. After a bench trial, the trial court granted the VA’s 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, however, the trial court entered judgment for the Plaintiffs against the VA.

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.


In Ward v. Most Health Services, Inc., No. 06-4646, 2008 U.S. Dist. LEXIS 61573 (E.D. Pa. Aug. 8, 2008), Plaintiff, 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.

In Toney v. Chester County Hospital, 36 A.3d 83 (Pa. 2011), the Pennsylvania Supreme Court held that some relationships, like a doctor-patient relationship, involve an implied duty to care for the plaintiff’s emotional well-being. The Court further held that if this implied duty is breached, there is the potential for emotional distress resulting in physical harm, and that trial courts must decide on a case-by-case basis whether a sufficient duty exists for the doctor to be liable under a theory of negligent infliction of emotional distress.

In Toney, defendant-physicians performed an ultrasound on Plaintiff Jeanelle Toney and her unborn child. Defendants reported the ultrasound as normal; however, after Plaintiff gave birth, it became apparent that the ultrasound was misinterpreted. Plaintiff alleges that the misinterpretation of the ultrasound prevented her from preparing herself for the shock of witnessing her son’s birth with substantial physical deformities. The Court examined the issue of whether a negligent infliction of emotional distress claim could be sustained based on a contractual or fiduciary duty of a pre-existing doctor-patient relationship, and found that the Defendant-physicians did have an implied duty to care for Plaintiff’s emotional well-being.

In Freedman v. Fisher, the United States District Court for the Eastern District of Pennsylvania distinguished the plaintiff’s claim for negligent-infliction of emotional distress from that of the plaintiff in Toney. No. 13-3145, 2014 WL 4931306, at *2-4 (E.D. Pa. Oct. 1, 2014). Plaintiff alleged that hospital doctors failed to properly diagnose and treat her husband for a dissecting aorta after his presentment to the hospital’s emergency department. Id. at *1. Plaintiff witnessed her husband’s pain and suffering immediately preceding his death. Id.

The court in Freedman granted the defendant’s motion for summary judgment reasoning that the Toney Court only extended NIED liability to a subset of cases involving preexisting physician-patient relationships. Id. at *2. The court distinguished the plaintiff from both the plaintiff in Toney and her deceased husband by explaining that there was no showing that the plaintiff had any preexisting relationship with the defendants, nor that any relationship developed during the eleven hours before the plaintiff’s husband passed. Id. at *2-3 (“Toney … make[s] clear that a doctor’s duty is to the patient and not to the concerned or worried relative.”). Hence, there could be no implied duty to care for plaintiff’s emotional-well being because there was no physician-patient relationship established between plaintiff and defendants. Id. at *4.
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 MIIIX Insurance Co. v. Epstein, 937 A.2d 469 (Pa. Super. Ct. 2007); appeal denied, 121 A.3d 956 (Pa. 2015), 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 Plaintiff, 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. 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, 753 F. Supp. 2d 468 (E.D. Pa. 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 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. But see Fessenden v. Robert Packer Hosp., 97 A.3d 1225 (Pa. Super. 2014); appeal denied, 113 A.3d 280 (Pa. 2015) (discussed infra).

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.

In Catlin v. Hamburg, 56 A.3d 914 (Pa. Super. 2012), appeal denied 74 A.3d 124 (Pa. 2013), the Court addressed the situation in which Plaintiff’s expert witness cited no literature that supported his opinion, and on the morning trial was to start, the court prohibited the expert from testifying to the standard of care and causation opinions in his reports, and entered summary judgment for the defense. The Superior Court reversed holding that an expert’s failure to cite to any literature or treatise confirming his opinion on the standard of care did not render his opinion inadmissible. The court stated that experience in a medical field is sufficient to support an articulation of the relevant standard of care, which is first and foremost, what is reasonable under the circumstances. Failure to cite an article or text on point goes to the weight of the expert’s testimony, not its admissibility. Regarding the claim that the proposed causation testimony would be speculative, the Superior Court again confirmed that the plaintiff’s expert is not required to rule out all conceivable causes nor testify to an absolute certainty that the negligence caused the harmful condition. Expert testimony is admissible when, taken in its entirety, it expresses reasonable certainty that the accident was a substantial factor in bringing about the injury. Id. at 921, citing Hreha v. Benscoter, 554 A. 2d 525 527 (Pa. Super. 1989).

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(1) 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
   1. the event is of a kind which ordinarily does not occur in the absence of negligence;
   2. other reasonable causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
   3. 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); appeal denied, 940 A.2d 365 (Pa. 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.

In *Asbury v. Mercy Fitzgerald Hosp.*, 13 Pa. D. & C.5th 225(C.P. Phila. April 14, 2010), aff’d without opinion, 23 A.3d 1078 (Pa. Super. Jan. 10, 2011), the court held that plaintiff was permitted to proceed under a *res ipsa loquitur* theory because she met her burden, under § 328D(1), of showing that her nerve injury, sustained under the circumstances of the surgery performed by defendants, did not ordinarily occur in the absence of negligence. Defendants argued that a *res ipsa loquitur* instruction was inappropriate because plaintiff was required, pursuant to Section 328D(1)(b), to show that other causes of plaintiff’s injury were impossible. The court disagreed, holding that any purported failure by plaintiff to show that other causes of plaintiff’s injury were impossible did not prevent plaintiff from carrying her burden to eliminate, as required by Section 328D(1)(b), other possible causes of her injury. More specifically, in order to warrant a *res ipsa loquitur* instruction, it was sufficient for plaintiff to show that defendants’ alleged negligence was more likely than not the probable explanation for her injury. The doctrine of *res ipsa loquitur*, the court reasoned, would then allow for the jury to resolve how and by whom the plaintiff’s alleged nerve injury had been sustained.

In *Vazquez v. CHS Professional Practice, P.C.*, 39 A.3d 395 (Pa. Super. 2012) the patient appealed the decision of the trial court which dismissed the patient’s medical malpractice claim on summary judgment, for failure to offer expert medical testimony. The patient sought to rely on the doctrine of *res ipsa loquitur* in claiming for the allegedly negligent removal of a pain
pump catheter, which resulted in a catheter fragment remaining in her shoulder. The patient took
the position that expert testimony was not required. The trial court held and the Superior Court
agreed that (a) the circumstances of the patient’s injury were beyond the comprehension of the
average layperson, (b) the injury could occur in the absence of negligence, and (c) the patient had
not eliminated other possible causes of her injury. Thus, because Plaintiff could not rely on the
doctrine of *res ipsa loquitur* the Superior Court affirmed the decision to grant the defendant
summary judgment.

stiffness in her knee. It was later found that her prosthetic device was infected with
*staphylococcus capitis*. Plaintiff brought suit against her doctor and the hospital, and filed a
Certificate of Merit under Pennsylvania Rule of Civil Procedure 1042.3(a)(3), stating that
expert testimony is unnecessary.

A Note to 1043(a) states that if an attorney certifies that an expert is unnecessary, “in the
absence of exceptional circumstances the attorney is bound by the certification and,
subsequently, the trial court shall preclude the plaintiff from presenting testimony by an expert
on the questions of standard of care and causation.”

Despite her 1043(a)(3) certification, Plaintiff sought to rely on expert testimony to
support her *res ipsa loquitur* claim. The court stated that there is no Pennsylvania case law
allowing expert testimony to establish a *res ipsa* claim after the plaintiff certified that expert
testimony is unnecessary. Therefore, the court endeavored to predict how the Pennsylvania
Supreme Court would rule on the issue. It found that because Rule 1043(a) is unambiguous,
Plaintiff was bound to her certification that an expert was unnecessary and she therefore could
not introduce any standard of care or causation experts. The court held that a later discovery that
expert testimony is actually required after already filing an (a)(3) certificate of merit is not an
exceptional circumstance. Nor does the invocation of *res ipsa loquitur* bypass (a)(3). The court
stated:

> Plaintiffs seeking to invoke *res ipsa loquitur* in medically complex
cases must present expert testimony on causation because one of
the three prerequisites of *res ipsa loquitur* is that causes other than
the defendant’s negligence have been sufficiently eliminated.
Thus, the Note to Rule 1042.3(a)(3) unequivocally provides that
the rule applies to *res ipsa loquitur* expert testimony.

*Id.*, 2012 U.S. Dist. LEXIS 57857, at *12.

In *Fessenden v. Robert Packer Hosp.*, 97 A.3d 1225 (Pa. Super. 2014); appeal denied,
113 A.3d 280 (Pa. 2015), plaintiff had abdominal surgery and after experiencing abdominal pain
four years later, discovered that a sponge had been left inside his abdomen. Following two
surgeries, the drainage of an abdominal abscess and the removal of both the plaintiff’s
gallbladder and a portion of his small bowel, plaintiffs filed suit against his doctor and the
hospital. In their Certificate of Merit, plaintiffs averred that expert testimony was unnecessary
pursuant to the doctrine of *res ipsa loquitor*. The trial court granted defendants summary
judgment and the plaintiff appealed, raising the following issue for the Court’s consideration:

Did the [trial court] err in finding that there was no genuine issue
of material fact for a jury to consider as it relates to the necessary
causation element of negligence in determining that the *res ipsa
loquitor* doctrine was inappropriate to apply the nexus to defeat the
summary judgment application?

The Superior Court held that the trial court erred in entering summary judgment in favor
of defendants and remanded the matter for trial. *Id.* at 1233. The court held that the plaintiffs
sufficiently demonstrated each of the three elements required by Section 328D of the Second
Restatement by a preponderance of the evidence, and were thus entitled to an inference of
negligence and causation pursuant to the doctrine of *res ipsa loquitor*. The court reasoned that
plaintiffs had sufficiently demonstrated that surgical sponges were not left in a patient’s
abdomen absent negligence and that there was no explanation for the retained sponge other than
negligence.

On the latter issue, the court explained that Section 328D(1)(b) does not require a
plaintiff to prove that a defendant’s act was the proximate cause of the patient’s injury. *Id.* at
1232. Instead, the plaintiff is only required to make the negligence “point” to the defendant,
establishing by a preponderance of the evidence that it was the defendant, and not a third party,
who injured the plaintiff. *Id.* In cases where it is equally as probable that a third party injured
the plaintiff, then the second element of the *res ipsa loquitor* doctrine has not been satisfied. *Id.*
But in instances where a plaintiff has demonstrated that the injury was caused by the negligence
of the defendant, a “plaintiff is not required to exclude all other possible conclusions beyond a
reasonable doubt, and it is enough that he makes out a case from which the jury may reasonably
conclude that the negligence was, more probably than not, that of the defendant.” *Id.* (citing
Restatement (Second) of Torts § 328D, cmt. F (1965)).

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.

In *Ellison v. United States*, 753 F. Supp. 2d 468 (E.D. Pa. 2010), the federal 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
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 *Sampathachar*, 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. In response, Defendant-insurer argued that Plaintiff’s expert’s testimony should be excluded under Federal Rule of Evidence 702. *Id.* The federal district court denied Defendant’s motion and admitted the proffered testimony. *Id.*

Affirming the district court’s ruling, the Third Circuit 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.* (alterations added).
In Montgomery, 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. 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 work life. 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. In response to Dr. Gamboa’s testimony, Mitsubishi objected on various grounds, including that Dr. Gamboa’s opinions regarding the level of education, 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.

The federal 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 “future goals” 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 determining the admissibility of Defendant’s expert witness. 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 also include when the decedent would have stopped working, died, and the various other effects of having the disease. 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 & 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 was based on assumptions unfounded in the record facts); Gannon v. United States, 571 F. Supp. 2d 615 (E.D. Pa. 2007), aff’d, 292 Fed. Appx. 170 (3d Cir. 2008) (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).

An expert’s conclusions that are not based on reliable methodology are inadmissible. In Shannon v. Hobart, No. 09-5220, 2011 WL 442119 (E.D. Pa. Feb. 8, 2011), which involved injuries sustained by plaintiff while operating a commercial dough mixer, Defendant challenged the qualifications of Plaintiff’s mechanical engineering expert, on the basis that the expert possessed no experience in the area of designing or manufacturing commercial food mixers. Id. at *1-2. The court held that the expert’s methodology in forming his opinion was unreliable under Rule 702, because the expert’s opinion was based on his own speculation about the mixer’s design, rather than on any reliable methodology. Id. at *4-5. More specifically, the expert produced no persuasive, objective evidence that his method was subject to peer review, had a known or potential rate of error, could be measured against existing standards, or was generally accepted, as required by Rule 702. Id. at *4. Further, the expert had no experience in the design or manufacture of commercial food equipment, nor had he ever worked for a commercial food manufacturer, published any articles on the design or manufacture of commercial food equipment, been involved in a case regarding commercial food equipment, or operated a commercial food mixer prior to his inspection of the mixer at issue in the case. Id. at *4.

In Amadio v. Glenn, No. 09-4937, 2011 WL 336721 (E.D. Pa. Feb. 1. 2011), a case involving injuries sustained in an automobile accident, defendants sought to preclude the testimony of plaintiff’s expert because: (1) the expert allegedly did not possess the requisite
requirements to qualify as an expert with respect to determining whether plaintiff had suffered a “traumatic brain injury;” and (2) the expert allegedly relied on unsound methodology, resulting in an unreliable opinion. The court held that the expert was qualified to offer an expert opinion regarding a traumatic brain injury based upon a review of his curriculum vitae, which demonstrated his sufficient formal qualifications as well as his specific expertise in neurology and brain injury. Id. at *8. Further, the court held that the expert’s methodology, which involved review of other physicians’ examinations of plaintiff, an examination of plaintiff he himself performed, and a review of plaintiff’s medical records, was a reliable means of forming an expert opinion. Id. The court cited Qeisi v. Patel, No. 02-8211, 2007 WL 527445 at *7 (E.D. Pa. Feb. 9, 2007), for the proposition that an expert may arrive at an opinion by noting the symptoms a patient exhibits and making an evaluation based upon those symptoms. Amadio, 2011 WL 336721 at *8.

Conversely, the court in Maldonado v. Walmart Store #2141, No. 08-3458, 2011 WL 1790840 (E.D. Pa. May 10, 2011), excluded the testimony of two witnesses, pursuant to Daubert, because of their insufficiency with regard to methodology and “fit.” The case involved a decedent who fell into a pool purchased at defendant’s store and the allegedly negligent design, marketing and sale of that pool. The first expert witness was an aquatics expert who sought to proffer several hypotheses to explain decedent’s injuries. The court held this testimony inadmissible because the first expert’s hypotheses regarding how the decedent may have entered the pool and how the decedent may have sustained his injuries were arrived at using insufficient methodology. Id. at *10-11. The court determined that the first expert’s opinions regarding what caused decedent’s death could not withstand Daubert scrutiny because they consisted of unsupported speculation and conjecture that was not derived from any testable hypotheses. Id. at *11.

The second expert witness, a purported “drowning prevention issues” specialist, sought to testify regarding the nature of the hazards associated with pools, industry awareness of these hazards, and the proper, safe methods for hazard reduction. While finding the second expert was qualified based upon her experience to testify regarding these issues, the court nonetheless barred her testimony because of her failure to review any evidence in the case when forming her opinions. Id. at *12-13. For evidence to be relevant under Rule 702, it must help the trier of fact to understand the evidence; however, because the second expert failed to review any facts or data in the case before forming her opinions, the court found that her testimony failed to meet this requirement. Id. at *13.

Similarly, the court excluded expert testimony in Sterling v. Redevelopment Authority of the City of Philadelphia, 836 F. Supp.2d 251 (E.D. Pa. 2011), because of its improper basis. The case involved an alleged breach of contract. Plaintiff sought to introduce expert testimony that calculated Plaintiff’s economic loss resulting from the breach. The court excluded this testimony because the expert’s calculations were based upon projected revenue estimates provided by Plaintiff and based on several assumptions made by plaintiff. Id. at 272. Because Plaintiff failed to adduce any evidence to support his estimates or the assumptions upon which the estimates were based, and the expert did not independently investigate the reasonableness of these figures, the court concluded that the figures were based upon nothing more than speculation. Id. Consequently, plaintiff’s expert was precluded from testifying pursuant to Rule 702. Id.

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

In Grady v. Frito Lay, 789 A.2d 735 (Pa. Super. Ct. 2001), rev’d, 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 held that the experts were not qualified to render opinions regarding causation of Plaintiff’s injuries. The trial court also found that the experts’ methods were invalid and that the testimony offered constituted “junk science.” The court precluded their testimony 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, the expert 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. The expert also concluded that these dangerous characteristics had caused Plaintiff’s injuries.

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, 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 applied the proper standard of review itself, “in the interests of judicial economy.” In so doing, the Supreme Court held that the expert’s methodology “misses the mark,” because, while the testing methods used were generally accepted for certain purposes, they were “not also necessarily a generally accepted method that scientists in the relevant field (or fields) use for reaching a conclusion as to whether Doritos remain too hard and too sharp as they are chewed and swallowed to be eaten safely.”

The Court found that Plaintiffs failed to prove that the expert’s methodology was generally accepted “as a means for arriving at such a conclusion.” 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) (en banc), appeal denied, 847 A.2d 1288 (Pa. 2004), 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 Superior 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 Superior 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.” Id. 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. Because of a pharmacy error, Plaintiff had 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 Superior 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 Superior 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.


The Pennsylvania Superior Court subsequently sought to distinguish, and thus, limit the import of, Betz in Rost v. Ford Motor Co., Nos. 404 EDA 2012, 624 EDA 2012, 2014 WL 2178528 (Pa. Super. Ct. May 19, 2014). Id. at *1 (concluding that Betz is “easily distinguishable from the factual and procedural record in the present appeal” and holding that “these distinctions are material pursuant to the language from Betz itself”). Rost is currently pending on appeal before the Supreme Court of Pennsylvania. Rost v. Ford Motor Co., 102 A.3d 1251 (Pa. 2014).

In, In re Denture Adhesive Cream Litig., No. 915 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 4126 (Pa. Super. Nov. 12, 2015), the Superior Court affirmed trial court’s exclusion of plaintiffs’ causation experts under Frye and ruling which granted summary judgment on behalf of the defendant-appellees. Plaintiffs had alleged that use of zinc containing denture adhesive creams manufactured by P&G caused them to develop an irreversible neurologic condition. The Superior Court affirmed the trial court’s ruling, under Frye, that the evidence proffered by appellants did not apply accepted scientific methodology in a conventional fashion. In rendering its decision, the Superior Court made clear that a Frye motion to exclude expert witness testimony upon novel scientific evidence as inadmissible under Pa. R.E. 702 or 703, requires under Pa. R.C.P. 207.1:

(i) the name and credentials of the expert witness whose
testimony is sought to be excluded,

(ii) a summary of the expected testimony of the expert witness, specifying with particularity that portion of the testimony of the witness which the moving party seeks to exclude,

(iii) the basis, set forth with specificity, for excluding the evidence,

(iv) the evidence upon which the moving party relies, and

(v) copies of all relevant curriculum vitae and expert reports.

The Superior Court observed that the trial court must engage in a two step process: (1) determine whether the evidence is “novel scientific evidence” and (2) determine whether the expert’s methodology “has general acceptance in the relevant scientific community”. Here, the Appellants’ experts’ studies were not based upon generally accepted methodologies and failed to opine as to a causal link between the cream and the neurologic condition. The Superior Court also seemed persuaded by the fact that arguments offered by the plaintiff-appellants, as to why it was erroneous to even subject their experts to a Frye hearing, were considered and rejected in another matter.

In Porter v. SmithKline Beecham Corp., Sept. Term 2007 No. 03275 (Phila. CCP), Judge Bernstein presiding, the trial court granted defendant’s Frye motion to exclude plaintiffs’ causation expert Dr. Cabrera and Dr. Freeman. Judge Bernstein wrote, “It is the methodology employed which is to be evaluated, not the conclusions reached”. By way of background, plaintiffs sought to have Dr. Cabrera and Dr. Freeman testify to general and specific causation of birth defects. Yet, Dr. Freeman failed to analyze, discuss, and exclude other possible causes of the birth defects. Dr. Freeman failed to utilize proper methodology which required preclusion. Dr. Cabrera failed to draw specific causal connections between the specific anti-depressants taken by plaintiff and the resulting birth defects. There was a lack of adequate differentiating between the different medications.

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 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, cmt.. 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. The Superior Court determined that the non-testifying doctor’s opinion had been elicited from Plaintiff’s expert for the sole purpose of bolstering the testifying expert’s credibility, and should have been excluded. The Superior Court held that a new trial was warranted on the basis of this error.

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

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. 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. The Supreme Court held that learned treatises can be utilized on direct examination of an expert witness for the limited purpose of explaining the basis for the expert’s opinion, but that the trial court must exercise careful control over the use of such learned treatises to prevent the texts from becoming the focus of the examination. Id. at 298; see also Hycrza 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.


The Superior Court recently reversed and remanded for a new trial a medical malpractice defense verdict, based upon, in part, the misuse of medical literature at trial. In Klein v. Aronchick, 85 A. 3d 487 (Pa. Super. Ct. 2014), Plaintiff claimed that she suffered permanent progressive kidney disease as a result of Dr. Aronchick’s off-label use of a prescription drug, which she took for five years. The jury found Dr. Aronchick negligent, however, it determined that his negligence was not a factual cause of plaintiff’s harm. Post-trial motions were denied, and Plaintiff’s timely appeal followed.

One of the issues on appeal was whether the trial court erred in allowing Defendants to introduce the contents of hearsay medical literature as substantive evidence during the testimony of the defense expert witness. The Superior Court found that the “extensive questioning” of defense expert Dr. Roberts ran afoul of the law concerning learned treatises as outlined in Aldridge v. Edmonds, 750 A. 2d 292 (Pa. 2000). In Aldridge, the Court stated:

There is no question that if published material is authoritative and relied upon by experts in the field, although it is hearsay, an expert may rely upon it in forming his opinion; indeed it would be unreasonable to suppose that an expert’s opinion would not in some way depend upon the body of works preceding it.
Pennsylvania Courts have thus permitted, subject to appropriate restraint by the trial court, limited identification of textual materials (and in some circumstances their contents) on direct examination to permit an expert witness to fairly explain the basis for his reasoning.

Id., 750 A. 2d at 296-297 (nb: Klein is discussed, infra).

In the instant matter, over objection, defense counsel had the defense expert discuss at length several studies appearing in the New England Journal of Medicine. The witness did more than just cite to the articles as providing a basis for his opinion. Rather, the witness first characterized the journal as “probably the world’s most prestigious medical journal” and the “final word on most things” and “proven, good science.” He then characterized the author as “probably the leader in the field in this area of medicine.” Then, in direct examination, counsel had the witness read from the articles. The Superior Court majority concluded that the texts were not used to clarify the basis for the witness’ opinions, but rather as a means by which to convey to the jury the out-of-court, hearsay opinions of the article’s author.

6. **Expert Qualifications – Medical Malpractice**

Expert qualifications are governed by the MCARE Act. Pursuant to MCARE, “[n]o person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.” 40 Pa. Cons. Stat. § 1303.512(a).

Under 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. Id. § 1303.512(b). The court, however, “may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.” Id.

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.” Id. § 1303.512(c)(1). 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.” Id. § 1303.512(c)(2). A court, however, “may waive this requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that (1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and (2) the defendant physician provided care for that condition and such care was not within the physician's specialty or competence. Id. § 1303.512(d).

Also, “in the event the defendant physician is certified by an approved board, the physician must be board certified by the same or a similar approved board.” 40 Pa. Cons. Stat. § 1303.512(c)(3). A court, however, may waive this requirement “if the court determines that the
expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.” Id. § 1303.512(e). 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), appeal denied, 934 A.2d 71 (Pa. 2007), for more regarding effective date of requirements.

Before the federal district court in Madden v. A.I. duPont Hospital, 264 F.R.D. 209 (E.D. Pa. 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. In both cases, Defendants filed Motions to Preclude Plaintiffs’ expert from testifying at trial pursuant to Daubert, supra.

In support of their Motions to Preclude, Defendants argued that Plaintiffs’ expert, who was 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 performed that surgical procedure a handful of times during his career. 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.

The district 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 district 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 Plaintiff’s expert had indeed performed the surgery at issue and that the opinions of Plaintiffs’ expert are supported by medical literature. Id. Therefore, the court concluded that 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, 981 A.2d 145 (Pa. 2009), the Pennsylvania Supreme Court held that Plaintiff’s expert reports expressed the requisite degree of specificity and medical certainty for a prima facie case of malpractice.

By way of background, Plaintiff developed peripheral circulatory failure after giving birth to her first child at Chestnut Hill Hospital in 1965. As part of her medical care, Defendant-physician performed an antecubital cutdown on the inside of Plaintiff’s right and left elbows. Plaintiff was discharged but experienced complaints of pain and shortness of breath for the next 36 years. None of Plaintiff’s physicians could determine the cause of her condition until an echocardiogram performed in 1999 uncovered an abnormality. Subsequent echocardiograms in early 2000 revealed the presence of a twelve- to 18-inch catheter coiled in Plaintiff’s right atrium and passing into her right ventricle.
Plaintiff filed a medical malpractice suit in 2001 against Chestnut Hill Hospital and numerous physicians who had treated her in 1965. In 2004, various Defendants filed Motions for Summary Judgment, which were granted by the trial court. 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. at 150. 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. The Superior Court upheld the granting of summary judgment.

On appeal, the Pennsylvania Supreme Court held that the trial court and Superior Court erred in granting and upholding the summary judgment motions. Id. at 161. 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 155 (citing Welsh v. Bulger, 548 Pa. 504, 698 A.2d 581, 585 (1997)). Based upon this authority, 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.

Moreover, the Supreme Court found that, when read in their entirety, Plaintiff’s expert reports expressed the requisite degree of specificity for Plaintiff to show a prima facie cause of action. Id. at 157. 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 were read in the context of the respective reports, it was clear that the experts were offering their opinions with a high degree of medical certainty. Id.

In Neidig v. United States, No. 07-229, 2010 WL 1023937 (W.D. Pa. Mar. 17, 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 thereof, obtained the expert opinion of Jamie Stern, M.D. Plaintiff requested that the federal district court appoint an expert witness on his behalf. Four requests were made by the Clerk of Courts – all four requests were declined.
The relevant facts are as follows. On September 4, 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, Plaintiff returned to the medical clinic complaining of increased pain and was promptly admitted to the hospital. On September 7, Plaintiff underwent an appendectomy.

The district 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, 971 A.2d 1202 (2009), reargument granted, 979 A.2d 846 (Pa. 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 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 Supreme 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 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, an 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 it “must examine the expert's testimony in its entirety. That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty. Nevertheless, an expert fails this standard of certainty if he testifies that the alleged cause possibly, or could have led to that result, that it could very properly account for the result, or even that it was very highly probable that it caused the result.” Id. at 510-11 (citations and quotation marks omitted). 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 granted an 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 1303.512 of the MCARE Act. 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).

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.

A recent manifestation of this issue arose in Dieffenbach v. Trevouledes, 2012 WL 1379476 (Lycoming Cnty. Com. Pl. Jan. 6, 2012). In Dieffenbach, Defendant argued that Plaintiff’s expert radiologist should be precluded from testifying for two reasons: (1) the radiologist’s conclusions within his expert report were based on pure speculation; and (2) the radiologist failed to express his opinions with the requisite degree of medical certainty. The court considered the Superior Court’s ruling in Vicari. In doing so, the trial court held that although the radiologist “wrote words such as ‘very likely’ and ‘would have shown’ within his report, the report, taken in its entirety, illustrates that the opinions are based upon a reasonable degree of medical certainty.” See id.
In Lasko v. Watts, 373 Fed. Appx. 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 federal district court granted summary judgment for the officials and held that: (1) it did not abuse its discretion in denying the inmate’s appointment for counsel; and (2) 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 Rauser v. Horn, 241 F.3d 330, 334 (3d Cir. 2001)).

It should be noted, that the Third Circuit 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, 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 25% 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.

denied, 921 A.2d 494 (Pa. 2007), 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, 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
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
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 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 § 1303.512 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 § 1303.512 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 Superior 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. Although gastroenterology is not a subspecialty of oncology or general surgery, the Superior 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 Superior Court concluded that Dr. Battle is a general surgeon with specialization in gastrointestinal surgery. He testified that over the past 33 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 30 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), appeal denied, 934 A.2d 71 (Pa. 2007), 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 disqualified by 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 Superior 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). The Court noted that “there is little guidance in statutory or case law to assist the trial court in determining what level and involvement in teaching does satisfy the statute.” The Court then went on to suggest the trial court inquire into “whether his students are interns, residents, fellows, or others; the subject matter he teaches; the amount of time per week he teaches; the academic level of his students; the settings where he teaches; and the compensation he receives for teaching.” *Weiner*, 871 A.2d 1283, 1289-90.

*Miville v. Abington Memorial Hospital*, 377 F. Supp. 2d. 488 (E.D. Pa. 2005) 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 1303.512 of MCARE.

The District Court initially determined that, pursuant to Rule 601 of the Federal Rules of Evidence, Section 1303.512 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 1303.512(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 1303.512(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), appeal denied, 594 Pa. 705 (Pa. 2007), the trial court had held that Plaintiff’s expert neurologist could not comment on the standard of care applicable to Defendant-radiologists and that Plaintiff’s’ 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, \textit{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 \textit{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. \textit{Id.} at 1283. Plaintiff subsequently developed anxiety and was treated with sedatives, including Ativan. \textit{Id.} at 1283-84. Plaintiff then complained of “mild respiratory discomfort.” \textit{Id.} at 1284. In response to these symptoms, Defendant physician, a third year resident in the department of internal medicine, prescribed intravenous Ativan. \textit{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.” \textit{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. \textit{Id.} Judge Glazer denied Defendants’ motions for summary judgment, and the case was subsequently assigned to Judge Moss for trial. \textit{Id.} at 1284-85. Defendants submitted pretrial motions \textit{in limine} again arguing Plaintiffs’ expert was not qualified under MCARE. \textit{Id.} at 1285. Judge Moss granted Defendants’ motions and dismissed the case. \textit{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. \textit{Id.} at 1285. The court held that the coordinate jurisdiction rule had been violated when the trial court granted Defendants’ motions \textit{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. \textit{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. \textit{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 1303.512(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 1303.512(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 1303.512 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 1303.512(b)(1) to an expert ‘possessing an unrestricted physician’s license to practice medicine’ unambiguously denotes a medical doctor or osteopath licensed by the state board appropriate to such practices.” 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 1303.512(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 1303.512(d) of the MCARE Act.

The Supreme Court of Pennsylvania granted allocator 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(e) to the case at hand, the court stated that “those practicing radiation oncology and urology might be surprised to learn of a judicial pronouncement—offered without reference to relevant supporting testimony from those practicing in the respective subspecialties beyond a discussion of a single area of treatment overlap—that their disciplines represent related fields of medicine for the purposes of reform legislation.” Id.

In Jacobs v. Chatwani, 922 A.2d 950 (Pa. Super. Ct. 2007), appeal denied, 595 Pa. 708 (Pa. 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 a 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 uretal 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 uretal 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 uretal injury during pelvic surgery and post-operative assessment.

The Superior Court recently addressed the issue of expert qualification in Hyrcza v. West Penn Allegheny Health System, Inc., 978 A.2d 961 (Pa. Super. Ct. 2009), appeal denied, Hyrcza v. West Penn Allegheny Health System, Inc., 604 Pa. 707 (Pa. 2009). In Hyrcza, 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 physiatrist. 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 1303.512 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.

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

In Anderson v. McAfoos, 57 A.3d 1141 (Pa. 2012), our High Court confronted, primarily, whether a pathologist was competent to testify as an expert witness regarding the standard of care applicable to a board-certified general surgeon in an action for medical malpractice. Generally speaking, the defendant surgeon was alleged to have perforated the patient’s bowel, which was not timely appreciated, culminating in sepsis and death. The Court also reviewed whether the surgeon’s objection to the pathologist’s testimony was waived because it was asserted at trial for the first time, rather than via a motion in limine.

The MCARE Act did not come into effect until approximately three months after the institution of the suit by the administratrix of decedent’s estate and her husband. The MCARE Act of course, spells out certain requirements for any party offering standard of care testimony against a physician in a medical malpractice action. One of these requirements is that, with very limited exception, a physician offering standard of care testimony against a board-certified physician, must be board-certified in the same or similar specialty. In 2007, years after the 2002 MCARE Act, the parties were required to submit expert reports and motions in limine. Plaintiffs sought to utilize the expert report of a pathologist, and no party challenged the pathologist’s ability to give standard of care testimony by way of a motion in limine.

At trial, there was a challenge to the pathologist’s qualifications to offer an expert opinion concerning the standard of care applicable to a general surgeon under the MCARE Act. Plaintiffs resisted, largely based on the pathologist’s ability to opine regarding certain blood tests which plaintiffs suggested argued against the discharge of the decedent from the hospital, post-surgery, before her sepsis was diagnosed. The trial court awarded nonsuit, and refused to remove the nonsuit, even in the face of plaintiffs’ challenge that the pathologist’s credentials were not timely challenged. The Superior Court affirmed the trial court. The Superior Court specifically found that the challenge to the pathologist’s testimony was timely raised immediately following voir dire, and did not need to be raised by a motion in limine.

The Supreme Court framed the issues on appeal as:

(a) When should the defendant raise an objection to the plaintiff’s expert’s qualifications under the MCARE Act?

(b) Whether a board certified pathologist may, under Section 512 of the MCARE Act, testify regarding a general surgeon/treating physician's standard of care in deciding to discharge a patient without reading the patient's blood work results?
Anderson, 57 A. 3d at 1148. The Supreme Court determined that as to the latter issue, the plaintiffs had not properly preserved it for appellate review, because they never asserted that the pathologist met the same or similar board certification requirement contained in the MCARE Act. The Supreme Court further held that there is no general legal requirement that an objection to a proposed expert’s qualifications under the MCARE Act be made prior to voir dire, nor did they view a case management order merely establishing deadlines for pre-trial motions as establishing such a requirement.

In Renna v. Schadt, 64 A.3d 658 (Pa. Super. 2013), defendant/appellant surgeon appealed the trial court’s order allowing plaintiff’s expert oncologist and expert pathologist to testify as to the standard of care applicable to a surgeon with regard to “the propriety of conducting a fine needle aspiration biopsy.” The Superior Court, relying on § 1303.512(e) of MCARE, affirmed the trial court. Specifically, the Court held that “there was considerable evidentiary support for the trial court’s conclusion that a board certified pathologist and oncologist practiced in specialties related to a surgeon for purposes of rendering expert testimony as to the specific standard of care at issue, i.e. opting to perform a fine needle aspiration in lieu of other available biopsy methods.”

In Milliner v. Diguglielmo, No. 08-4905, 2014 WL 413873, at *4-5 (E.D. Pa. Jan. 31, 2014), the physician-defendants argued that the plaintiff’s expert witness was not qualified to testify as an expert on the standard of care because he specialized in neurosurgery and the physician-defendants were board certified in family practice. In denying the defendants’ motion for summary judgment, the court held that the plaintiff’s expert opinion was adequately supported because his expert reports addressed more than the neurosurgery performed. Id. The reports assessed the review of symptoms that lead to the referral to a neurosurgeon, specifically identified delays in ordering tests and a neurological consultation, and identified the delays as the likely cause of the plaintiff’s injuries. Id.

In Carter v. U.S., No. 11-6669, 2014 U.S. Dist. LEXIS 15956 (E.D. Pa. Feb. 7, 2014), in denying the defendants’ motion for summary judgment, the court concluded that “there is a close enough relation between the overall training, experience, and practices of experts in pediatrics and those in obstetrics and gynecology” to conclude that plaintiffs’ expert witness pediatrician could testify to the standard of care for the defendant-physician, an obstetrician and gynecologist, as to the specific area at issue. Id., 2014 U.S. Dist. LEXIS 15956 at *26 (nb: Carter is discussed, infra).

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 Jones, the court noted, “[t]he proper use of expert witnesses should supply the answers. Once the expert states the factual reasons to support his claim that there is a considerable number of professionals who agree with the treatment employed by the defendant, there is sufficient evidence to warrant an instruction to the jury on the ‘two schools of thought.’”
In **Jones v. Chidester**, 610 A.2d at 969. The court further opined that, at that point, the question becomes one for the jury who must decide, “whether they believe that there are two legitimate schools of thought such that the defendant should be insulated from liability.” *Id.*

In **Gala v. Hamilton**, 715 A.2d 1108 (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), appeal denied, 877 A.2d 231 (Pa. 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.

unequivocally obligates a physician only to present evidence that his or her method ‘is advocated by a considerable number of recognized and respected professionals.’” The court further stated that the “Pennsylvania Supreme Court has refused to quantify the number of professionals who must accept the method.” Id. (citing Jones v. Chidester, 610 A.2d at 969) (“[W]e do not attempt to place a numerical certainty on what constitutes a ‘considerable number.’”). Rather, the court noted that a more flexible approach should be used, where “an expert witness who provides factual reasons to support his claim that there is a considerable number of professionals who agree with the treatment employed by a defendant physician ‘suppl[i]es the answers’ and, hence the necessary foundation for the instruction on the ‘two schools of thought.’” Id. (citing Jones v. Chidester, 610 A.2d at 969).

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). 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 determining whether an expert testified to the requisite degree of medical certainty, the court reviews expert testimony in its entirety. Id. at 1030. “That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty.” Carrozza v. Greenbaum, 866 A.2d 369, 379 (Pa. Super. Ct. 2004), affirmed, 916 A.2d 553 (Pa. 2007).

In Winschel v. Jain, 925 A.2d 782 (Pa. Super. Ct. 2007), appeal denied, Winschel v. Jain, 596 Pa. 709 (Pa. 2008), the Superior Court granted a new trial on the basis that the jury’s conclusion that Defendant’s negligence was not a factual cause of death bore no rational relationship to the undisputed evidence. The court also held that the trial court did not err in excluding defense expert’s testimony 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. The court stated:

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

Id. at 110. This same well accepted rule is stated in the 2007 Superior Court case, Jacobs v. Chatwani, 922 A.2d 950, 961 (Pa. Super. Ct. 2007): “Pennsylvania law does not require a defense expert in a medical malpractice case to state his or her opinion to the same degree of medical certainty applied to the plaintiff, who bears the burden of proof at trial.” Id. (citing Neal by Neal v. Lu, 530 A.2d at 110). 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 ileocolectomy 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), affirmed in part, 383 Fed. Approx. 165 (3d Cir. 2010), cert. denied, 131 S.Ct. 568 (2010), 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), affirmed, 916 A.2d 553 (Pa. 2007), 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/joint and several liability issue, at 882 A.2d 1000 (Pa. 2005); however, the Court had denied further appeal on the “increased risk of harm” standard. Resolution of the insurance/joint and several liability issue is found at 916 A.2d 553 (Pa. 2007).

In Winschel v. Jain, 925 A.2d 782 (Pa. Super. Ct. 2007), appeal denied, Winschel v. Jain, 596 Pa. 709 (Pa. 2008), 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 recommended 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.

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1 More specifically, in Carrozza, the Supreme Court confronted the question of:

Where two defendants are found jointly and severally liable, one defendant has sufficient insurance coverage to satisfy the entire judgment, and the other defendant's insurer is insolvent, may a court direct the judgment creditor to seek satisfaction exclusively from the solvent insurer, thus effectively discharging the Pennsylvania Property & Casualty Insurance Guaranty Association of all liability?

The Court answered the question with a “qualified “No.”” Id., 916 A.2d at 557. It found, “generally that PPCIGA, when it has assumed the liabilities of an insolvent insurer pursuant to § 1803 of the Act, stands in the shoes of that insurer for purposes of joint and several liability. As in any other joint and several judgment situation, the judgment creditor may seek satisfaction of its judgment from PPCIGA to the extent of the entire judgment or the statutory cap on PPCIGA's liability, whichever is lower.” Id. However, in light of the Fair Share Act, discussed below, joint and several liability in the Commonwealth has dramatically changed and so Carrozza’s holding must be put in that context.
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).

Several years later, in 2007, when repeat MRI's were reviewed by a different physician, the Plaintiff’s progressive spinal cord injury was correctly diagnosed. Proper treatment was initiated, including surgery to relieve the compression on his spinal cord. By 2007, however, the Plaintiff’s paraparesis was irreversible and he was wheelchair bound. It was subsequently confirmed that the Plaintiff never had ALS.

At trial, the Plaintiff was able to establish by expert testimony that the Defendant-Doctor, who was evaluating the Plaintiff to “rule out ALS,” instead came back with a “certain” diagnosis. Plaintiff’s expert in neurosurgery opined that the “certain” diagnosis of ALS delayed treatment for treatable spinal cord injury, causing irreversible loss of function in the Plaintiff. Plaintiff’s expert repeatedly stated the importance of identifying treatable conditions prior to rendering a “certain” diagnosis of ALS, which is not treatable. The court noted in its trial order that in Hamil v. Bashline, the Pennsylvania Supreme Court adopted the relaxed “increased risk of harm” standard for use in certain medical malpractice claims. Finally, it stated that the Plaintiff established by expert testimony that the failure to diagnose myelomalacia and the “certain” ALS diagnosis was the proximate cause of harm and increased the risk of harm.

In Hatwood v. Hosp. of the Univ. of Pa., 55 A.3d 1229 (Pa. Super. Ct. 2012), the Superior Court affirmed the judgment of the trial court, which in reviewing the evidence in the case, held that there was ample evidence for the jury to conclude that the conduct of the doctor and nurses at HUP increased the risk of harm and caused the harm at issue.

In the case, Dr. Brian Eric Woodruff, an expert in pediatric neurology, testified as to the nature of the injury suffered by decedent-infant. He opined that the infant sustained a hypoxic brain injury as a result of lack of “oxygen in the blood or the blood to his brain in order to keep parts of his brain alive, and, subsequently, those parts of his brain that didn't get the nutrients, the oxygen that they needed at that time, were damaged permanently.” Id. at 1239. Dr. Woodruff continued that the “hypoxic ischemic encephalopathy” was brought about during the “abruption that the child sustained. The child—the abruption, meaning the placenta pulled away from the uterus.” Id. Dr. Mollick, another expert, testified that once there were signs of placental abruption, the health care providers were under a duty to deliver the baby as soon as possible. Ultimately, Dr. Mollick opined that the failure to quickly perform a caesarean section to remove the baby resulted in the baby’s injuries. Id. at 1240.

The court noted that “the plaintiff is not required to show that the defendant's negligence was the actual ‘but for’ cause of the plaintiff's harm. Rather, under the ‘increased-risk-of-harm’ standard, the plaintiff must introduce sufficient evidence that the defendant's conduct increased the risk of the plaintiff's harm.” Id. at 1239. Under this standard, the trial judge concluded that “These plaintiffs presented ample evidence for the jury to conclude that the conduct of [the doctor], ... and the nurses at HUP deviated from the appropriate[] standards of care and that their conduct increased the risk of harm and caused the harm to Baby Hyseem.” Id. at 1240. The Superior Court affirmed.
In Klein v. Aronchick, 85 A.3d 487 (Pa. Super. 2014), the Superior Court held that direct causation and increased risk are in fact “alternative theories of recovery” and are not “mutually exclusive.” At trial, plaintiff had alleged that defendant physician was negligent for prescribing her Visicol for chronic constipation, an off-label-use. The trial court allowed plaintiff’s experts to testify that the Visicol was the direct cause of plaintiff’s subsequent kidney disease but refused to allow her experts to testify that the Visicol increased her risk of kidney disease. On appeal, defendant physician, relying on Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888 (1990), argued that evidence of increased risk is only allowable when it is impossible for an expert to testify within a reasonable degree of medical certainty that the negligence was the direct cause of the harm and that therefore the two theories were mutually exclusive. The Superior Court disagreed, holding that a plaintiff, at trial, can present evidence that a physician’s negligence either directly caused the plaintiff’s harm or at least increased the risk of such harm occurring.

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


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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. Daneshooost, 2008 Pa. Dist. & Cnty. Dec. LEXIS 60 (Lehigh Cty. Ct. Com. Pl. Jan. 16, 2008). In Hartenstine, plaintiff alleged that consent to surgery was obtained following the physician’s misrepresentation of the surgical procedure to be performed. See id. The 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.

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.


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.

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
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 Friter, 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. 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.

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.

2 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.
3 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.
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.

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.

In Brady v. Urbas, 80 A. 3d 480 (Pa. Super. 2013), the Superior Court held that a patient’s consent to surgery, and acknowledgement that there are risks associated with the surgery, were inadmissible in the trial of a medical negligence action. Mrs. Brady filed suit against the defendant podiatrist, claiming he was negligent in the performance of multiple surgeries upon her toe. The trial court denied plaintiff’s Motion in Limine seeking to preclude informed consent evidence at trial. Throughout the trial, reference was made to the plaintiff’s consent to surgery and her knowledge of the risks involved. In fact, copies of the consent forms were even provided to the jury during its deliberations. The Superior Court (Colville, J.), held that the trial court erred in admitting that evidence, as the evidence was irrelevant and therefore inadmissible in a negligence action. The Court stated:
[Plaintiff’s] consent to her surgeries and knowledge of the risks associated with those surgeries have no tendency to make the existence of any fact of consequence to the determination of this action more or less probable than it would be without this evidence. In other words, evidence of informed consent is irrelevant in a medical malpractice case. Moreover, assuming arguendo that such evidence had some marginal relevance in this case, the evidence clearly could have misled or confused the jury by leading it to believe that Mrs. Brady's injuries simply were a risk of the surgeries and that she accepted such risks, regardless of whether Dr. Urbas’ negligence caused the risks to occur.

Id. at 484 (emphasis added).

The Court, noting that the evidence was a central component of the defense, held the trial court abused its discretion and that error was not harmless, reversing and remanding for a new trial.

Brady was appealed to the Supreme Court where it was argued on November 18, 2014 and decided on March 25, 2015. Brady v. Urbas, 111 A.3d 1155 (Pa. 2015). The issue on appeal was whether, in a medical malpractice case, a doctor may introduce evidence that the patient was informed of and acknowledged various risks of surgery, although the complaint did not specifically assert a cause of action based on lack of informed consent. Id. The Supreme Court, authored by Justice Saylor, affirmed the Superior Court’s order vacating the judgment and remanding for new trial. However, the Court declined to endorse the Superior Court’s broad pronouncement to the degree it might be construed, to hold that all aspects of informed consent information were always “irrelevant in a medical malpractice case” because some informed consent information might be relevant to the question of negligence or establishing the standard of care. Id. at 1162. But, the Court held, evidence that a patient affirmatively consented to treatment after being informed of the risks of said treatment, was generally irrelevant to a cause of action sounding in medical negligence. Id. The Court reasoned that the fact that a patient may have agreed to a procedure in light of the known risks does not make it more or less probable that the physician was negligent in either considering the patient an appropriate candidate for the operation or in performing it in the post-consent timeframe. Id. Put differently, there is no assumption-of-the-risk defense available to a defendant physician which would vitiate his duty to provide treatment according to the ordinary standard of care. The patient's actual, affirmative consent, therefore, is irrelevant to the question of negligence. Id.

informed consent must be carefully distinguished from that imposed under the doctrine of medical malpractice. Id.; see also Montgomery v. Bazaz-Sehgal, 568 Pa. 574, 798 A.2d 742, 748-749 (Pa. 2002). The doctrine of informed consent requires physicians to provide patients with "material information necessary to determine whether to proceed with the surgical or operative procedure to remain in the present condition." Id. quoting Sinclair by Sinclair v. Block, 534 Pa. 563, 633 A.2d 1137, 1140 (Pa. 1993). Therefore, a claim that a physician failed to obtain the patient's informed consent sounds in battery, not negligence. Id.; see also Montgomery, 798 A.2d at 748-749. There is no cause of action in Pennsylvania for negligent failure to gain informed consent. Id.

E. Hospital Liability

1. Theories of Hospital Liability


(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. The Supreme Court being equally divided, affirmed the Superior Court on December 22, 2011. Toney v. Chester County Hosp., 36 A.3d 83 (Pa. 2011). Specifically, Justice Orie Melvin did not participate in the consideration of the case at the Supreme Court level; Justice Baer, Justice Todd and Justice McCaffrey supported affirming the Superior Court decision; Chief Justice Castille, Justice Saylor, and Justice Eakin all supported reversing the Superior Court.

Justice Baer, who wrote the lead opinion in support of affirming the Superior Court, noted that:

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

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

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Justice Baer noted that “some relationships, including some doctor-patient relationships, will involve an implied duty to care for the plaintiff’s emotional well-being that, if breached, has the potential to cause emotional distress resulting in physical harm.” Id. at 95. In Toney, given the sensitive and emotionally charged field of obstetrics, the Justice’s writing in support of affirmance concluded that Defendants had such an implied duty to care for Plaintiff's emotional well-being. Justice Baer also wrote that “[a] plaintiff asserting a special relationship NIED cause of action absent physical injury, however, must still demonstrate the genuineness of the alleged emotional distress, in part, by proving the element of causation.” Id. at 99.

Justice Saylor, who wrote the lead opinion in support of reversal, believed that the Court was engaging in judicial policymaking within the purview of the legislature. Justice Saylor also wrote:

... I have serious reservations about the practical consequences of introducing what is essentially "emotional crashworthiness" liability into the healthcare arena.

Id. at 102.5

In Sokolsky v. Eidelman, 93 A.3d 858 (Pa. Super. Ct. 2014) the Superior Court held that a plaintiff need not identify “a specific medical practitioner” in order to establish a vicarious liability claim against a defendant hospital or managed care facility. Specifically, the Court held that “simply because employees are unnamed within a complaint or referred to as a unit i.e., ‘the staff,’ does not preclude one’s claim against their employer under vicarious liability if the employees acted negligently during the course and within the scope of their employment.” It should nonetheless be noted that Sokolsky is a review of a legal malpractice case; however, the underlying “case within a case” involves a medical malpractice action.

(b) Ostensible Agency


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

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

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 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

In *Green v. Pa. Hosp.*, 123 A.3d 310, 323 (Pa. 2015) the decedent arrived at the
emergency department of a hospital where he was admitted to the ICU and given
medication, intubated and placed on a ventilator to assist with his breathing. After
remaining in critical condition for ten (10) days, he died. *Id.* During his admission, a
physician, that was not an agent of the hospital, responded to a page as part of the
emergency team and attended to the decedent. The question on appeal was whether the
hospital’s liability for the negligence of this treating physician should be presented to the
jury under a theory of ostensible agency. *Id.* at 315. In the Court's view, when a hospital
patient experiences an acute medical emergency, such as that experienced by Decedent in
the instant case, and an attending nurse or other medical staff issues an emergency request
or page for additional help, it is more than reasonable for the patient, who is in the throes
of medical distress, to believe that such emergency care is being rendered by the hospital or
its agents. *Id.* at 323. Accordingly, the Court held that the trial court's grant of a nonsuit
under 40 P.S. § 1303.516(a) (addressing vicarious liability for ostensible agency) was erroneous in the instant case, and that the question of whether a reasonably prudent person in Decedent's position would be justified in his belief that the care rendered by the physician was rendered as an agent of the Hospital should have proceeded to the jury. *Id.* Finding that a Hospital can be held vicariously liable for the negligence of an on-call doctor based on ostensible agency, even when on-call doctor is independent contractor the Court reversed the Superior Court's decision affirming the trial court's grant of a nonsuit in favor of the Hospital on this issue, and remanded the matter for further proceedings. *Id.*

(c) EMTALA Cases

In *Torretti v Main Line Hospitals, Inc.*, 580 F.3d 168 (3rd 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.

\textit{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 has 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.
Plaintiff’s Antidumping Claims

In Baney v. Fick, No. 4:14-CV-2393, 2015 U.S. Dist. LEXIS 21118 (M.D. Pa. Feb. 23, 2015) plaintiffs alleged that Brian Baney was injured as a result of inpatient medical care provided to him following a scheduled spinal procedure after which he suffered serious and catastrophic injury to his esophagus which was not properly managed/stabilized during his inpatient stay resulting in permanent injury. Id. at *4. Plaintiffs alleged that after Mr. Baney's esophagus was perforated during the surgery, "the medical team managing his care was negligent in treating him for his esophageal injury . . . including that the defendants should have arranged for his transport immediately following the injury to a tertiary care facility where cardiothoracic surgeons were available." Id. Plaintiffs’ stated that the "gist of the EMTALA claim was that Brain Baney was not 'stabilized' or transferred as required by EMTALA for persons suffering from an 'emergency condition.'" Id.

The court stated that the EMTALA "forbids hospitals from refusing to treat individuals with emergency conditions, a practice often referred to as 'patient dumping.'" Id. at *6 citing Torretti v. Main Line Hospitals, Inc., 580 F.3d 168, 169 (3d Cir. 2009). Yet, "EMTALA[] ... is not a federal malpractice statute." and EMTALA was not "intended to create a federal malpractice statute or cover cases of hospital negligence." Torretti, 580 F.3d at 178. EMTALA requires hospitals to provide medical screening and stabilizing treatment to individuals seeking emergency care in a nondiscriminatory manner and is not limited to the indigent and uninsured. Baney, at *13. However, the court found that Mr. Baney did not "fit within EMTALA's scope-a patient antidumping statute." Id. Given that the plaintiffs did not put forth any evidence or allegations that the elective inpatient spinal procedure was to treat an emergent condition - rather Mr. Baney was being given an elective inpatient surgical procedure at a scheduled appointment – he did not fall within the EMTALA protections. Id. at *14. Mr. Baney’s “emergency condition” was really a complication of the elective procedure.

Plaintiffs asserted a stabilization claim and a failure to promptly transfer to an appropriate facility. In Torretti, the court stated the following requisite elements of a "stabilization" claim under EMTALA, the plaintiff "(1) had 'an emergency medical condition; (2) the hospital actually knew of that condition; [and] (3) the patient was not stabilized before being transferred.'" 580 F.3d at 178 (quoting Baber v. Hosp. Corp. of Am., 977 F.2d 872, 883 (4th Cir. 1992)). The Baney court observed, "EMTALA's requirements are triggered when an 'individual comes to the emergency department' and an individual only does so if that person is not already a 'patient.'" Id. at *20; citing Smith v. Albert Einstein Med. Ctr., 378 Fed.Appx. at 157 (citing Torretti, 580 F.3d at 175) (internal citation omitted). As Mr. Baney was an inpatient at the time his alleged emergency condition occurred EMTALA did not apply under the facts of this case. Id. at 21; see also Torretti, 580 F.3d at 174-75.
(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.

In *Scampone v. Grane Healthcare Co.*, 11 A.3d 967 (Pa. Super. 2010), *appeal granted*, 15 A.3d 427 (Pa. 2011), 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. 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].” Following trial, the jury concluded that the defendant nursing home was liable under theories of corporate and vicarious liability. 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.

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.” 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.

Likewise, the court concluded that the corporation managing the nursing home is also subject to corporate liability for understaffing. The court noted that the management corporation exercised complete control over all aspects of the nursing home’s operation. 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….

The Superior Court concluded that issues of staffing fall within the four (4) Thompson duties for which a corporation may be held directly liable. 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.

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.” The court noted that the plaintiff established breach and causation by expert testimony from a nurse practitioner.
The Supreme Court, Scampone v. Highland Park Care Center LLC, 57 A. 3d 582 (Pa. 2012), agreed with the Superior Court, holding that a nursing home and affiliated entities are subject to potential direct liability for negligence, where the requisite resident – entity relationship exists to establish that the entity owes the resident a duty of care. The Court reasoned that it was not expanding the law of corporate negligence from just hospitals to now include nursing homes as the defendants suggested. Rather, the Court stated that it was refusing to give blanket immunity to the nursing home industry for breaching a duty it owed a plaintiff.

The Court stated that immunity from liability is an exception to the general rule. A nursing home is no different than any other alleged corporate tortfeasor, which has an obligation to not breach legal duties it owes to others. The Court noted that corporate negligence exists in many areas, citing not only the corporate responsibilities owed by a hospital to its patients as found in Thompson v. Nason Hospital, 591 A. 2d 703 (Pa 1991), but also the duty of care a corporation owes its customers to maintain its premises in a safe condition, Gilbert v. Korvette Inc., 327 A. 2d 94 (Pa. 1974), and the duty owed to employees to use reasonable care in hiring other employees, Dempsey v. Walso Bureau Inc., 246 A. 2d 418 (Pa 1968). The Court stated that categorical exemptions from liability exist only where the General Assembly has acted to create explicit policy based immunities; otherwise the default general rule of possible liability operates.

The Supreme Court framed the issue as whether the Scampone Estate offered sufficient evidence of the relationship with Highland Park, and separately with Grane Healthcare, to establish that a duty of care existed. The Court remanded the matter to the trial court and instructed that its initial task is to determine, consistent with its opinion, whether Highland Park and Grane Healthcare owed Ms. Scampone legal duties or obligations and to articulate any specific duties it may find.

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

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

Failure of a trial court to consider these five factors, in addition to the Thompson factors, in malpractice actions involving skilled nursing facilities, is reversible error. As stated above, it should be noted that Sokolsky is a review of a legal malpractice case, however, the underlying “case within a case” was a medical malpractice action.
Hall v. Episcopal Long Term Care, 54 A.3d 381 (Pa. Super. Sept. 27, 2012). In this decision, the family of a deceased nursing home resident brought suit against the facility for negligence. In its opinion, the Superior Court reiterated the decision in Scampone (11 A.3d 967, 976 (Pa. Super. 2010), that a nursing home is “analogous to a hospital in the level of its involvement in a patient’s overall health care.” Id. at 976. A nursing home, therefore, can be subject to a claim for corporate negligence. Additionally, the Court held that testimony from former employees, even if it can be argued that they are disgruntled, is sufficient to serve as evidence that the facility was understaffed, and that the corporate entity had actual or constructive knowledge of the understaffing of the facility. Such evidence was sufficient basis for the trial court to deny the Defendant’s motion for JNOV.

(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 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, constructive 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.
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.

The Eastern District of Pennsylvania has 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 1508521 (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 Vochinksy 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 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), affirmed 397 Fed. Appx. 744 (3d Cir. 2010), the District Court addressed whether it was required to apply Rule 1042.3 when it was not sitting in diversity and was instead addressing pendent state claims of negligence. The court cited to *Abdulhay v. Bethlehem Medical Arts*, 2005 WL 2416012 (E.D. Pa. Sept. 28, 2005), and held that under the Erie doctrine, “federal courts must apply [Rule 1042.3] to state law claims arising under pendent jurisdiction.” Id. 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.

Cooper v. Lankenau Hospital, 51 A.3d 183 (Pa. Aug. 20, 2012). In this action, the Plaintiff brought a claim against Lankenau Hospital and others asserting medical battery due to the performance of a cesarean section after the patient had refused consent. The Plaintiff appealed from a judgment for the Defendants, alleging that the jury instruction improperly required the jury to find that the physician who performed the procedure had acted with intent to cause harm.

The trial court issued the following jury charge:

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

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

Id. at 186.

The Supreme Court of Pennsylvania disagreed with Plaintiff's argument. The Court reasoned that it has been long held that “intent”, in the context of battery, does not mean “intent to harm”, but rather “an act done with the intent to cause a harmful or offensive contact with the body of another...”. Whether such contact is harmful or offensive in the context of medical treatment depends on whether the patient has consented to such treatment.

The Court did, however, recommend that the Pennsylvania Committee for Proposed Standard Jury Instructions consider developing a standard jury charge for medical battery/lack of consent cases.

(b) Sovereign Immunity

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
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 Hyrcza 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.” Hyrcza, 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 5th, 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.

(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.

(e) **Extension of Corporate Liability**

In Milliner v. DiGuglielmo, No. 08-4905, 2011 WL 2357824 (E.D. Pa. June 8, 2011), a prison inmate fell from the top bunk of his cell, resulting in extreme pain throughout his body, including his lower back. An MRI eventually revealed “several cervical disc herniations, protrusions, and bulges as well as significant compression of the cervical spinal cord and possible edema on an myelomalacia of the cord itself.” Id. at *1. Plaintiff underwent a surgery at an outside hospital, which left him immediately paralyzed from the neck down, though some movement was eventually regained in other parts of his body. Following the surgery, plaintiff received poor care and submitted numerous complaints to the prison administrators.

Plaintiff eventually filed suit against the doctor who performed the surgery, the hospital at which the surgery was performed, and various other “medical defendants” who worked at the correctional facility. Plaintiff also filed suit against Prison Health Services, Inc. (“PHS”), a “Delaware corporation [that] contracted with the [Pennsylvania] Department of Corrections to provide health care services to inmates on behalf of the Department of Corrections.” Id. at *6. Plaintiff alleged corporate liability on the part of PHS, amongst other claims.

PHS filed a motion to dismiss the corporate negligence claim, arguing that it could not be held liable under the theory of corporate liability because the Thompson rule was limited to entities that play a central role in a patient’s total health care. The Court disagreed and denied
the motion to dismiss, noting that the plaintiff had sufficiently alleged that PHS was involved with the inmates’ care to such a degree that it did play a “central role” in their care. Moreover, the Court cited prior Eastern District caselaw, i.e., Wheeler v. Prison Health Servs., Inc., No. 09-410, 2010 WL 3489405 at *7 (E.D. Pa. 2010), for the proposition that the Pennsylvania Supreme Court “would extend corporate negligence to an institution responsible for an inmate’s healthcare, like PHS.”

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 PRPA 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”.

   Note that as a plurality opinion, the Supreme Court's opinion already lacks precedential value. Moreover, McClellan is further abrogated as noted in the 2014 Commonwealth Court decision in Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, 83 A.3d 488 (Pa. Commw. 2014). In Tri-County, the Commonwealth Court noted a 2010 Supreme Court decision, i.e., Deckert, LLP v. Commonwealth, 998 A.2d 575 (Pa. 2010), which suggests that the language, "including but not limited" to preceding more specific language, suggests an intention to broaden a statute, rather than constrain its scope. **But see Yocabet v. UPMC Presbyterian.**
119 A.3d 1012, 1023 (Pa. Super. Ct. 2015) (citing McCellan and refusing to extend the protections of the PRPA to documents created during a Pennsylvania Department of Health investigation.)

(b) Discovery of Hospital Files

In Piroli v. LoDico, M.D., 909 A.2d 846 (Pa. Super. Ct. 2006), Plaintiff sued a physician and his practice after his wife died following a transforaminal epidural steroid injection during which, Plaintiff alleged, Defendant punctured Decedent’s vertebral artery. 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.” Piroli, 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 . . . .

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 (Pa. 1999), the Supreme Court of Pennsylvania affirmed in part a trial court order permitting a physician to obtain through discovery an audiotape of a hospital medical board in staff privilege litigation. 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, 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.

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, 577 F.3d 186 (3d Cir. 2009), the mother of minor children who were removed from her custody brought a section 1983 claim against Monroe County Children and Youth Services (“MCCYS”) and two MCCYS employees, alleging that her due process rights were violated after a dependency hearing regarding her children’s custody was held more than seventy-two hours after removal. 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, 577 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

Thierfelder v. Wolfert, 52 A.3d 1251 (Pa. Sept. 28, 2012) (also dealt with, supra). In this case of first impression, the Supreme Court of Pennsylvania had to determine whether a general practitioner who provided incidental mental health treatment to a patient could be held liable in tort for engaging in a sexual relationship with a patient.

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

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

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

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

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), allocatur granted in part, 984 A.2d 935 (Pa., 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.

However, on November 24, 2009, Defendant’s Petition for Allowance of Appeal was granted but Allocatur was limited to the following 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?

The PA Supreme Court ultimately reversed. The Court wrote, “we decline to expand the potential malpractice liability of a general practitioner to include an absolute duty derived from the duty of mental health specialists, to avoid sexual relations with patients in circumstances where they have rendered some degree of mental and emotional treatment to the patient.” Thierfelder, 52 A.3d 1251, 1279 (Pa. 2012).

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).

B. Discovery Rule


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 Matharu v. Muir, 29 A.3d 375 (Pa. Super. Ct. 2011) (also addressed, supra), vacated on other grounds, 73 A.3d 576 (Pa. 2013), the Defendant, Dr. Muir, did not administer the Plaintiff-mother with an injection RhoGAM during her pregnancy in 1998. RhoGAM is administered in cases in which a pregnant mother’s blood is Rh-negative and the father’s blood is Rh-positive. In these circumstances, future-conceived children could have a Rh-positive blood type, which could cause the mother to create antibodies against the fetus. The administration of RhoGAM can prevent harm in future pregnancies. The Plaintiff-mother became pregnant again, treated again with Dr. Muir, and had no issues.

In March 2003, Dr. Muir sent a letter to the Plaintiff-mother ending the treatment and relationship. Then, in 2005, the Plaintiff-mother again became pregnant, and this time did not treat with Dr. Muir. The child was delivered early by C-section and died two days later, on November 12, 2005. The Plaintiffs sued claiming that Dr. Muir and other defendants failed to administer RhoGAM, which in turn caused the issues with this last pregnancy. Id. at 380-81.

The Plaintiffs filed their Complaint on June 26, 2007, within two years of the child’s death. The Pennsylvania Superior Court detailed that the statute of limitations for a survival action begins to run on the date of the injury, as though the decedent were bringing her own lawsuit, and that the statute of limitations for a wrongful death action begins “when a pecuniary loss is sustained by the beneficiaries of the person whose death has been caused by the tort.” Id. at 383 (citation and quotation marks omitted). Therefore, in the Plaintiffs’ survival action, the child’s right to proceed in a lawsuit against the Defendants did not start until the child suffered an injury—either on his birth day of November 10, 2005, or his date of death of November 12, 2005. Id. at 384. Thus, the survival action was brought within the statute of limitations. Id.

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

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

brought suit July 16, 2009. The suit was a civil rights action under 42 U.S.C. § 1983 for violations of the Federal Nursing Home Reform Amendments. The Complaint contained claims under 42 Pa. C.S.A. § 8301 and 8302, which “serve only as a mechanism for recovery and do not create their own causes of action.”

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

In Wilson v. El-Daief, 964 A.2d 354 (Pa. 2009), Mary Wilson filed a writ of summons against Samir El-Daief, M.D., and Montgomery Hospital Medical Center in October of 2003. 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. Id. at 356-57. The Superior Court affirmed. Id. at 357-58.

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

The court also held that, “with full appreciation of the additional requirement imposed upon plaintiffs to obtain a certificate of merit under Rule 1042.3, we decline to retool the discovery rule specific to medical malpractice actions in light of the procedural rule. . . . [W]e believe the rules allow sufficient flexibility to avoid untenable results.” Id. at 366. The court further noted that the current discovery rule was adequate in providing the plaintiffs with their day in court, as well as protecting the defendants from stale claims. Id. at 368.
Justice Baer filed a concurring and dissenting opinion, noting that he agreed with the majority opinion that the action was not time-barred by the statute of limitations. He stated:

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

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


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. Id. at *2. Defendants then filed a Motion for Summary
Judgment. Id. 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. Univ. 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 court determined that the facts were knowable and discoverable by the Plaintiff if he had sought them. Id. at *6.

As to equitable tolling, the court noted that the Plaintiff failed to exercise reasonable diligence, and 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. Id.

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. The 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.

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

Plaintiff Kach alleged that her claims were timely, because the date of accrual of her injury should have been the date when she revealed her actual identity to her friend and was removed from defendant Hose’s home. Plaintiff Kach relied on Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir. 2006), in which the United States Court of Appeals for the Third Circuit “carved out a narrow equitable exception to Kubrick’s 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 (citation and quotation marks omitted).
Plaintiff Kach alleged that she was without a legal guardian during the time that she was in defendant Hose’s home. The Third Circuit noted that, because Plaintiff Kach reached the age of majority in 1999, even if she had lacked a guardian, she would have to prove that she was mentally incompetent prior to the government conduct that injured her in order to qualify for the Miller exception. Kach, 589 F.3d at 637.

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

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

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

As to the issue of whether Defendant Hose was acting under the color of state law, the Third Circuit determined that he did not qualify as a state actor under any of the three tests outlined by the Supreme Court: “‘(1) whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state’; (2) ‘whether the private party has acted with the help 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 Third Circuit found that Plaintiff Kach’s assertions failed the first test, because she put forth no evidence that school security is purely a function of the state. Id. at 647-48. Similarly, the Third Circuit found that Plaintiff Kach’s case failed the third test, because there is no evidence that Defendant Hose’s relationship with her was at the direction of any school official. Id. at 648-49. According to the Third Circuit, Defendant Hose’s behavior was instead of his own accord and in violation of his prescribed duties. Id. at 649. The Third Circuit therefore held that he was not acting under color of law and the Plaintiff’s § 1983 claim against him failed. Id. at 649.
Finally, the Third Circuit rejected Plaintiff Kach’s argument that the federal district court should have maintained jurisdiction over the state law claims that she raised against the Defendants, who failed to respond to the federal claims. The Third Circuit pertinent statute allows 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, in light of the text of the statute, the Third Circuit held that the federal district court was well within its rights to decline supplemental jurisdiction over the state law claims of the defaulting defendants. Id.

In Byrne v. The Cleveland Clinic, 684 F. Supp. 2d 641 (E.D. Pa. 2010), summary judgment granted on other grounds, Byrne v. Chester County Hospital, Civil Action No. 09-889, 2012 WL 4108888 (E.D. Pa. Sept. 19, 2012), the pro se Plaintiff brought suit against the Defendants under the Emergency Medical Treatment and Active Labor Act (EMTALA), as well as a state law claim for breach of implied contract. The Defendants moved to dismiss on multiple grounds, including the Plaintiff’s failure to file within the two-year statutory period.

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

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

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

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

In Fine v. Checcio, 870 A.2d 850 (Pa. 2005), the Supreme Court of Pennsylvania reviewed two cases, consolidated on appeal, in which the Plaintiffs were patients that had sued dentists and alleged dental malpractice. 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-Plaintiff’s four wisdom teeth be surgically extracted. The patient-Plaintiff, Fine, accepted this recommendation and signed a consent form with complications and conditions that could follow surgery, including numbness of the lip, tongue, chin and cheeks. 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.

Fine subsequently 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 the trial resulted in a verdict in favor of Fine, and following the trial court’s denial of 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 v. Rice, the companion case, the Plaintiff-patient, Ward, had her wisdom teeth extracted by Dr. Rice on March 28, 1995. Immediately following the surgery, Ward experienced some numbness and occasional tingling in her lip. Ward told Dr. Rice of her condition, and Dr. Rice assured her it would go away. Ward continued to treat with Dr. Rice until May 1995, and Dr. Rice continued to assure her the problems she was having would subside. Ward 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. Ward’s first visit to the new doctor occurred on October 11, 1995.

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

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 reviewed the settled aspects of the discovery rule and then noted that it remained unsettled whether the rule requires that it be determined whether the injury and its cause were reasonably ascertainable at any point within the prescribed statutory period. Id. at
According to the Supreme Court, 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. \textit{Id.} at 859.

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.” \textit{Id.} To adopt the alternate position, the Supreme Court reasoned, could lead in many instances to unreasonable and arbitrary results. \textit{Id.} at 860. The Supreme Court explained that such a regime could nullify the recognized purpose of the rule, which is to see to it that persons who are reasonably unaware of an injury that is not immediately ascertainable have essentially the same rights as those who suffer an immediately ascertainable injury. \textit{Id.}

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

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

In \textit{Santos v. United States}, 523 F. Supp. 2d 435 (M.D. Pa. 2007), \textit{rev’d}, 559 F.3d 189 (3d Cir. 2009), the minor-Plaintiff alleged a failure to diagnose and treat an infection in the Plaintiff’s neck area at a federally subsidized health care clinic. The Plaintiff, unaware that her health care providers were deemed federal employees, filed suit in state court more than two years after the cause of action accrued, but within the time allowed by Pennsylvania’s Minor’s Tolling Statute. 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 the Plaintiff to pursue an administrative complaint. The 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), the Plaintiff filed an FTCA claim in federal court. The FTCA requires that a claim be filed within two years from which it accrues. \textit{Santos}, 523 F. Supp. 2d at 439-40. Unlike Pennsylvania, the FTCA does not contain a minor tolling statute. \textit{Id.} at 440. However, the FTCA does contain a limited
exception to save claims mistakenly filed in a state court within the two-year statute of limitation. Id.

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

The federal district court found the Plaintiff’s response unpersuasive and granted the Defendant’s motion for summary judgment. Id. at 443-44. The court explained that the Plaintiff’s error did not amount to more than “a garden-variety claim of excusable neglect, to which the Supreme Court has stated that equitable tolling should not extend.” Id. (citation and quotation marks omitted).

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

The Third Circuit held that the Plaintiff diligently and vigorously pursued her claim, albeit prior to realizing that she filed a state court action against a federal defendant. Id at 198. Evidence in support of the diligence included the fact that she retained diligent counsel, who requested and reviewed medical records, visited the Defendant, corresponded with the Defendant, performed a public records search on the Defendant, retained experts—all of whom prepared expert reports. 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 the plaintiff failed to perform reasonable investigations that would have demonstrated that the defendants had been deemed federal employees covered by the FTCA. Id. at 199. The Third Circuit observed that the federal district court noted that it was not clear whether the Plaintiff knew, or should have known, that the Defendant received federal funds. Id. at 200.

The Third Circuit reasoned that the Plaintiff’s belief that the Defendant was a state entity was “far from a baseless assumption,” given that the Defendant resembled a private clinic, and except for FTCA purposes, the clinic and its employees were private actors rather than federal employees. Id. The Third Circuit stated that Plaintiff’s attorney also performed a public records search on the Defendant, which revealed it as an apparently private corporation. Id. According to the Third Circuit, the Plaintiff’s counsel’s many visits and discussions with the Defendant failed to provide any evidence that they were indeed a Federal entity. Id. at 200-01.
The Government argued, *inter alia*, that the website for the Defendant indicated that it is a “federally qualified health center.” *Id.* at 201. The Third Circuit found that, although the Defendant received grant support from the United States Department of Health and Human Services:

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

*Santos,* 559 F.3d at 201.

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

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

While the Decedent was in Frankford Hospital, the Plaintiff, who was the Decedent’s sister, discovered that the Decedent had suffered an adverse reaction to the psychiatric medications. The Decedent remained at Frankford Hospital until November 27, 1995 at which time he was transferred to the Philadelphia Geriatric Center. The Decedent resided at the Philadelphia Geriatric Center until he was transferred to Temple University Hospital on September 9, 1997. The Decedent died at Temple University Hospital on September 24, 1997, with the cause of death listed as sepsis.

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

The Government raised a statute of limitations defense, arguing that the Plaintiff’s claims were time-barred because they were brought more than two years after the accrual of the
injury. Plaintiff responded that the “discovery rule” should apply to toll the statute of limitations, since Decedent’s injury was not “discoverable” until the Decedent’s death. Plaintiff also argued that, in light of the Decedent’s profound mental retardation, the Plaintiff should be the “reasonable person” for purposes of determining when the Decedent’s injury was “discoverable.” The federal district court granted summary judgment in favor of Defendants, and plaintiff appealed to the Third Circuit.

In a split panel opinion, the United States Court of Appeals for the Third Circuit reversed. The Third Circuit held that Pennsylvania’s discovery rule did, in fact, toll the statute of limitations until the Decedent’s death, because a plaintiff exercising reasonable diligence could not have discovered the Decedent’s injury until that time. Id. at 276. The Third Circuit based its decision on dicta contained in the 2005 Pennsylvania Supreme Court’s Fine opinion, supra, which they found required a subjective, rather than an entirely objective, evaluation of when a decedent should have been able to discover his injury and its cause. Id. The Third Circuit also concluded that, in cases involving the mentally retarded, a “narrow equitable exception” 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. Id. at 275.

In Miller v. Ginsberg, 874 A.2d 93 (Pa. Super. Ct. 2005), the Plaintiff, who was born with a congenital defect known as a double ureter, contended that her ureter was negligently cut during an operation on January 18, 1996, and that surgery to repair the cut was negligently performed on January 21, 1996. The 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 the Defendant-urologist, but that was reversed on appeal. A second trial resulted in a hung jury. Before the third trial, the parties entered into a high/low agreement. The jury determined that the statute of limitations did not bar the claim, since the Plaintiff did not know, or have reason to know, that she had suffered an injury caused by the January 1996 surgeries more than two years before she filed suit. The jury awarded the Plaintiff an amount well in excess of the high in the agreement. The trial court denied the Defendant’s post-trial motions and reduced the recovery to the agreed upon high. Both parties appealed.

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

The Superior Court disagreed as to both arguments. Id. at 97. The Superior Court noted that, in all three trials, the trial court had determined that the discovery rule was applicable due to the nature of the Plaintiff’s injuries and was a question of fact for the jury. Id. The Superior
Court observed that the trial court found that, while the Plaintiff may have known her ureter was cut at the time of the January 1996 surgeries, a jury could conclude that it was not until she began treatment with a new doctor in August of 1996 that she became aware her injuries were related to these surgeries—particularly in light of the Plaintiff’s testimony that the Defendant told her that her problems were not related to his treatment. Id. The Superior Court thus held that there was no clear error of law, that the trial court had not abused its discretion in its jury instruction on the statute of limitations, and that the statute of limitations did not bar the claim. Id.

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

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

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

In Chaney v. Meadville Medical Center, 912 A.2d 300 (Pa. Super. Ct. 2006), the Plaintiff brought a malpractice action against Meadville Medical Center (“MMC”) and a physician, Dr. Glenn A. Bollard, after her 18-year-old daughter died following a bout of pneumonia and severe hypoxia. After the Plaintiff instituted her action, the Defendants moved to have certain paragraphs and subparagraphs stricken from the complaint. The trial court granted the Defendants’ motion, and the Plaintiff subsequently filed a petition for rule to amend the complaint. The trial court denied the Plaintiff’s petition and proceeded to enter summary judgment in favor of the 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.’ Only if the proposed amendment merely amplifies, as opposed to altering, the cause of action already averred, will it be allowed if the statute of limitations has run.


Given that the statute of limitations had run before the Plaintiff moved to amend her complaint, the Superior Court examined the proposed amendments and affirmed summary judgment with regard to the amendments establishing new causes of action against Dr. Bollard, but reversed summary judgment with regard to the proposed amendments that merely amplified or expanded theories of liability that were included in the original complaint. Id. at 304-06.

D. Wrongful Death and Survival Actions

The discovery rule is generally inapplicable to wrongful death and survival actions. See, e.g., Pastierik v. Duquesne Light Co., 526 A.2d 323, 325 (Pa. 1987); Anthony v. Koppers Co., 436 A.2d 181, 183-85 (Pa. 1981); Moyer v. Rubright, 651 A.2d 1139, 1142-43 (Pa. Super. Ct. 1994). Accordingly, in actions brought under the Wrongful Death and Survival Statutes, 42 Pa. Cons. Stat. §§ 8301-02, the statute of limitations commences, at the latest, upon the death of the individual, and not from the date the survivors knew, or should have known, the cause of death. 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, 1214-15 (Pa. Super. Ct. 2002).

VI. RULES AND STATUTES REFLECTING TORT REFORM INITIATIVES

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

A. Pennsylvania’s Apology Law

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

The 2002 Medical Care Availability Act, 40 P.S. §§1303.101 to 1303.1115 (the “MCARE Act”), 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: (1) patient safety; (2) medical professional liability; (3) malpractice insurance; and (4) 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 P.S. § 1303.303. The Authority was created to facilitate the collection and analysis of data documenting reports of serious events and incidents occurring within Pennsylvania’s health care facilities. Id. The Authority is directed to use the data to make recommendations to the Department of Health and individual institutions for changes in health care practices and procedures which may be instituted for the purpose of reducing the number and severity of serious events and incidents. Id.

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

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

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

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. 40 P.S. § 1303.504(b). 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 *Bell v. Willis*, 80 A.3d 476 (Pa. Super. Ct. 2013), the Pennsylvania Superior Court found that the MCARE Act does not apply to chiropractors, only physicians. Id. at 479. The Superior Court thus held that, even though the MCARE Act expanded the informed consent doctrine to cover certain procedures not included in prior case law, such as blood transfusions and chemotherapy, the expansion did not impose an additional duty on chiropractors, who were governed by the Chiropractic Practice Act 63 P.S. §§ 625.101 to 625.1106. *Bell*, 80 A.3d at 479.

The Pennsylvania Supreme Court recently suggested that a specific jury instruction regarding lack of consent, rather than lack of informed consent, be implemented to reduce confusion regarding the elements of medical battery. In *Cooper v. Lankenau Hosp.*, 51 A.3d 183 (Pa. 2012), the Plaintiffs alleged that the Defendant-physicians committed a battery when they delivered plaintiff’s baby via Caesarean section, despite the Plaintiff-mother’s refusal to consent to this procedure. The Plaintiffs sought the standard jury charge for lack of informed consent,
which focuses primarily on the nature of the consent given by a patient, rather than whether any consent was given at all.

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

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

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

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

*Id.* at 186 (emphasis added).

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

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

On appeal, the Supreme Court recognized that medical lack-of-consent claims constitute battery, a tort that has been described as “unconsented touching that is either harmful or offensive.” *Id.* at 191. In medical battery, the Supreme Court continued, whether a physician’s
contact is offensive or harmful depends on whether the patient gave consent. Id. Consequently, the Supreme Court reasoned that a surgery performed without a patient’s consent constitutes an intentional and offensive touching and satisfies the elements of battery. Id. The Supreme Court added that “[n]o intent to harm the patient need be established.” Id.

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

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

Unlike Act 135, however, the MCARE Act contains a provision stating that a doctor can be held liable for failure to obtain a patient’s informed consent if the doctor “knowingly misrepresents to the patient his or her professional credentials, training or experience.” Id. § 1303.504(d)(2). This provision apparently overrules the Supreme Court case Duttry v. Patterson, 771 A.2d 1255 (Pa. 2001), with respect to procedures performed after the MCARE Act’s effective date.

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

The Defendants attempted to remove the case to federal court, alleging that federal jurisdiction was appropriate because: (1) federal courts have jurisdiction over state law claims that turn on substantial questions of federal law; and (2) the Plaintiff’s battery claim turned on a
substantial question of federal law as it requires an interpretation of federal regulations governing informed consent.

The Plaintiff contended that removal was inappropriate since her claim solely involved state statutory and common law. In particular, the Plaintiff argued that her informed consent claim did not refer to or rely on federal law, but rather asserted a claim, alleging battery based on lack of informed consent, that was governed solely by MCARE. Further, the Plaintiff contended that the relevant inquiry was whether Congress intended federal regulations to confer federal question jurisdiction. The Plaintiff averred that Congress had not intended to create a federal private right of action, because the regulations were not phrased in terms of persons benefited. The Plaintiff thus maintained that, as Congress did not create a federal right of action, removal was inappropriate.

The federal district court determined that, in applying the MCARE Act, the only potential significant federal issue was whether the topic of informed consent for human research subjects had been preempted by federal law. Id. at *12. “If Congress had intended to preempt this area of law,” the federal district court reasoned, “then it would be impermissible for the MCARE Act to impose additional or different informed consent requirements for human research subjects.” Id.

The federal district court observed that the federal regulations explicitly indicate that they do not preempt state law requirements, thus suggesting that those regulations did not preempt the MCARE Act. Id. The federal district court found further support for this conclusion, given that “the federal statute on informed consent does not provide civil enforcement provisions” and “the FDA regulations make clear that state and local authorities have retained the power to create civil enforcement provisions.” Id. at *13.

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

(b) Punitive Damages

The MCARE Act also makes changes to Pennsylvania’s law related to the imposition of punitive damages. Pursuant to the statute, punitive damages may be awarded for conduct that is the result of the health care provider’s “willful or wanton conduct, or reckless indifference to the rights of others.” 40 P.S. § 1303.505(a). A showing of gross negligence is insufficient to support punitive damages. Id. § 1303.505(b). Furthermore, punitive damages shall not be

6 The federal regulations at issue were 21 C.F.R. §§ 50.1 to 50.27 and 45 C.F.R. §§ 46.101 to 46.124. These regulations pertain to the protection and informed consent of human subjects during clinical investigations, like the study at issue in this case.

7 More specifically, the regulations state: “This policy does not affect any state or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.” 45 C.F.R. § 46.101(f).
awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury, “unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages.” Id. § 1303.505(c).

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

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

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

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

In James v. City of Wilkes-Barre, No. 3:10-CV-1534, 2011 WL 3584775 (M.D. Pa. Aug. 15, 2011), the Plaintiff alleged that, over her protests, personnel at the Defendant-hospital bound her to a gurney, forcibly withdrew blood from her and injected her with sedatives, while the

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8 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.
Defendant—police officers laughed. The Plaintiff further contended that the hospital personnel kept her in restraints for several hours, despite knowing that this was not necessary. After the Plaintiff filed a complaint in state court, the Defendants removed the case to federal court. The Defendant-hospital then filed a Motion to Dismiss, arguing, in relevant part, that the complaint failed to state a claim for punitive damages under Pennsylvania law.

The federal district court disagreed, finding that the Plaintiff had made allegations of outrageous conduct sufficient to survive the Motion to Dismiss. Id. at *12. Specifically, the federal district court concluded that the Plaintiff’s allegations were sufficient to allow for discovery to examine the motives and results of the Defendants’ alleged mistreatment, and to examine whether evidence existed to support the Plaintiff’s claim that the Defendant-hospital knew of and permitted the alleged outrageous conduct to occur. Id.

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

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

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

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

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

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

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

The federal district court also found that, pursuant to a plain reading of the MCARE Act, the Plaintiff will be permitted to introduce into evidence the total amount of past medical expenses he actually incurred. Id. The federal district court posited, however, that the Plaintiff’s recovery “will be limited to the Medicare billing rates that healthcare providers accepted as full payment.” Id. As such, the federal district court denied the Defendant’s Motion in Limine. Id.
Courts have also implemented limiting instructions to discourage jury confusion regarding the damages that plaintiff may be awarded. In Dieffenbach v. Trevouledes, No. 10-00016, 2012 WL 1379473 (C.P. Lycoming Jan. 18, 2012), the Plaintiffs moved to introduce the full amount of the Plaintiff-wife’s medical bills for treatment rendered as a result of the Defendant’s alleged negligence, but the Defendant countered that the Plaintiffs should be limited to introducing only the expenses paid by the wife’s insurance providers. Citing the MCARE Act’s aim of ensuring reasonable compensation for a plaintiff injured due to medical negligence, the trial court held that submitting to the jury the medical expenses billed, rather than the medical expenses paid, would not ensure reasonable compensation for the Plaintiffs, but instead might lead to a windfall for them.

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

Another notable case is Deeds v. Univ. of Penn. Med. Ctr., 2015 Pa. Super. 21 (Pa. Super. 2015) (Memorandum Opinion). Deeds is discussed at length, infra. In Deeds, the Superior Court reversed a jury verdict in favor of defendants in a claim for medical negligence brought on behalf of a minor. The Superior Court was persuaded that a new trial was warranted in light of the fact that the defense, on multiple occasions, informed the jury of collateral sources of compensation to Deeds for Deeds’ care. The Superior Court further observed that:

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

Id., 2015 Pa. Super. 21 at *8. The Superior Court determined that the appellee-plaintiff was not adequately shielded from the inappropriate references to collateral sources of recovery by the trial court, which made no curative or limiting instructions, despite sustaining more than one objection.

(d) Calculation of Damages

For causes of action arising after March 20, 2002, the MCARE Act 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 P.S. § 1303.510. Expert evidence will still be admissible with regards to the effects of productivity and inflation over time. Id.
The MCARE Act 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. \textit{Id.} § 1303.509(b)(1)-(2). These periodic payments will terminate upon the death of the plaintiff. \textit{Id.} § 1303.509(b)(5). Each party liable for all or a portion of the future damages shall contribute funding to the awarded periodic payments by means of an annuity contract, trust, or other court-approved funding plan. \textit{Id.} § 1303.509(b)(6). An award for future medical expenses is paid in a lump sum where the plaintiff stipulates that the expenses, without present value reduction, do not exceed $100,000. \textit{Id.} § 1303.505(b)(8).

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

The Superior Court found that the Defendant’s liability to the Plaintiff terminated upon the Decedent’s death, at which time the Decedent had accrued $165,750.00 in damages under the court’s award, pursuant to 40 P.S. § 1303.509. \textit{Sayler}, 40 A.3d at 140. The Superior Court thus determined that the present value of the Plaintiff’s future damages was $165,750.00, and her attorneys’ fees must be calculated based on that award. \textit{Id.}

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

\subsection*{(e) Preservation and Accuracy of Medical Records}

In another effort to protect the safety of patients, the MCARE Act 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 P.S. § 1303.511(a). Subsequent, additional, and/or reversionary entries into the patient’s chart must be clearly identified with the date and time of their entry. \textit{Id.} § 1303.511(b)(2).

Additionally, MCARE addresses the consequence of an intentional alteration or destruction of a patient’s medical records. \textit{Id.} § 1303.511(c). The license of a medical professional who engages in such prohibited activity is subject to suspension or revocation. \textit{Id.} § 1303.511(d). Furthermore, if a plaintiff can prove an intentional alteration or destruction of a medical record or entry, a jury may be instructed that such alteration and/or destruction constitutes a negative inference. \textit{Id.} § 1303.511(c).
This issue was addressed by the Philadelphia County Court of Common Pleas in Bugieda v. University of Pennsylvania Hospital, No. 005216, 2007 Phila. Ct. Com. Pl. LEXIS 36 (C.P. Phila. Feb. 6, 2007), aff’d, 951 A.2d 1203 (Pa. Super. Ct. 2008). In this case, the Defendant-hospital argued that, pursuant to 40 Pa. P.S. § 1303.511(c), a claimant must prove by a preponderance of the evidence that there was an intentional alteration or destruction of medical records before the jury is instructed on adverse inference due to lack of medical records produced.

The trial court rejected this argument, holding that there was no indication that the charge set forth in the MCARE Act was intended to replace the charge given in medical malpractice actions, as noted by the Superior Court in Magette v. Goodman, 771 A.2d 775 (Pa. Super. Ct. 2001), appeal denied, 790 A.2d 1017 (Pa. 2001). The trial 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 P.S. § 1303.512(a); see, e.g., Wexler v. Hecht, 928 A.2d 973 (Pa. 2007). Additionally, the MCARE Act establishes additional standards for qualification of an expert in a medical liability case. 40 P.S. § 1303.512(b). Under the Act, in order to qualify as an expert, a physician must possess an unrestricted medical license in any state (including the District of Columbia), and have been engaged in active clinical practice or teaching within the previous five years. Id. § 1303.512(b)(1)-(2). The expert must also be familiar with the applicable standards for the care at issue, and the expert must have practical experience in the same subspecialty as the defendant physician, or be board-certified by the same or similar approved board as the defendant doctor. Id. § 1303.512(c).

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

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

Pennsylvania courts are willing to inquire into the specifics of a proposed expert’s teaching or clinical practice, in conformity with 40 P.S. § 1303.512(b). In Kling v. Waciuma, No. 09-02-033, 2012 WL 5362590 (C.P. Lycoming Sept. 28, 2012), the Defendant filed a Motion in Limine, seeking to preclude the Plaintiff’s expert, Michael Golding, M.D., from testifying based upon Dr. Golding’s alleged failure to be engaged in or retired within the
previous five years from active clinical practice or training, in supposed contravention of 40 P.S. § 1303.512(b)(2). The trial court observed that, according to his deposition transcript, Dr. Golding last performed surgery in 1986, and although he was currently a professor emeritus, his position as a full-time instructor had ended in 1998. The court noted that Dr. Golding also testified during his deposition that his recent “teaching” consisted of occasional lectures on various subjects, and that he saw patients not to render treatment, but to provide second opinions for former patients. Indeed, the court indicated that Dr. Golding stated during his deposition that he had not provided treatment for the last ten years or more. In light of the foregoing, the trial court granted the Defendant’s Motion in Limine, classifying Dr. Golding’s recent lectures as an insufficient “de minimis level of teaching,” and finding that he had not been actively engaged in either clinical practice or teaching for more than five years.

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

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

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

The Lackawanna Court of Common Pleas also extended the waiver provision of 40 P.S. § 1303.512(b) to a non-physician. In Locker, supra, the Defendants asserted that the Plaintiff’s expert, Tarun Goswami, D.Sc., a biomedical engineer, should be barred from offering causation testimony, because he did not possess a medical license or any specialized training or expertise with regard to the care at issue. The trial court noted that, while no court had applied the qualifications waiver of Section 512(b) to a non-physician seeking to address causation and medial matters in a malpractice suit, Pennsylvania courts have permitted non-physicians to testify regarding certain medial issues in cases that predated the MCARE Act.
Based upon this precedent, the trial court reasoned that “a properly qualified biomedical or biomechanical engineer may opine how an orthopedic implant functions mechanically in a patient's body and reacts with surrounding structures following implantation.” The trial court found that Dr. Goswami was sufficiently qualified to testify that the trial component caused increased stress shielding and resulted in bone remodeling and loss of cortical bone in the Plaintiff. The trial court thus waived the requirements that Dr. Goswami possess a medical license and be currently or recently engaged in practice or teaching to testify an expert witness in a medical malpractice action, as permitted by 40 P.S. § 1303.512(b) because he was otherwise competent to testify about the issues by virtue of his education, training and experience. The court, however, barred Dr. Goswami from rendering opinions as to the cause of the Plaintiff’s alleged injuries, as he was not qualified under 40 P.S. § 1303.512(c) to render such medical standard of care and causation testimony.

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

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

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

The federal government proceeded to move for summary judgment on various grounds, including that the Plaintiffs’ expert witness was not competent to testify that the clinic breached the required standard of care in failing to inform the Plaintiff-mother of her test results before her scheduled follow-up visit. The federal district court denied the motion. Id. at *9. The federal
The district court explained that the competency of a witness to testify in a civil case in federal court is a function of state law when the claim or defense is predicated upon state law. *Id.* at *6. The federal district court observed that Pennsylvania substantive law applied to a claim brought against the federal government under the Federal Tort Claims Act, and that the MCARE Act provided rules to determine the competency of experts in a medical malpractice matter. *Id.* The federal district court thus held that it was bound to apply the terms of the MCARE Act. *Id.*

Turning to the MCARE Act, the federal district court noted that, while an expert testifying on the standard of care in a Pennsylvania medical malpractice action must always be “substantially familiar with the applicable standard of care for the specific care at issue,” as required by Section 512(c)(1), Section 512(e) provides a limited exception to the subspecialty requirement of subsection (2) and the board certification requirement of subsection (3). *Id.* at *7. The federal district court observed that, to determine whether a proffered expert has “active involvement in . . . a related field of medicine” for purposes of Section 512(e), the expert’s field and the defendant-physician’s field “must be ‘assessed with regard to the specific care at issue’ and not in a general sense.” *Id.* (quoting Vicari v. Spiegel, 989 A.2d 1277, 1284 (Pa. 2010)).

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

The federal district court opined that, although the Pennsylvania Supreme Court had not addressed the substance of Section 512(e) since its decision in Vicari, the Pennsylvania Superior Court had recently confronted the issue in Renna. *Id.* at *8. Viewing that case as similar to Vicari and Renna in “many important respects,” the federal district court concluded that “there is a ‘close enough relation between the overall training, experience, and practices of experts in pediatrics and those in obstetrics and gynecology ‘to assure the witness’ expertise would necessarily extend to standards of care pertaining in the defendant-physician’s field’ as to the specific care at issue.” *Id.* at *8-9 (quoting Vicari, 989 A.2d at 1283).

The federal district court further determined that there was evidence to demonstrate that Dr. Saiman had “the overall training, experience, and knowledge to testify as to the specific standard of care at issue.” *Id.* at *9 (quoting Vicari, 989 A.2d at 1285). The federal district court therefore held that Dr. Saiman’s “training, experience, and knowledge” of the use of GBS test results to prevent neonatal GBS disease makes her competent to testify as to the standard of care for notifying a patient of a GBS test result that was obtained specifically to ensure the health of a newborn child. *Id.* See also, Krock v. U.S., No. 5:14-cv-3683, 2015 WL 4601130 (E.D. Pa. Jul. 31, 2015).
(g) **Statute of Repose**

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

Prior to the enactment of the MCARE Act, the discovery rule was available to delay the expiration of the statute of limitations for several years under certain circumstances. However, MCARE now limits the amount of time that the discovery rule can toll the statute of limitations in most cases 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 the MCARE Act’s Statute of Repose does not apply to situations where foreign objects are unintentionally left in the patient’s body, or for affirmative misrepresentation or fraudulent concealment of the cause of death in wrongful death or survival actions. Id. § 1303.513(b), (d). Furthermore, minors may commence a lawsuit alleging a tort or breach of contract within seven years under the Statute of Repose, or until their 20th birthday, whichever is later. Id. § 1303.513(c).

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

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

The Superior Court also found that, even under the more general statutory language to be found in the Judicial Code, the Defendants’ statute of limitations argument would not prevail. Id. at 383. The Superior Court concluded that the survival claim did not begin to run at the

\(^9\) That is, claims brought under 42 Pa.C.S. § 8301 (relating to death action) or 8302 (relating to survival action).
earliest until the child’s birth, and that, as to the wrongful death claim, no pecuniary harm was present until the child’s death, and the survival claim brought on behalf of the child was not time-barred—meaning therefore that neither was the wrongful death claim. Id. at 384.


The Defendants filed a Motion for Judgment on the Pleadings, alleging that the Plaintiff’s action was barred by the 40 P.S. § 1303.513 statute of repose. The trial court, however, denied the motion. The Defendants then filed a Motion for Reconsideration, which the trial court denied. The Defendants appealed to the Pennsylvania Superior Court.

On appeal, the Plaintiff contended that, as the alleged professional negligence occurred prior to the enactment of the statute of repose, the statute was inapplicable. The Defendants distinguished between “cause of action” and “alleged tort,” arguing that the 1997-2000 medical treatment was the “alleged tort” that did not precipitate a “cause of action” until April 2008, when the Plaintiff discovered her lung cancer. Under this interpretation, the Defendants opined, the Plaintiff’s suit would be time-barred, because it was initiated over seven years after the allegedly negligent care was rendered.

The Superior Court noted that a statute of repose period generally begins when a specific event occurs, regardless of whether a cause of action has accrued or any injury has resulted. The Superior Court also explained that a statute of repose differs from statutes of limitation, because the statute of repose potentially bars a plaintiff’s suit before the plaintiff discovers an injury. The Superior Court recognized that 40 P.S. § 1303.513 was limited by 2002 Pa. Laws 13 § 1303.5105, which stipulated that the statute of repose was applicable only if the triggering event, i.e., the alleged tort, arose on or after the MCARE Act’s enactment on March 20, 2002. The Superior Court held that it was the trier of fact’s task to determine whether plaintiff’s “cause of action” arose at the time of the allegedly negligent conduct from 1997-2000 or at a different date, but interpreted “cause of action” as used in 40 P.S. § 1303.513 to mean the allegedly negligent acts and omissions themselves, rather than the injury which flowed from this conduct.

In Osborne v. Lewis, 59 A.3d 1109 (Pa. Super. Ct. 2012), appeal denied, 70 A.3d 812 (Pa. 2013), the Superior Court addressed the Statute of Repose set forth in the MCARE Act. There, the Defendant, Dr. Lewis, performed LASIK surgery on the Plaintiff on June 1, 2000. On August 10, 2004, the Plaintiff returned to see Dr. Lewis complaining of decreased vision. Dr. Lewis confirmed that the Plaintiff was losing his vision, but did not tell him the reason for the

10 By way of additional background, the trial court determined that the case was improperly before her, because the appealed Order was neither a final order, nor an appealable order subject to interlocutory or collateral review.
loss. Thereafter Mr. Osborne saw a number of specialists. Eventually, he was advised that the LASIK surgery caused the deterioration of his sight. Within two years of learning that, the Plaintiff commenced this medical malpractice action on July 24, 2007.

After the close of pleadings and discovery, Dr. Lewis moved for summary judgment, arguing the provisions of the seven-year statute of repose provided in the MCARE Act precluded this claim. The trial court denied the motion for summary judgment. The Defendant filed an interlocutory appeal to the Superior Court.

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

The Superior Court also addressed the plaintiff’s claim that the defendant’s fraudulent concealment interfered with bringing the action. The Superior Court held that the doctrine of fraudulent concealment does not apply to the MCARE Act’s general provisions of the Statute of Repose, as the plain language of the MCARE Act evidences that the Legislature did not intend it to apply. The Superior Court noted that paragraph (d) of the Statute of Repose expressly provides an exception for fraudulent concealment when addressing its application to wrongful death and survival actions. However, within paragraph (a) setting forth the general rule for the statute of repose, there is no exception made for fraudulent concealment. Thus, the Superior Court concluded that the Legislature did not intend that a fraudulent concealment argument avoid the seven year statute of repose in medical malpractice cases that were not wrongful death or survival actions.

The Pennsylvania Superior Court recently applied the holdings of Matharu and Osborne in Bulebosh v. Flannery, 91 A.3d 1241 (Pa. Super. Ct. 2014), but reached a different conclusion than those cases. There, the Plaintiffs commenced a medical malpractice action against the Defendant-physician by a Writ of Summons on February 2, 2005. The Plaintiffs subsequently filed a Complaint, alleging that the Defendant-physician was negligent in performing unsuitable surgeries to implant STA-peg devices in both of the Plaintiff-wife’s feet in 1985 and 1989, respectively.

The Plaintiffs further contended that, during a surgery to remove the device from the Plaintiff-wife’s left foot in 2000, the Defendant-physician negligently failed to remove the entire device. The Plaintiffs additionally asserted that the Defendant-physician failed to provide informed consent prior to the 1985 and 1989 surgeries. The Plaintiff-wife claimed that she first
became aware of the Defendant-physician’s negligence and her lack of informed consent, after an August 8, 2003 surgery performed by another doctor.

The Defendant-physician thereafter filed an Answer and New Matter, raising affirmative defense that the Plaintiffs’ negligence claim was barred by the MCARE Act’s statute of repose, among other defenses. The Defendant-physician later filed a Motion for Summary Judgment premised on those affirmative defenses, which the trial court denied. The Defendant-physician renewed his summary judgment request by means of a Motion in Limine/Motion in Reconsideration/Petition to File an Interlocutory Appeal, asking the trial court to reconsider its denial of summary judgment in light of the Superior Court’s rulings in Osborne and Matharu, both of which had been issued after the trial court denied the prior motion. The trial court again denied the motion, and the Defendant-physician appealed.

On appeal, the Superior Court affirmed. Id. at 1247. The Superior Court explained that, pursuant to Osborne and Matharu, a cause of action in a medical malpractice action arises when the negligent act results in a discernible injury, for purposes of determining the applicability of the MCARE Act’s statute of repose. Id. at 1246. The Superior Court observed that, in each of those cases, the statute of repose governed “since the cause of action arose after its effective date when the ‘physical manifestation of harm’ resulted from the pre-MCARE tortious conduct.” Id.

The Superior Court reasoned that, when applying Osborne and Matharu to the facts before it, a different result was appropriate. Id. The Superior Court noted that, in those cases, the negligent act or omission predated the MCARE Act, but the manifestation of the harm post-dated the effective date of the statute. Id. As such, the Superior Court posited that the causes of action in Osborne and Matharu arose after the effective date of the statute of repose, and therefore, the statute applied. Id.

The Superior Court found that, in the instant matter, there were no ascertainable negative effects when the surgeries were performed, but instead, the injury (i.e., the physician manifestation of the harm) occurred years later when the Plaintiff-wife experienced pain that necessitated additional surgeries to remove the STA-pegs in 1992 and 2000. Id. The Superior Court determined that, in contrast to Osborne and Matharu, both the negligence act and the ascertainable injury predated the effective date of the MCARE statute of repose. Id. The Superior Court thus held that the statute of repose was inapplicable and summary judgment was properly denied on that basis. Id. at 1246-47.

(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. 42 P.S. § 5101.1. While previous venue principles essentially permitted an action to be filed in a county in which any defendant conducted business or had sufficient contacts, Section 5101.1(b) specifically provided that a medical professional liability action may only be filed in the county in which the cause of action arose. Id. § 5101.1(b).
The Pennsylvania Commonwealth Court has deemed 42 P.S. § 5101.1 unconstitutional. See N.-Cent. Pa. Trial Lawyers Ass’n v. Weaver, 827 A.2d 550 (Pa. Commw. Ct. 2003) (en banc). In North-Central, the Petitioners alleged that the provisions of Act 127, the act that gave rise to Section 5101.1, violated Article V, Section 10(c) of the Pennsylvania Constitution pertaining to the Supreme Court’s power to prescribe general procedural rules governing operation of the courts. The en banc Commonwealth Court held that Section 5101.1 was procedural in nature, because it affects the procedure by which the rights of an individual claiming an injury caused by medical negligence may be effectuated but does not create, define, or regulate substantive rights. Id. at 558.

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

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

Secondly, as noted above, the Pennsylvania Rules of Civil Procedure have been revised to conform to the General Assembly’s changes set forth in the MCARE Act. Rule 1006, relating to change of venue, provides that a medical malpractice action may be brought against a health care provider only in a county in which the cause of action arose. PA. R. CIV. P. 1006(a.1). By an Amendatory Order, dated March 3, 2003, the Pennsylvania Supreme Court ruled that Rule 1006 “shall apply to medical professional liability actions filed on or after January 1, 2002 and not to such action filed prior to that date.” However, a 2011 amendment to Rule 1006(a.1) provides that it does not apply to actions arising outside the Commonwealth.

The revisions provide that, if an action to enforce a joint or joint and several liability claim against two or more defendants includes one or more medical malpractice claims, the action must be brought in any county in which venue may properly be laid against any defendant under subdivision (a.1). PA. R. CIV. P. 1006(c)(2). Further, Section (f)(2) of the Rule stipulates that, if one or more of the causes of action stated against the same defendant is a medical malpractice claim, the action must be brought in a county required by subdivision (a.1). PA. R. CIV. P. 1006(f)(2).

The revisions to Rule 1006 as applied to individual defendants are incorporated into the following other Rules of Civil Procedure: 2130 (Partnerships as Parties); 2156 (Unincorporated Associates as Parties); 2179 (Corporations and Similar Entities as Parties). PA. R. CIV. P. 2130; PA. R. CIV. P. 2156; PA. R. CIV. P. 2179. Significantly, the Commonwealth Court, in holding Section 5101.1 unconstitutional, made no ruling concerning the constitutionality of the amended
One venue case of interest, however, does not involve a medical malpractice claim. In Zappala v. Brandolini Property Management, Inc., 849 A.2d 1211 (Pa. Super. Ct. 2004), aff’d & remanded, 909 A.2d 1272 (Pa. 2006), rev’d sub nom. Zappala v. The James Lewis Group, 982 A.2d 512 (Pa. Super. Ct. 2009), the 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.” The Plaintiff, a Delaware County resident, was injured in a slip and fall accident that occurred in Chester County. The 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. The Plaintiff appealed, and the Superior Court vacated the venue transfer order, finding that an objection to venue was waived since the Chester County Defendants did not challenge venue by way of preliminary objections. The Superior Court noted that the Chester County Defendants claimed that the Philadelphia Defendants were “sham” Defendants, and that “[w]hile we are not entirely unsympathetic to [Defendants’] position, we are not at liberty to rewrite a rule which has been promulgated by the Supreme Court.” Id. at 1214. The Supreme Court granted Defendants’ Petition for Allowance of Appeal.

The Supreme Court stated there are only three bases which a defendant can challenge venue: (1) improper venue by preliminary objection; (2) *forum non conveniens*; and (3) inability to hold a fair and impartial trial. See Zappala v. Brandolini Prop. Mgmt., Inc., 909 A.2d 1272, 1281 (Pa. 2006). The Supreme Court explained that, when examining improper venue by preliminary objection, a court must examine whether venue is proper by taking a snapshot at the time the complaint is filed. Id. The Supreme Court stated, if venue is proper at the time the complaint was filed, then venue technically remains proper throughout litigation. Id.

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

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

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

Upon remand to the trial court, the Honorable Arnold L. New granted the Chester County Defendants’ Petition to Transfer Venue pursuant to forum non conveniens. The trial court noted that the forum on Philadelphia was vexatious, even considering the extent of the court’s involvement with the case. The trial court stated that “Plaintiff’s claims against the Philadelphia County Defendants were tenuous at best when this action was brought.” The trial court also stated that Plaintiff claimed both the Philadelphia and Chester County Defendants had a responsibility or ownership interest in the land where the accident occurred, but “[n]othing on the record, beyond Plaintiff’s bald assertions in her complaint, supports this claim against [the Philadelphia] Defendants.”

The trial court only pointed to one defendant, who stated “trial in Philadelphia County would create problems with staffing and unnecessary costs and time expenditure.” The trial court also stressed that it is important to note that the summary judgment motions against the Philadelphia Defendants were dismissed without opposition. Additionally, the trial court noted, but did not comment upon, the Defendants’ argument that Philadelphia County juries are more liberal in awarding damages to plaintiffs in personal injuries suits, which results in cases settling at higher figures.

The trial court acknowledged that there is a right to “legitimate” forum shopping, but that the Plaintiff here “created” a forum by suing an unwarrantedly broad choice of parties. The trial court stated, even if Plaintiff had support for her claims against the Philadelphia Defendants, the consideration of forum shopping would still be an appropriate factor to consider in deciding a petition to change venue based upon forum non conveniens. Id.

This 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 the defendants cannot argue that the Philadelphia defendants were “sham” defendants. The trial court also stated that even, if the defendants do not allege forum shopping, it is proper for a court to address forum shopping to determine whether the forum was designated to harass the defendants.

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

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 County because that is where the cause of action arose, based on the fact that the cardiologist’s residence was there and it was from there that he managed her care before he came to St. Luke’s.

The Superior Court held, however, that “for venue purposes the cause of action arose in the county where the negligent act or omission of failing to provide the needed care occurred.” Id. at 731. In that case, the Plaintiff’s allegations of negligence were based on delay in the performance of the cardiac catheterization and in the overall care at St. Luke’s, which is in Lehigh County. As such, St. Luke’s was the location of the negligent act or omission, even though the cardiologist had given orders over the phone from his Northampton County home. Those orders were to be carried out in Lehigh County. Venue was only proper, therefore, in Lehigh County.

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

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

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

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

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

The Superior Court held that the trial court properly transferred venue to Montgomery County, because all of the medical care was furnished to the patient in Montgomery County, and therefore, the “cause of action arose” in Montgomery County. Olshan, 849 A.2d at 1216. In so holding, the Superior Court examined Rule 1006. Id. The Superior Court also looked at the MCARE Act, which defines “medical professional liability claim,” in part, as “resulting from the furnishing of health care services”. Id. (citation and quotation marks omitted). The Superior Court concluded that venue is created not by where alleged corporate negligence occurred, but where the action affected the patient, i.e., where the care was “furnished.” Id.


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

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

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

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

Citing Olshan, the Philadelphia Court of Common Pleas 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. Furin, 2007 Phila. Ct. Com. Pl. LEXIS 265 (Phila. Cnty. Ct. Com. Pl. Aug. 22, 2007), aff’d, 946 A.2d 125 (Pa. Super. Ct. 2008). In Cohen, the Plaintiff-mother developed pregnancy complications around the thirty-second week of her pregnancy. In response to these complications, the Plaintiff-mother consulted with Defendant Maternal Wellness Center and Defendant “Certified Childbirth Educator” (the “Philadelphia Defendants”), both located in Philadelphia County. At the thirty-fourth week of her pregnancy, following the advice of the Philadelphia Defendants, the Plaintiff-mother decided to treat with the Defendant Gynecologists and to plan to deliver her baby at Lankenau Hospital. The Defendant Gynecologists and Lankenau Hospital are located in Wynnewood, Montgomery County.

When the Plaintiff-mother’s contractions began, she traveled to Lankenau Hospital for labor and delivery of her child. The Plaintiff-mother 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.
The Plaintiff-mother and her husband (collectively the “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. The Plaintiffs filed their Complaint in Philadelphia County. The Defendants filed timely Preliminary Objections in the form of a Motion to Transfer Venue to Montgomery County.

The trial court held that proper venue lay in Montgomery County. The trial 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 the Plaintiff-mother decided to deliver her baby at Lankenau Hospital and receive pre-natal care from defendant Gynecologists as a result of this advice, the trial court found that she did not actually receive any medical care in Philadelphia County.

Relying on the Superior Court’s decision in Olshan, the trial court 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 trial court stated that the Plaintiffs had not alleged that any medical care had been provided in Philadelphia County. Therefore, the trial court held that venue was proper in Montgomery County as that is where the Plaintiff-mother was “furnished” medical care.

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

In Nees v. Anderson, 2013 Phila. Ct. Com. Pl. LEXIS 367 (Phila. Cnty. Ct. Com. Pl. Apr. 10, 2013), the trial court rejected the Defendant-physician’s preliminary objections to whether venue was appropriate, among other things. The Decedent, a minor, passed away while engaged in athletic activity, and it was alleged that the Defendant-physician failed to place any restrictions on his athletic activities, despite tests revealing cardiac abnormalities. The Defendant-physician only maintained an office and saw patients, including the Decedent, who died at 15 and whom he had seen since he was 4, in New Jersey. However, the Defendant-physician was employed by the Children’s Hospital of Philadelphia (“CHOP”) and his office was known as a “CHOP Specialty Care Center.” Notably, bills for services rendered were sent and received in Pennsylvania, and certain testing when the Decedent was 13 years old took place at CHOP in Philadelphia.

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

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

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

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

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

The trial court subsequently amended its order to allow an immediate appeal, owing to the presence of a substantial issue of venue (as well as jurisdiction).

For additional venue cases not involving medical malpractice, see Zampana-Barry v. Donaghue, 921 A.2d 500 (Pa. Super. Ct.), appeal denied, 940 A.2d 366 (Pa. 2007) (discussed in detail in the “Legal Malpractice” section of these materials); Walls v. The Phoenix Ins. Co., 979 A.2d 847 (Pa. Super. Ct. 2009) (holding the defendant failed to present sufficient evidence in forum non conveniens petition to demonstrate that venue in Philadelphia was both oppressive and vexatious such that case should be transferred to Monroe County); McMillan v. First Nat’l Bank of Berwick, 978 A.2d 370 (Pa. Super. Ct. 2009) (holding trial court did not abuse its discretion in finding that proper venue in malicious prosecution case against bank was in county where bank brought underlying claim against plaintiff).
Where a health care provider challenges a verdict on the basis of its excessiveness, the MCARE Act establishes a standard for the court’s evaluation of the challenge. 40 P.S. § 1303.515. The trial court shall consider whether the health care provider’s satisfaction of the verdict will impact the availability of the community’s access to medical care. Id. § 1303.515(b). If it is determined that the verdict results in a limitation of the community’s availability to healthcare, then the trial court may reduce award accordingly. Id. If the trial court has not adequately considered the impact of paying the verdict upon availability and access to health care in the community in denying remittitur, an appellate court can find that the trial court abused its discretion. Id. § 1303.515(c). Also, a trial court or appellate court may limit or reduce the amount of the security that the defendant health care provider must post to prevent execution, if the either court finds that requiring a bond in excess of the insurance policy limits would effectively deny defendant’s right to an appeal. Id. § 1303.515(d).

The MCARE Act modifies Pennsylvania’s doctrine of ostensible agency for causes of action arising after the statute’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 had to show that they looked to the health care institution, as opposed to the individual physician, and second, that the institution “held out” the physician as its employee. Under the MCARE Act, however, a healthcare provider can be held vicariously liable, if the plaintiff shows that a “reasonably prudent person in the patient’s position” would believe that the care was being rendered by the hospital or its agents or that the care in question was “advertised or otherwise represented” as being care rendered by the hospital or its agents. 40 P.S. § 1303.516(a). MCARE changes the traditional subjective belief of the patient to a reasonable prudent person standard.

Trial courts have held that a pre-existing patient-doctor relationship, as well as healthcare facility advertisements regarding defendant physician, militate against a finding of ostensible agency. In Kelley v. Clark, No. 2683 of 2009, 2012 WL 4865306 (Westmoreland Cnty. Ct. Com. Pl. Mar. 14, 2012), the Plaintiff’s course of treatment with the Defendant-physician, Roy Clark, M.D., included multiple appointments at Dr. Clark’s office in a stand-alone building separate and apart from the Defendant-hospital. On April 3, 2007, Dr. Clark sent the Plaintiff to the Defendant-hospital for testing and blood work, the results of which revealed allegedly abnormal bilirubin levels.

The Plaintiff alleged that, in light of these levels, Dr. Clark negligently failed to perform additional tests, failed to consult a liver specialist, and failed to admit plaintiff to the hospital. In a follow-up visit, Dr. Clark sent the Plaintiff back to the Defendant-hospital for further testing, where another physician interpreted the April 3, 2007 test results and transferred the Plaintiff to another hospital, where she delivered a healthy infant but required a liver transplant, precipitating the Plaintiff’s suit. The Plaintiff asserted that, despite Dr. Clark’s independent
contractor status with the Defendant-hospital, he could nonetheless be the hospital’s agent with respect to plaintiff.

The trial court held that the Plaintiff failed to establish an ostensible agency claim, pursuant to 40 P.S. § 1303.516(a). The trial court found that there was no evidence to indicate that the Plaintiff believed that Dr. Clark was rendering care as the Defendant-hospital’s agent, because there was a pre-existing, independent relationship between the Plaintiff and Dr. Clark. Further, though the Plaintiff argued that the Defendant-hospital’s website advertised Dr. Clark as its employee or agent, the trial court found that this advertising was not directed to the Plaintiff, and consequently held that the Defendant-hospital had not represented to the Plaintiff that Dr. Clark was its employee or agent.


3. Insurance Reform

The MCARE Act 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 P.S. § 1303.712. Like its predecessor, the MCARE Fund provides insurance coverage in excess of the basic limits for each eligible health care provider. Id. § 1303.712(a). The MCARE Fund is subsidized through assessments on each participating health care provider. Id. § 1303.712(d). Participating health care providers provide these assessments, which are collected by primary insurance carriers and remitted to the MCARE Fund. Id. § 1303.712(d)(1). The MCARE Fund notifies those approved insurers of the MCARE Fund assessments each year. Id. The MCARE Fund communicates directly with the insurers, but does not notify the individual health care providers of their MCARE Assessments. Id. § 1303.712(d)(2).

MCARE assessments must be received by the MCARE Fund within 60 days from the effective date of a health care provider’s primary insurance policy. 31 Pa. Code § 242.6(a)(3). Further, a provider who fails to timely pay an assessment will not be covered by MCARE in the event of a loss. Id. § 242.17(b). A health care provider may not make a payment directly to the MCARE Fund; rather, only insurers communicate with MCARE and remit assessments to MCARE using a Form 216. Id. § 242.6(a)(3).

In a ruling implicating 40 P.S. § 1303.712, Wolfson v. MCARE Fund, 39 A.3d 551 (Pa. Commw. Ct. 2012), the Plaintiff-physician’s primary professional liability insurance was administered by Professional Risk Management Services (“PRMS”). On December 7, 2004, the Plaintiff received a medical records request, dated December 1, 2004, from an attorney, stating that he represented a patient of the Plaintiff in a claim for personal injuries.

That same day, the Plaintiff faxed this request to PRMS, asking for assistance in responding to the request. The MCARE Fund approved the Plaintiff’s eligibility for a 50% abatement of his 2004 MCARE Fund Assessment, and the Plaintiff paid this assessment in full to PRMS on January 31, 2005. The MCARE Fund received the Plaintiff’s assessment payment from PRMS on March 17, 2005. In 2005, The MCARE Fund again approved the Plaintiff for a
50% abatement, and received the Plaintiff’s payment from PRMS on March 16, 2006, for MCARE Fund coverage for the November 1, 2005, through November 1, 2006, policy period.

On September 28, 2006, the Plaintiff was served with a Writ of Summons, indicating the patient whose records had been requested in 2004 had commenced a civil action against the Plaintiff. On June 21, 2007, PRMS informed the MCARE Fund that the date the claim was first reported to the insured and insurer was about December 7, 2004, i.e., the date the Plaintiff received the records request. On June 22, 2007, the MCARE Fund denied the Plaintiff’s coverage for the claim on the ground that his assessment payment was untimely.

According to the MCARE Fund, as long as it receives an assessment payment before a provider’s claim for coverage is submitted, then the MCARE Fund will provide coverage, even if it receives the assessment payment more than 60 days from the effective date of a provider’s primary insurance policy. Because the claim against the Plaintiff was made on December 7, 2004, before the MCARE Fund received the Plaintiff’s assessment on March 17, 2005, the MCARE Fund would not excuse the assessment’s tardiness. The Plaintiff argued that the December 7, 2004 records request was not a claim, and that the September 8, 2006 receipt of the Writ of Summons was when the claim was first made.

The hearing examiner concluded that the Plaintiff was not entitled to excess coverage. The hearing examiner interpreted the Plaintiff’s primary insurer’s insurance policy and concluded that the medical records request constituted a “claim.” The hearing examiner determined that, because the Plaintiff reported the claim to his insurer on December 7, 2004, when he sent PRMS the fax, and since the MCARE Fund had not yet received the Plaintiff’s assessment, he was not eligible for MCARE coverage.

On appeal, the Commonwealth Court first examined the Plaintiff’s primary insurer’s policy provisions, which stipulated that a claim was “made” when the insurer either received a demand for money or received sufficient notice of circumstances that may result in a claim. The Commonwealth Court then held that the records request did not constitute a claim, as nothing in this request could be construed as a demand for money, and the request did not contain any details that constituted notice to the Plaintiff of an impending professional liability claim against him.

The Commonwealth Court further concluded that the Plaintiff did not “report a claim” on December 7, 2004 when he forwarded the records request to PRMS, as the fax did not indicate the Plaintiff’s intent to report a claim to his insurer, but rather, specifically asked PRMS for assistance in responding to the attorney’s request. The Commonwealth Court reasoned that the Plaintiff’s actual receipt of the Writ of Summons on September 28, 2006, was the earliest date the claim was made, and held that the Plaintiff was entitled to excess coverage from the MCARE Fund.

In a similar yet less complex case, Highland Park Care Ctr. v. MCARE Fund, 36 A.3d 628 (Pa. Commw. Ct. 2011), the Plaintiff’s primary insurance carrier, Campmed, billed the Plaintiff for its MCARE assessment on August 31, 2005, and received the Plaintiff’s payment on September 16, 2005. On October 7, 2005, the Plaintiff received notice that a professional
liability claim had been asserted against it. On March 29, 2006, the MCARE Fund received a Form 216, transmitting the Plaintiff’s assessment payment. On April 5, 2006, Campmed submitted a request for MCARE excess coverage for the Plaintiff’s professional liability claim. The MCARE Fund denied coverage, asserting the assessment payment was untimely.

The hearing examiner concluded that the Plaintiff’s assessment should be considered timely, because it complied with the prescribed timeliness, and since the untimeliness was the insurance carrier’s fault. The hearing examiner posited that the late assessment was the result of the MCARE Fund’s collection and remittance system, whereby medical care providers are directed to pay the carrier, but are not warned or otherwise notified of a carrier’s failure to remit the assessment on time. The hearing examiner thus recommended that the MCARE Fund’s determination be reversed.

On appeal, the Commonwealth Court held that the Plaintiff properly followed the MCARE Fund’s procedures, timely paying its assessment to its insurer within 60 days of the effective date of its policy. Id. at 630. Indeed, the Commonwealth Court noted that the MCARE Fund conceded in its brief that Campmed received the Plaintiff’s assessment with “ample time” to remit it to the MCARE Fund. Id. As the untimeliness was the fault of the insurer, not the Plaintiff, the Commonwealth Court determined that the MCARE Fund had provided no reason why the Plaintiff should be penalized for the actions of its insurer, and held that the Plaintiff’s assessment should be considered timely. Id. at 629, 630. Consequently, the Commonwealth Court found that the Plaintiff was entitled to statutory medical malpractice coverage by defendant. Id.

In 2015, the annual assessment will be 17% applied to the prevailing primary premium for each participating health care provider. Medical Care Availability and Reduction of Error Fund; Notice of and Amount of Assessment Action; Notice No. 2015-08, available at: http://www.pabulletin.com/secure/data/vol45/45-44/1945.html (last visited Jan. 4, 2016).

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 P.S. §§ 1303.1101 to 1303.1115 (repealed). However, in 2009, the General Assembly repealed HCPR. Id.

Under the MCARE Act, 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). Id. §§ 1303.711(d), 1303.712(c). The basic limits are secured from private commercial insurance carriers, or, upon certain qualifications, through self-insurance. Id. § 1303.711. The MCARE Fund will eventually terminate following satisfaction of all liabilities of the Fund. Id. § 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). Id. §§ 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 P.S. § 1303.715. To be eligible for this first-dollar indemnity of MCARE coverage, 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. Id. § 1303.715(a).

In Yussen v. MCARE Fund, 17 A.3d 422 (Pa. Commw. Ct. 2011), rev’d, 46 A.3d 685 (Pa. 2012), the Commonwealth Court clarified that the date on which the claim “is made” against an eligible provider for purposes of Section 715 can be the date on which the writ of summons is filed in a medical negligence case. In Yussen, the Plaintiff-physician submitted a claim to the MCARE Fund on August 30, 2007, requesting coverage with respect to a malpractice claim for medical negligence that allegedly occurred on July 7, 2003. The MCARE Fund denied Section 715 coverage because the claim was made less than four years after the alleged malpractice. In affirming the MCARE Fund’s decision, the Commonwealth Court found that the date the writ was filed less than four years after the alleged malpractice. Consequently, as the writ was filed less than four years after the alleged malpractice, the Commonwealth Court held that the Plaintiff-physician was ineligible for coverage under Section 715. Id.

On appeal, the Pennsylvania Supreme Court reversed. See Yussen v. MCARE Fund, 46 A.3d 685 (Pa. 2012). The Plaintiff-physician maintained that a claim should be deemed “made,” for purposes of Section 715, only when a demand for something is communicated to a health care provider. Plaintiff-physician distinguished Harnist, supra, on the basis that, although the Insurance Commissioner indicated that the relevant claim was made upon the filing of the writ, the Insurance Commissioner also found that service had occurred within the salient four-year period. The Plaintiff-physician further asserted that the MCARE Act distinguishes an “action” from a “claim,” which is inconsistent with the notion that an unnoticed commencement of an action constitutes the making of a claim. The MCARE Fund argued that, pursuant to the plain language of Section 715, a claim is made whenever it first comes into existence, including upon the filing of a praecipe for a writ of summons.

The Supreme Court found that the terms of Section 715 were ambiguous, and therefore, employed the principles of statutory construction. Id. at 691. Regarding the purpose of the MCARE Act, the Supreme Court disagreed with the MCARE Fund’s characterization that the MCARE Act “merely sets out criteria by which to determine which claims are, and are not, eligible for first-dollar indemnity and costs of defense treatment.” Id. The Supreme Court reasoned that the Legislature drew this distinction among claims to afford insurers greater certainty in calculating reserves. Id. The Supreme Court thus determined that “a construction encompassing some notice to the insured, at the very least, is most consonant with such purpose.” Id.

The Supreme Court therefore held that, “for purposes of Section 715, the mere filing of a praecipe for a writ of summons does not suffice to make a claim, at least in absence of some
notice or demand communicated to those from whom damages are sought.” Id. at 692; see also Hamot v. MCARE Fund, 46 A.3d 693 (Pa. 2012) (companion case remanded in light of Yussen for judgment in favor of plaintiff).

In Polyclinic Medical Center v. MCARE Fund, 13 A.3d 561 (Pa. Commw. Ct. 2011), the Commonwealth Court held that the MCARE 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 MCARE 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. Pennsylvania Property and Casualty Guaranty Association, 985 A.2d 678 (2009).

The MCARE 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 Commonwealth 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. Id. at 564-65. Therefore, the court examined the definitional sections of the MCARE Act to determine how to proceed when the injury is caused by a third party. Id. at 565. The Commonwealth Court explained that, pursuant to Section 102 of the Act, the purpose of the MCARE Act is to create “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.” Id. (quoting 40 P.S. § 1301.102) (emphasis in original).

The Commonwealth Court then examined Section 103 of the MCARE Act and determined that “a health care provider is a health center or its equivalent or an agent thereof.” Id. The Commonwealth Court therefore held that 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. Id. In other words, the Commonwealth Court found that the MCARE Fund is not required to provide coverage when the alleged injury was the result of a tort by a fellow patient. Id.

In West Penn Allegheny Health System v. MCARE Fund, 11 A.3d 598 (Pa. Commw. Ct. 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 the Plaintiff as an extended claim under Section 715. However, the MCARE 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 MCARE Fund would only pay $394,917 of the judgment against the Plaintiff, as that amount would cause the yearly aggregate limit to be met.

Section 715 of the MCARE Act sets defendant’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 MCARE Fund argued that extended claims were subject to Section 712’s aggregate yearly limit, while the Plaintiff argued that they were not, contending that the MCARE Fund must pay the $1,000,000 per occurrence limit in this judgment against the Plaintiff.

The Commonwealth Court agreed with the Plaintiff, finding that the General Assembly created a difference between excess and extended claims. Id at 605. The Commonwealth Court looked to the CAT Fund’s per occurrence and annual aggregate liability limits. Id. The Commonwealth Court 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. Id.

The Commonwealth Court noted that MCARE Act differs from the Malpractice Act’s CAT Fund, in that Section 712 of MCARE Act 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. Id. Therefore, the Commonwealth 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.” Id. Consequently, the Commonwealth Court held that, as the annual aggregate liability limit for excess claims does not apply to extended claims, the MCARE Fund was required to pay the full $1,000,000 towards satisfying the judgment against the Plaintiff. Id at 606.

Also, for the MCARE Fund to provide Section 715 coverage, the MCARE Fund must receive a written request for coverage within 180 days of an eligible provider’s first notice of the claim. The Commonwealth Court has examined whether a Writ of Summons constitutes adequate notice to a provider by which the 180 day statutory period begins to run. Cope v. Ins. Comm’r, 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. Approximately nineteen months later, on February 1, 2006, the Plaintiffs filed and served a Complaint alleging medical malpractice between April and June, 2000. On February 12, 2006, the MCARE Fund received an MCARE claim from the provider requesting Section 715 coverage. The MCARE Fund denied coverage on the basis that the provider had not notified it of the claim within the timeframe required by Section 715. 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. Id at 1047. In addressing this question, the Commonwealth Court first looked to the language of Section 715. Id at 1049. The
Commonwealth Court found that, in Section 715, the language “the claim” refers specifically to a medical malpractice claim subject to Section 715 coverage.  

The Commonwealth Court contrasted the language of Section 715 with that of Section 714, which refers to “any claim.”  Id. at 1050. Because the Legislature used the phrase “the claim” in Section 715, the Commonwealth 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. (emphasis in original). Thus, the Commonwealth 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, according to the Commonwealth Court, is not provided by a bare Writ of Summons. The Commonwealth Court reasoned that 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, 2008 Pa. Commw. Unpub. LEXIS 301 (Pa. Commw. Ct. Aug. 18, 2008).  

The MCARE Act 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 P.S. § 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.  

The Commonwealth Court has addressed two cases dealing with the Act of October 9, 2009, and issued both opinions on April 15, 2010.  Hosp. & Health System Ass’n of Pa. v. Commonwealth, 997 A.2d 392 (Pa. Commw. Ct. 2010), rev’d 77 A.3d 587 (Pa. 2013); Pa. Med. Soc’y v. DPW, 994 A.2d 33 (Pa. Commw. Ct. 2010), rev’d 614 A.2d 574 (Pa. 2012).  Hospital & Health System 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, the Petitioners filed an application for summary relief, based on Section 712(k) of the MCARE Act, which (as explained above) 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 Commonwealth Court found that they had a vested right in the monies in the MCARE Fund based on Section 712(k)’s “guarantee” that . . . the money was to be returned to the contributing health care providers” when the Fund was phased out.  Health System, 997 A.2d at 400-01 (emphasis added).  The Commonwealth Court therefore granted the 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 the Petitioner’s vested right to the money once the MCARE Fund is phased out.  Id. at 401.
The Supreme Court reversed the Commonwealth Court’s grant for summary relief in Hospital & Health System Association of Pennsylvania v. Commonwealth, 77 A.3d 587 (Pa. 2013). Noting that the MCARE Act requires providers to pay substantial monetary assessments and mandates that those funds be used to satisfy claims against the providers, the Supreme Court concluded that the MCARE Fund was in the “nature of a trust fund whose monies are being held for the purpose designated by statute.” Id. at 603-04. According to the Supreme Court, the assessment program was never intended as a general mechanism to raise tax revenue, but the 2009 budget law redirected the MCARE Fund monies to close a general budgetary gap. Id. at 603.

The Supreme Court found that this was inconsistent with the purpose of the MCARE Act, which was to satisfy judgments against health care providers. Id. at 604. The Supreme Court therefore posited that “such providers retained a vested entitlement under the Due Process Clause to have the money utilized in the manner directed by statute.” Id. However, the Supreme Court noted that legislatures typically have authority with regard to surplus monies that remain in funds after the fund’s purposes have been accomplished. Id. at 605. Whether the money in the MCARE Fund was a surplus at the time the budget law was passed was a fact material to the outcome of the Due Process claim; however, that issues was in dispute during the Commonwealth Court proceedings. Id.

The Supreme Court thus held that the October 2009 amendment to the Fiscal Code transferring $100 million from the MCARE Fund to the General Fund did implicate the providers’ Due Process rights. Id. at 606. However, the Supreme Court stated that the issue of whether the legislation was “finally unconstitutional” required further factual development and remanded the case for further proceedings. Id.

In Pennsylvania Medical Society, the Commonwealth Court evaluated the Health Care Provider Retention (“HCPR”) program, which funded MCARE abatements. In 2004, the Budget Secretary transferred $100 million from the HCPR account to the MCARE Fund, and in 2005, transferred $330 million in the same manner. The MCARE Fund continued to grant abatements after 2005, but no transfers were made from the HCPR Account to the MCARE Fund after 2005. Instead, the Petitioners, members of the Pennsylvania Medical Society, claimed that the HCPR Account credited “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 [plaintiffs], rather than with funds transferred from the HCPR Account.” The 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 an interpretation of the HCPR statute. Pa. Med. Soc’y, 994 A.2d at 39. The Commonwealth 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 the Petitioners were entitled to judgment as a matter of law. Id. at 40-41. Finally, the Commonwealth Court addressed the Commonwealth’s assertion that the elimination of the HCPR program and Account, passed in late 2009, abolished the Petitioners’ right to relief. Id. at 43. The Commonwealth Court held that vested interests cannot be extinguished by subsequent
legislation, and as the Petitioners had a vested right to HCPR funds in the amount of the abatements granted prior to the program’s abolishment, the Petitioners were still entitled to relief. Id. at 44-45.

The Supreme Court reversed the Commonwealth Court in Pennsylvania Medical Society v. DPW, 39 A.3d 267 (Pa. 2012). Preliminary, the Supreme Court affirmed that the Petitioners had standing to bring the instant suit, because the Legislature enacted the Abatement Law, 40 P.S. §§ 1303.1101-1303.1115, to reduce the MCARE assessments paid by health care providers, in an effort to discourage them from leaving the Commonwealth due to perceived rising costs of medical malpractice claims. Pa. Med. Soc’y, 39 A.3d at 279. The Supreme Court held that the Petitioners had a direct, immediate and substantial interest in the litigation as they alleged harm, in the form of increased future assessments, arising from the Budget Secretary’s failure to fund the abatements via transfers from the HCPR Account to the MCARE Fund. Id. According to the Supreme Court, there was a causal connection between the Budget Secretary’s failure to fund all abatements granted and their alleged harm; also the Petitioners’ interest in the litigation’s result was greater than the common interest of the general population. Id.

The Supreme Court analyzed the Commonwealth’s appeal, based upon the Commonwealth Court’s alleged misunderstanding of the HCPR Account’s nature and purpose, as reflected in the Commonwealth Court’s holding that Section 1112 of the Abatement Law created the HCPR Account to provide a dollar-for-dollar transfer to the MCARE Fund for all abatements granted from 2003-2007. Id.

The Supreme Court first held that, based upon the plain language of the Abatement Law, the Abatement Program’s goal was the temporary alleviation of health care providers’ burden of paying MCARE assessments, via the granting of abatements. Id. at 283. The Supreme Court found that the statute only required that abatements be granted to all eligible health care providers, and did not speak to whether the Commonwealth was required to transfer funds from the HCPR Account to the MCARE Fund when the MCARE Fund had sufficient resources to pay all claims. Id. at 284. Consequently, the Supreme Court concluded that the Commonwealth Court had inappropriately conflated the mandatory nature of the grant of abatements and the Commonwealth’s purported obligation to transfer monies to the MCARE Fund. Id. Further, the Supreme Court determined that the Legislature’s creation and funding of the HCPR Account did not demonstrate that the Commonwealth had an obligation to transfer funds from the HCPR Account to the MCARE Fund. Id.

The Supreme Court also held that the word “administer,” as used in the phrase “The Department of Public Welfare [DPW] shall administer funds appropriated under this section consistent with its duties under section 2101(1) of the…Public Welfare Code” did not mean “pay all abatements.” Id. at 284 (citing 40 P.S. § 1303.1112(a)). Indeed, the Supreme Court reasoned that Section 201 of the Public Welfare Code was unrelated to abatements or transfers of money to the MCARE Fund, but rather, simply granted DPW the power to act as the sole agency of the State in the application for, receipt, and use of federal funds to finance programs in fields under DPW’s purview. Id. at 284-85. Consequently, the Supreme Court concluded that no parts of the Abatement Law, when considered individually or as a whole, required the Commonwealth to
transfer funds from the HCPR Account to the MCARE Fund in an amount necessary to fund all abatements. Id. at 285.

The Supreme Court then examined 40 P.S. § 1303.1112(c), the only part of the statutory scheme that contemplated fund transfers from the HCPR Account to the MCARE Fund. Pa. Med. Soc’y, 39 A.3d at 285. The Supreme Court noted that the statute specifically states that the Budget Secretary “may” transfer from the HCPR Account to the MCARE Fund, “an amount up to the aggregate amount of abatements granted…” Id. Because the plain language of this section demonstrated that the Budget Secretary “may” transfer monies between the HCPR Account and the MCARE Fund in an amount “up to” the aggregate amount of abatements granted, the Supreme Court concluded that the Commonwealth Court erred in holding that the Medical Society had a vested right to such funds. Id. Indeed, the Supreme Court determined that, because the Abatement Law does not impose a duty on the Commonwealth to transfer additional funds from the HCPR Account to the MCARE Fund, the Petitioners had not accrued any cause of action in relation to this issue, and no obligation upon the Commonwealth to make such transfers vested when the abatements were awarded. Id. at 285-86.

C. Rules

1. Certificate of Merit

The Pennsylvania Supreme 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 60 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; (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. CIV. 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. PA. R. CIV. P. 1042.7.

No discovery, other than a request for production of documents and things, or entry upon property for inspection and other purposes, may be sought by plaintiff prior to the filing of a certificate of merit. PA. R. CIV. P. 1042.5.

The “appropriate licensed professional” referred to in the certificate of merit does not have to be the same person that the plaintiff uses as an expert at trial, but this “appropriate” person must, in a medical malpractice case, meet the qualifications for an expert set forth in Section 512 of the MCARE Act.

In connection with the certificate of merit requirement, the Supreme Court also has amended several other miscellaneous Rules, specifically, Rules 229, 1026, and 4007.2 of the Pennsylvania Rules of Civil Procedure, 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.” PA. R. CIV. P. 1042.3(d). 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.

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

Specifically, Rule 1042.6 provides, in pertinent part,

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

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

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

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

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

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

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 30 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 60-day period for filing a certificate of merit, but now require the defendant to give a 30-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.


There is also no obligation upon the court to provide funds for a *pro se* plaintiff who is unable to afford to retain an expert for use in preparing a certificate of merit. *Hodge v. U.S.*, No. 3:06-CV-1622, 2009 WL 2843332 (M.D. Pa. Aug. 31, 2009). In *Hodge*, pursuant to an Order requiring the Plaintiff to file a certificate of merit, the Plaintiff requested the federal district court provide funds to cover the cost of a medical expert. The federal district court recognized that, while the rule requiring plaintiffs, even those proceeding *in forma pauperis*, to pay for their expert witness fees in civil actions may cause a dilemma for individuals like the Plaintiff, funding the expert costs for indigent and/or incarcerated plaintiffs, and not all plaintiffs, would be unfair. *Id.* at *5. Further, though the federal district court acknowledged that it had the power to appoint expert witnesses at its discretion, the purpose behind that rule was to promote the jury’s fact-finding ability, not to benefit an indigent litigant. *Id.* Consequently, the federal district court denied the Plaintiff’s request. *Id.*

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

When a plaintiff does file a certificate of merit, the court will nonetheless dismiss those certificates it deems inadequate. In \textit{Horan v. U.S.}, No. 4:CV-08-00529, 2009 WL 700630 (M.D. Pa. Mar. 12, 2009), the Plaintiff filed a Complaint alleging medical negligence and filed what he termed a “certificate of merit” in which he stated he was unable to obtain a licensed professional to supply a written statement corroborating his claims. To that end, the Plaintiff requested the federal district court use medical reports in support of his claim. The federal district court found that the Defendants were entitled to summary judgment with respect to the Plaintiff’s medical negligence claim because the Plaintiff’s statement and request did not satisfy the requirements of Rule 1042.3 and the time for filing a certificate of merit had long passed. \textit{Id.} at *12, *13, *20. See also \textit{Hodge, supra}, 2009 WL 2843332 at *6 (holding that excerpts from a medical text did not constitute an adequate certificate of merit pursuant to Rule 1042.3).

The Superior Court has addressed the issue of “straddle cases,” where an action was commenced, via Praecipe for Writ of Summons, prior to the promulgation of Rule 1042.3, but the Complaint was filed after the Rule became effective. \textit{Skonieczny v. Cooper}, 37 A.3d 1211 (Pa. Super. Ct. 2012). In \textit{Skonieczny}, the Plaintiff commenced a medical negligence suit via Praecipe for Writ of Summons on September 13, 2001, and filed a Complaint on September 15, 2003. Rule 1042.3 became effective on January 27, 2003. The Defendants filed a Praecipe for Judgment of \textit{Non Pros} based upon the Plaintiff’s failure to file a certificate of merit within 60 days of the filing of the Complaint, pursuant to Rule 1042.3.

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

In Refosco v. U.S., No. 10-1112, 2011 WL 1833374 (W.D. Pa. May 13, 2011), the Plaintiff, in response to the Defendant’s motion to dismiss for failure to file a timely certificate of merit, offered the following “reasonable explanation” for this failure. According to the Plaintiff, prior to filing the lawsuit, her counsel had obtained an expert’s medical report to support the certificate of merit. However, shortly after filing suit, counsel contracted a rare cancer and was unable to attend to his practice while undergoing treatment. During counsel’s absence, there was a “breakdown of communication” that resulted in counsel’s erroneous belief that others in his law practice had filed the certificate of merit, while co-counsel believed the certificate had been filed prior to counsel’s illness. New lead counsel from the firm assured the federal district court there would be no further delay. In light of the foregoing, the federal district court held that the Plaintiff had proffered a reasonable excuse for counsel’s failure to timely file the certificate of merit and consequently found the certificate adequate to support plaintiff’s vicarious liability claim. Id. at *7.

(ii) **Timeliness Of Notice Of Intent To Enter Judgment of Non Pros**

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

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

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

In *Booker v. U.S.*, 366 Fed. Appx. 425, 429 (3d. Cir. 2010) (per curiam), 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. 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.” The letter stated that the physician reviewed plaintiff’s medical records and essentially concluded that plaintiff’s medical care “warrants a closer look.” 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 complaint certificate of merit. *Id.*

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

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

On appeal, Plaintiff argued that her complaint contained only claims of ordinary negligence, of a “slip and fall” type, and that, therefore, no certificate of merit was required. The Superior Court disagreed, noting that the events involved all occurred during the course of medical treatment and also involved, at least to some extent, medical judgments. The court further disagreed with Plaintiff’s argument that no expert testimony would be required to prove her case and that this established that her claim was not one of medical negligence. The court stated that expert testimony would, in fact, be required to prove her claims, that her claims were for professional negligence, and that accordingly, a certificate of merit was required.
The Superior Court also disagreed with Plaintiff’s arguments that Defendant was required to raise, by way of preliminary objections, the issue of whether the complaint asserted a professional claim, and that the amended complaint served to withdraw the original complaint and to foreclose all challenges against that first complaint. Finally, the Superior Court held that equitable considerations did not require that the judgment of non pros be opened and that the trial court had not abused its discretion in refusing to do so.

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

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

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

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

Plaintiff relied heavily on the recent opinion in Stroud v. Abington Memorial Hospital, 546 F. Supp. 2d 238 (E.D. Pa. 2008), where counsel for Plaintiff checked the vicarious liability box on the certificate of merit, not the box for corporate liability. The court distinguished
Stroud, noting the Plaintiff in Stroud could not re-file the Complaint with a proper certificate of merit because the statute of limitations had run, but that, in the present case, Plaintiff was able to re-file a new Complaint with a proper certificate of merit. The court also explained that, in Stroud, Plaintiff failed to check both applicable boxes on the certificate of merit (only checking box for vicarious liability); however, in the present case, Plaintiff checked the wrong box, which is clearly supported by Plaintiff’s Complaint and expert report.

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


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

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

In Scales v. Witherite, No. 3:10-CV-0333, 2011 WL 5239142 (M.D. Pa. Nov. 1, 2011), the court addressed the propriety of a certificate of merit that asserts that expert testimony is not
necessary in a medical negligence claim. In *Scales*, Plaintiff filed a document, entitled “certificate of merit,” asserting that expert testimony would not be necessary in his medical negligence claim. The magistrate judge recommended the matter be dismissed for Plaintiff’s failure to file a certificate of merit. However, the federal district court disagreed, holding that, while the magistrate judge is likely correct that medical testimony is necessary to establish Defendants’ negligence, a filing that a litigant intends to proceed without an expert, even in a case where the court believes an expert will be necessary, does satisfy Pennsylvania’s certificate of merit requirement. *Id.* at *2* (citing *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258 (3d Cir. Oct 4, 2011)); see also *Harris v. Moser*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 320, at 5 (Allegheny Cnty. Ct. Com Pl. Aug. 19, 2011) (the filing of the incorrect Certificate of Merit could have been considered to be in substantial compliance with the rule requiring that a Certificate of Merit be filed).

(c) **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 that Plaintiff’s claims, although couched as ordinary negligence, were “inextricably intertwined with the propriety of assessing the professional engineering services [Defendant] provided in the storm water management plan and civil design of [Plaintiff’s] property.” *Id.* at 602. The court placed particular emphasis on the expert report Plaintiff attached to the Petition to Open Judgment of *Non Pros* which stated Defendant’s storm management report for the property was found to be “thorough in scope and of sound engineering methods.” The court explained that the excerpt from the expert report addressed “topics ‘beyond the realm of common knowledge and experience’ that would require expert testimony to explicate.” *Id.* Accordingly, the court held a certificate of merit against the engineering firm was required and the entry of a judgment of *non pros* was proper. See also *Garland v. Chandragiri*, 2008 Phila. Ct. Com. Pl. LEXIS 186 (Phila. Cnty. 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.”
Id., at 635. The court vacated the trial court’s order and remanded to the trial court to determine which counts of the complaint sounded in professional negligence.

In Zokaites Contracting, Inc. v. Trant Corp., 968 A.2d 1282 (Pa. Super. Ct.), appeal denied, 985 A.2d 972 (Pa. 2009), the Superior 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 the Complaint sounded in professional liability, not breach of contract, because the Complaint’s averments related to the engineering firm’s overall exercise of care and professional judgment, not specific contractual duties and obligations. 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 Zokaites 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 Herrmann v. Pristine Pines of Franklin Park, 64 Pa. D. & C.4th 14 (Allegheny Cnty. Ct. Com. Pl. Ct. 2003), which provided 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 Zokaites 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 Superior Court addressed the distinctions between a claim of professional negligence and a claim of ordinary negligence. In Merlini, Defendants installed a water line on Plaintiff’s property without proper permission. Essentially, Plaintiff alleged that Defendants had a duty to determine the position of any easements and rights-of-way, and breached that duty in installing the water line. Plaintiff never filed a certificate of merit within 60 days of filing the complaint, and a judgment of non pros was entered in Defendants’ favor. The trial court denied Plaintiff’s petition to open the judgment of non pros, and Plaintiff appealed.

On appeal, Plaintiff maintained that the trial court erred in refusing to open the judgment of non pros. Specifically, Plaintiff argued that she was asserting an ordinary negligence claim, not professional liability, as the trial court had indicated. In addressing this argument, the Superior Court noted that it had embraced the Michigan Supreme Court’s method of distinguishing ordinary negligence from medical malpractice as illustrated in Bryant v. Oakpointe Villa Nursing Center, 684 N.W.2d 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 Supreme Court focused on Plaintiff’s failure to allege that Defendants’ actions fell below a professional engineering standard. The Court stated Plaintiff’s allegations essentially constituted ordinary negligence and trespass. The Court explained that the issues raised by Plaintiff were not issues involving professional judgment beyond the scope of common knowledge and experience, despite the fact that the alleged negligence occurred during the performance of professional services. Accordingly, no certificate of merit was required. 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.), appeal denied, 889 A.2d 1217 (Pa. 2005), is another legal malpractice case that addresses the certificate of merit rules. Defendant in this case was an attorney that had represented sellers in a transaction in which the buyers were the successful bidders on property they wanted to use for logging. The buyers filed suit when problems arose with the sale and included the sellers’ attorney as a defendant. The attorney maintained that the claims against him were for professional malpractice and filed a Praecipe for Judgment of Non Pros based on Plaintiffs’ failure to file a certificate of merit. Plaintiffs filed a motion to strike this praecipe, which the trial court denied.

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

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

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

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

In Quinn Construction, Inc. v. Skanska USA Building, Inc., No. 07-0406, 2008 WL 2389499 (E.D. Pa. June 10, 2008), the federal district court examined whether a certificate of merit is needed in a case involving claims of negligent misrepresentation against an architect. The 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 that 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, supra, the court examined whether an entry of judgment of non pross for a corporate negligence claim against a hospital was proper, where Plaintiff only filed a timely certificate of merit setting forth claims of vicarious liability against the hospital. The court explained that, while Plaintiff filed an amended certificate of merit supporting the corporate negligence claims, this certificate of merit was filed after the defendant hospital filed a motion to dismiss (which is the federal mechanism for enforcing the failure to file a certificate of merit). The court found that Plaintiff had properly pleaded a claim of corporate negligence against the hospital, but Plaintiff’s certificate of merit supporting a corporate negligence claim was filed more than 60 days after the filing of the Complaint and after Defendant’s motion to dismiss. The court held Plaintiff did not file a timely certificate of merit regarding the corporate negligence claim, and the claim would be dismissed unless Plaintiff could establish a reasonable explanation or legitimate excuse for not timely filing a certificate of merit. The court dismissed Plaintiff’s corporate negligence claim, without prejudice, and allowed Plaintiff leave to seek reinstatement to present evidence of a reasonable explanation or legitimate excuse for not filing the certificate of merit.

In Pollock v. Feinstein, 1 Pa. D. & C.5th 38 (Phila. Cnty. Ct. Com. Pl. 2006), aff’d, 917 A.2d 875 (Pa. Super. Ct. 2007), Plaintiff brought suit against her physician after sustaining a laceration to her anterior abdominal wall during a laparoscopic tubal ligation and IUD removal. Plaintiff claimed that Defendant failed to provide her with material information regarding the procedure, such as risks, consequences, and alternatives necessary for her to determine whether to proceed with the surgery, and that Defendant was therefore negligent for failing to obtain her 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, Defendant moved for the entry of a judgment of non pross. Plaintiff countered by arguing that she was not required to file a certificate of merit, because her malpractice action was based solely on lack of informed consent.
The Court of Common Pleas ultimately ruled in favor of Defendant, analyzing the doctrine of informed consent under Pennsylvania law and holding that,

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

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

Importantly, and as the United States District Court for the Western District of Pennsylvania has emphasized, the certificate of merit is only required when a professional is sued for violating professional standards. Ferencz v. Medlock, No. 11-1130, 2012 WL 4974639 (W.D. Pa. Oct. 17, 2012). In Ferencz, Defendant healthcare provider moved to dismiss Plaintiff’s wrongful death and survival claims due to a failure to file a certificate of merit; Plaintiff countered that a certificate of merit was not required because her claims were not premised upon professional negligence. The court first noted, in distinguishing medical negligence from ordinary negligence, the court must consider whether the claim pertains to conduct that occurred in the context of a professional relationship and whether the claim raises questions of medical judgment beyond the realm of common knowledge and expertise. Id. at *14. The Court, looking to the substance of Plaintiff’s Complaint, held that a certificate of merit was not required because plaintiff’s wrongful death and survival claims did not sound in medical negligence. Id. at *15.

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

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

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

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

The Third Circuit affirmed the district court’s decision and held that the district court had correctly applied Rule 1042.3 as substantive law. The Third Circuit further held that the decision to involuntary commit an individual is a question of medical judgment and Defendant’s conduct in admitting Plaintiff constitutes “an integral part of the process of rendering medical treatment.” As a result, Rule 1042.3 was applicable. The Court further noted that at the time Defendant filed its Rule 12(b)(6) motions, the 60-day window for filing a certificate of merit had not yet closed. Therefore, even if the Rule 1042.3 defense were required to be raised in a Rule 12(b)(6) motion, Defendant did not waive it. The defense was not “then available” to Defendant under Rule 12(g). Accordingly, Defendant was entitled to raise it in a separate motion. Thus, Rule 1042.3 applied and Plaintiff was required to file a certificate of merit.

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 that 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 that, since Rule 11(b) (which provides representations to the court are made for proper purpose) and 26(a)(2) (which governs disclosure of expert testimony) address the concern of weeding out “clearly non-meritorious lawsuits early in the litigation process,” Rule 1042.3 does not need to be imported into the federal judicial system.

Likewise, in Staten v. Lackawanna County, No. 4:07-CV-1329, 2008 U.S. Dist. LEXIS 6539 (M.D. Pa. Jan. 29, 2008), the federal 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 the plaintiff alleges that the defendant violated his/her constitutional rights by acting with deliberate indifference to the 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 that, 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 that, 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 60-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;
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; (iv) Plaintiff’s failure to file a certificate of merit did not prejudice additional Defendant; and (v) 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 federal 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, Gormall & 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 pross, the proper procedure in federal court is to treat a motion to dismiss a professional negligence action for failure to comply with Rule 1042.3 as a motion to dismiss, without prejudice. But see Liggon-Redding v. Estate of Sugarman, 659 F. 3d 258 (3rd Cir. 2011).

(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 that Fed. R. Evid. 702 would govern the admission of such testimony. See also McCool v. Dep’t of Corr., 984 A.2d 565 (Pa. Commw. Ct. 2009), appeal denied, 742 A.2d 678 (Pa. 2009) (dismissing the Complaint when certificate of merit stated that expert testimony was not required
and noting that the damages of mastocytosis and esophageal dysphagia are complex and little known diseases requiring expert testimony).

In Mertzig v. Booth, No. 11-1462, 2012 US Dist. LEXIS 57857 (E.D. Pa. Apr. 25, 2012), the federal district court, interpreting Pennsylvania law, held that a plaintiff who certifies in his/her certificate of merit that expert testimony is unnecessary for the prosecution of his claim may not, absent exceptional circumstances, be allowed to present expert testimony later on in the litigation. The court held that a plaintiff realizing he requires expert testimony to make out his claim does not qualify as an exceptional circumstance.

Even more recently in Illes v. Beaven, Civil No. 1:12-CV-0395, 2012 WL 2836581, at *4 (M.D. Pa. July 10, 2012), the federal district court found that an inmate bringing a medical malpractice claim against his prison doctor for discontinuing his depression medication required expert medical testimony. However, because the inmate had filed a certificate of merit stating that he did not need expert testimony for his claim, he was precluded from presenting the necessary testimony, and the prison doctor was granted summary judgment in his favor as to plaintiff’s claim of medical malpractice.

(iv) Dragonetti Act Claims

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

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

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

Recently, the Chester County Court of Common Pleas declared the Dragonetti Act unconstitutional as applied to lawyers. Villani v. Seibert, No. 2012-09795 (Chester Cnty. Ct. Com. Pl. Aug. 27, 2015). The issue is now before the Pennsylvania Supreme Court, after the defendant in Villani filed a Petition for Permission to Appeal with the Pennsylvania Superior Court and the Superior Court transferred the Petition to the Supreme Court on December 18, 2015. The Supreme Court, which has exclusive jurisdiction over matters where the Court of Common Pleas holds a Pennsylvania statute unconstitutional, see, 42 Pa. C.S.A. § 722(7), has this matter docketed as 11 MM 2016.

Another notable case is Perleman v. Perleman, 125 A.3d 1259 (Pa. Super. Ct. 2015). In Perleman, the Superior Court held an unsuccessful motion in the underlying action for sanctions under Fed. R. Civ. Pro. 11, did not bar a later Dragonetti Act claim against the party successfully defending against the Rule 11 motion. The Superior Court observed:

Our conclusion is buttressed by the constraints of our standard of review. Like the trial court, in reviewing preliminary objections, we are obligated to give the non-moving party the benefit of his own averments of fact and all reasonable inferences that may be derived therefrom. Given the procedural and evidentiary differences between a Rule 11 proceeding and a Dragonetti act trial, including the absence of discovery in the former case, the right to trial by jury that applies in the latter case, and the prospect that dispositive findings of fact that the district court never had the opportunity to make might dictate the outcome of a Dragonetti claim, we find no abuse of discretion or error of law in the trial court's denial of [defendants’] preliminary objections. While we express no opinion whatsoever as to the relative merit of [plaintiff’s] claims, it is neither for us nor the trial court to do so now. At this juncture, [plaintiff] is entitled to move forward with his case against [defendants].

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

1. Certificate of Merit

2. **Other Rules**

(a) **New/Amended Rules of Civil Procedure**

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


(ii) **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, and 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.

(b) **New/Amended Rules of Civil Procedure**

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

The amendment of Rule 234.1 requires that a non-party witness be served a subpoena reasonably in advance of the date the witness is required to attend and testify.

Under the revised rule, leave of court may be sought by any plaintiff or any defendant for whom the plaintiff has stipulated in writing to the discontinuance.

As set forth by the recent 2015, Explanatory Comment:

The Supreme Court of Pennsylvania has adopted new Rules 220.1 and 220.2 and the amendment of current Rules 220.1 and 223.1. The changes are intended to provide guidance to the bench and bar regarding the use of electronic devices by jurors in civil cases.

The new rules and amendments provide for jurors to be instructed that the use of electronic devices is restricted during their tenure as a prospective juror, i.e. a member of the jury pool, and as a selected juror. The new provisions require the trial court to instruct jurors that they may not conduct independent research on the Internet about the case, communicate about the case electronically, e.g. "tweet" or "blog," or use such devices during juror service. A trial court is required to instruct jurors at the earliest opportunity of interaction between the juror and the trial court, and then repeat those instructions as often as practicable. The new rules and amendments provide for sanctions against any person who violates the provisions of these rules. It should also be noted that a note to new Rule 220.1 cross-references Section 1.180 of the Pennsylvania Suggested Civil Jury Instructions, Pa. SSJI (Civ), § 1.180. These instructions specifically address the use of electronic devices by jurors.
While the proposal focuses on the use of electronic devices by jurors, it remains silent as to their use in the courtroom by the public and media. Rule of Judicial Administration 1910 outlines the responsibility of a trial court regarding the broadcasting, televising, or taking of photographs in the courtroom in civil proceedings.

(f) **New/Amended Rules of Civil Procedure**

(i) **Amended Pennsylvania Rule of Civil Procedure 227.1 – Effective October 1, 2015**

The Supreme Court has amended Rule 227.1 by adding new subdivision (i), which provides:

(i) When an appellate court has remanded a case for further proceedings, a motion for post-trial relief relating to subsequent rulings in the trial court shall not be required unless

(1) the appellate court has specified that the remand is for a complete or partial new trial, or

(2) the trial court indicates in its order resolving the remand issues that a motion for post-trial relief is required pursuant to this rule.

(g) **New/Amended Rules of Civil Procedure**

(i) **Amended Pennsylvania Rule of Civil Procedure 211 – Effective January 1, 2016**

“Any party or the party’s attorney shall have the right to argue any motion and the court shall have the right to require oral argument. With the approval of the court oral argument may be dispensed with by agreement of the attorneys and the matter submitted to the court either on the papers filed of record, or on such briefs as may be filed by the parties. The person seeking the order applied for shall argue first and may also argue in reply, but such reply shall be limited to answering arguments advanced by the respondent. In matters where there may be more than one respondent, the order of argument by the respondents shall be as directed by the court.”

According to the new rule, oral argument is now a right.

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

On Tuesday, June 28, 2011, Pennsylvania Governor Tom Corbett signed into law Senate Bill 1131, or the “Fair Share Act.” The Act had been adopted in the House of Representatives the
day before by a 116-83 vote, and had passed in the Senate the week prior by a 32-18 vote. The Act passed was an amended version of House Bill 1, which the House had passed in April of 2011. The Act amends Title 42 of the Pennsylvania Consolidated Statutes section 7102, and applies to causes of action which accrue on or after the effective date of the Act, June 28, 2011.

Pennsylvania’s Fair Share Act abolishes most forms of joint and several liability, which had been the law in Pennsylvania civil cases prior to the Act’s passage. Under joint and several liability, a defendant with as little as one percent fault could be required to pay the share of a verdict that a co-defendant could not afford, no matter what percentage of liability was assessed to both, then leaving it up to the paying-defendant to seek repayment from the non-paying defendant.

Under the Fair Share Act, most liability is several, but not joint. This means that an individual defendant will only be responsible for damages proportionate to his share of the judgment, as determined by the jury. However, if a defendant is determined to be liable for 60% or more of the total liability of all the defendants, this defendant could be jointly liable for all of the damages owed to the injured party.

The Fair Share Act has four exemptions:

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

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

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

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

In **Bruesewitz v. Wyeth, LLC**, 562 U.S. 223 (2011), the United States Supreme Court held that “the National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by Plaintiffs who seek compensation for injury or death caused by vaccine side effects.” Id. at 243. The particular language of the Act at issue provides:
No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.

42 U.S.C. § 300aa-22(b)(1). In interpreting this language, the Supreme Court reasoned that:

The “even though” clause clarifies the word that precedes it. It delineates the preventative measures that a vaccine manufacturer must have taken for a side-effect to be considered “unavoidable” under the statute. Provided that there was proper manufacture and warning, any remaining side effects, including those resulting from design defects, are deemed to have been unavoidable. State-law design-defect claims are therefore preempted. If a manufacturer could be held liable for failure to use a different design, the word “unavoidable” would do no work. A side effect of a vaccine could always have been avoidable by use of a differently designed vaccine not containing the harmful element. The language of the provision thus suggests that the design of the vaccine is a given, not subject to question in the tort action. What the statute establishes as a complete defense must be unavoidability (given safe manufacture and warning) with respect to the particular design. Which plainly implies that the design itself is not open to question.

Bruesewitz, 562 U.S. at 231-32.

In light of the United States Supreme Court’s decision in Bruesewitz, the Pennsylvania Supreme Court vacated the order of the Superior Court in Wright v. Aventis, 33 A.3d 1262 (Pa. 2011), with instructions on remand for proceedings consistent with the United States Supreme Court’s decision in Bruesewitz.

In Wright, 14 A.3d 850 (Pa. Super. Ct. 2011), the Superior Court reversed in part the decision of the trial court, which granted defendant drug manufacturers summary judgment in a case setting forth design defect and failure to warn claims, surrounding alleged neurological injuries to a minor allegedly flowing from vaccine administrations. The Superior Court had held that 42 U.S.C. § 300aa-22(b)(1) “does not serve as an outright bar to any design defect claim. Rather, § 300aa-22(b)(1) requires courts to conduct a case-by-case inquiry in order to determine whether a particular vaccine's side effects are unavoidable.” Wright, 14 A.3d at 880. The Superior Court had further held that, “Before ruling that § 300aa-22(b)(1) preempts Appellants’ design defect claim, the trial court must first conduct an inquiry to determine whether the injury-causing side effects were unavoidable.” Id.
This position is not compatible with the United States Supreme Court’s decision in Bruesewitz, readily explaining the decision of the Pennsylvania Supreme Court to vacate the Superior Court’s decision in Wright.

VII. **MISCELLANEOUS ISSUES**

A. **Discovery of Private Social Media Content in Personal Injury Actions**

The body of law surrounding the discovery of so-called “private” social media content continues to develop. This body of law obviously has significant implications in medical malpractice actions, where plaintiffs often claim severe and debilitating injuries, but may post content on-line that suggests otherwise. Questions pertain as to when a party may access “private” content through discovery, in the hopes of reducing or eliminating plaintiffs’ claimed damages. Thus, knowledge surrounding this body of law is helpful.

In *McMillen v. Hummingbird Speedway Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, 2010 WL 4403285, No. 113-CD (Jefferson CP. Sep. 9, 2010), the Jefferson County trial court held that, because the public profile showed that relevant information might have been contained in the private profile demonstrating that the plaintiff’s injuries were exaggerated and because there exists no privilege between friends on the social media account, and even if such a privilege did exist, it was waived by posting on that account, it was proper for the court to order the requested discovery. *Id.*

In *Largent v. Reed*, 2011 WL 5632688, No. 2009-1823 (Franklin CP. Nov. 8, 2001), the Franklin County court held that, because non-public information on a Facebook account is shared with others, there exists no reasonable privacy expectation. The very purpose for a Facebook account is to share information with others, which purpose nullifies any claim of privilege. The Largent court confined its holding to those cases whereby the party seeking discovery can articulate in good faith that further discovery will lead to relevant information. *Id.*

In *Zimmerman v. Weis Markets, Inc.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187, 2011 WL 2065410, No. CV-09-1535 (Northumberland CP. May 19, 2011), the Northumberland County court decided that, on the basis of publicly-available information, it was reasonable to infer the existence of added relevant content within the private profile of the plaintiff's profile. The court noted that, although the plaintiff had argued that he had a reasonable expectation of privacy on this matter, the plaintiff consented to share the information when he created the account and voluntarily posted the information. It thus ordered that plaintiff comply with the discovery request. *Id.* at *10. In accordance with McMillen, the court limited its holding to requests founded on "some factual predicate gleaned from the publicly available pages" requiring some threshold that the public portions of an internet profile contained information that points to additional relevant information in the non-public portions of the profile. *Id.*

In *Arcq v. Fields*, No. 2008-2430 (Franklin CP. Dec. 2011), the Franklin County court held that this type of request was predicated on a showing that the public portions of the subject profile contained relevant information establishing a gateway to the non-public portion and that there had to be articulated some reasonable, good-faith basis for thinking that the private profile
contained relevant information for the discovery request for the non-public information to be granted. Id.

In Hoy v. Holmes, 28 Pa.D.&C.5th 9 (C.P. Schuylkill 2013) (January 31, 2013), the court was presented with a Motion to Compel Discovery Responses that were filed by the defendant. In this matter, plaintiffs filed suit against the defendant arising out of an automobile accident and claimed damages from the accident such as present and future mental suffering, present and future pain and suffering, medical expenses, lost earning capacity, and uncompensated work loss, and he for present and future mental suffering, present and future pain and suffering, medical expenses, lost earning capacity, and uncompensated work loss. Id. at 11. As a result of plaintiffs’ claims, defendant sought discovery from plaintiffs in three (3) particular areas, those being: social media, prior or subsequent accidents, and income tax records. Id.

Defendant argued that he should be entitled to the discovery and access to information of any social media internet accounts of plaintiffs, for example Facebook. Id. at 11-12. Defendant argued that by filing a lawsuit and thereby claiming certain injuries and damages, both physical and mental, the defendant is entitled to view the social media accounts of plaintiffs for information that may help with defense of the matter or which concern or relate to plaintiffs’ claims for damages. Id. at 12. Further, defendant argued that the permitted discovery into these areas would lead to information that might lead to discoverable material. Id.

Plaintiffs argued that defendant had failed to present any evidence that the social media information he was requesting was relevant or would lead to discoverable information. Id. Plaintiffs argued that the majority of cases of Pennsylvania common Pleas courts on this issue hold that discovery of social media is only permitted after a showing that the public portion of a person’s internet profile supports an argument that relevant information may be available on the private portion. Id. Plaintiff cited Trail v. Lesko, 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (C.P. Allegheny 2012). In Trail, the court held that a threshold showing of relevance is necessary prior to permitting discovery of the non-public portions of the social media. Plaintiffs argued that defendant was simply on a fishing expedition, has not articulated a factual basis for his social media requests and only intends to harass, embarrass, and unduly burden plaintiffs. Trail at *10.

Moreover, in Trail, the Allegheny county court explained that social media, such as Facebook, contains a public profile open and available to anyone and a non-public profile which is considered to be private. Id. The Trail court wrote: "The courts recognize the need for a threshold showing of relevance prior to discovery of any kind, and have nearly all required a party seeking discovery in these cases to articulate some facts (emphasis added) that suggest relevant information may be contained within the non-public portions of the profile. To this end, the courts have relied on information contained in the publicly available portions of a user's profile to form a basis for further discovery." Id.

The court in Hoy, based upon precedent, noted that there exists no constitutional right of privacy that prohibits the type of discovery that the defendant sought concerning social media, nor was such social media protected by an established privilege. Hoy, at 16. However, based on Pennsylvania Discovery Rules, see Pa.R.C.P. 4001 et. seq., Pa.R.C.P. 4011, Pa.R.C.P 4019, and decisions pursuant thereto and related to social media information, the court agreed that a factual
predicate has to be shown by the party seeking discovery for non-public information posted on social media.  Id.  The court held that the mere allegation that a lawsuit has been commenced against the Defendant and that the Plaintiffs are claiming certain damages does not identify nor establish such a factual predicate.  Id.

However, the court denied the Motion to Compel without prejudice and if defendant could establish factual predicate as to his discovery request, then he may file a motion and have the matter praeciped to the court for disposition.  Id.

In Brogan v. Rosenn, Jenkins & Greenwald, LLP, 2013 Pa. Dist., & Cnty. Dec. LEXIS 171 (Ct. Com. Pl. Lackawanna Cty. April 22, 2013), the court faced an action brought by purchasers of property against their former counsel, title searcher, and title insurer.  Plaintiffs complained of an alleged failure to disclose to them a duly recorded utility easement for a water main, which had implications for the construction of Plaintiffs’ own sewer and water lines.  Whether disclosure of the easement was made to Plaintiffs prior to closing on the property was contested.

Plaintiffs brought a motion to compel the production of the Facebook username and password of a paralegal working for the defendant title insurer.  A prior deposition of the title insurer’s former Director, disclosed that he communicated with brief, private messages via Facebook with the paralegal, concerning whether he should speak with the title insurer’s counsel prior to his deposition.  At the paralegal’s own deposition, she was not asked whether she had communicated with the Director of Claims & Recovery via Facebook, and she did not identify him among her “Friends” on Facebook.  The title insurer produced to Plaintiffs the communications disclosed by the former Director, but declined to produce the paralegal’s Facebook username and password.

Plaintiffs’ motion presented an issue of first impression in Lackawanna County.  The Brogan Court held that in order to obtain such information, the moving party must at a minimum, demonstrate that the information sought is relevant, and that the requisite relevancy may be established by demonstrating that publicly accessible information published by the social-media user, arguably controverts the account holders’ claims or defenses in a given action (here of course, the deponent was not even a named defendant, but an employee of one).  The Court also required social media requests be framed to seek only relevant, non-privileged information.

The Brogan Court determined that the plaintiffs did not establish the relevance of the deponent’s private Facebook information, and that plaintiffs’ requests were in any event overly broad.

In Perrone v. Lancaster Regional Medical Center, No. Cl-11-14933 (Ct. Com. Pl. Lancaster Cty. May 3, 2013), the trial court determined to order plaintiff to permit a neutral forensic expert to conduct an examination of materials on plaintiff’s computer and that the forensic expert also be given plaintiff’s user name and password in order to access the private portion of plaintiff’s Facebook account.  The forensic expert was charged with identifying any and all photographs of snow and references to snow in any emails, and identifying any photographs of Plaintiff, engaged in any physical activity.
Plaintiff had claimed that a fall had left her with debilitating injuries, but Defendant came forward with photographs from the public portion of Plaintiff’s Facebook account, suggesting otherwise. Plaintiff argued that while the photographs were posted post-injury, they were from before her claim arose. However, Defendant contended that snow in the photographs corresponded to recent heavy snowfall, undermining the contention that the photographs were from before the Plaintiff was allegedly injured. The Court clearly felt that defendant made the requisite showing entitling it to have access to Plaintiff’s private social medial postings.

In Hunter v. PRC, Inc., No. 2010-SU-3400-71 (Ct. Com. Pl. York Cty. Nov. 13, 2013), the York County Court of Common Pleas denied a Defendant’s Motion to Compel discovery of all photographs and postings on plaintiff’s social media accounts (with the focus of the inquiry being Facebook). Plaintiff objected that the Defendant did not make a prima facie showing of entitlement to access the private portion of the Plaintiff’s Facebook profile. The Plaintiff maintained that the Defendant had to show that the public portions of the profile indicated relevant information would be contained in the private portions of the account.

The court held that a Defendant seeking access to information made private using a social media platform’s ordinary privacy controls, must make a “threshold showing that the otherwise available information leads to the reasonable probability that relevant information is contained within the private portions of the account.” The court felt that a hypothetical possibility that relevant information would be contained in a party’s private social media posting was not sufficient, determined that the Defendant-movant had not met the court’s standard, and accordingly, denied the defendant’s motion. The court rejected using the standard of “reasonably likely to lead to the discovery of admissible information” because the requesting party, it reasoned, cannot know what is contained in the private pages of another party’s account and cannot reasonably calculate whether the information there will lead to relevant evidence; instead, the court looked to whether the public or otherwise available information establishes a “reasonable probability that relevant information will be found on the private account.” The court also explicitly left open blocking or curtailing requests based on Pa. R.C.P. 4011 and 4012.

In setting forth its decision, the court acknowledged but specifically rejected the reasoning employed by Judge Wettick in Trail v. Lesko, 2012 WL 2864004 (2012). The court found the opinion in Trail to be persuasive, but the analysis employed “whereby the level of intrusion is determined and the party seeking discovery must establish a fluctuating standard of the relevancy, availability and impact on the case based on that level of intrusion,” was not adopted.

B. Arbitration Clauses in Malpractice/Nursing Home Actions

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

In Pisano v. Extendicare Homes, Inc., 77 A.3d 651 (Pa. Super. Ct. 2013), Vincent Pisano was admitted to Extendicare Homes, Inc., Belair Heath facility in April of 2010. After being admitted, Pisano’s daughter, who held a power of attorney, signed an admission agreement on his behalf that contained an Alternative Dispute Resolution Agreement which provided that any
disputes covered by the agreement would be resolved through binding arbitration. Upon his death, Pisano’s surviving children brought a wrongful death claim against the facility. The daughter who signed the agreement on Pisano’s behalf was not a party to the action and disclaimed any interest in any litigation proceeds. The Defendant facility claimed that the case should go to arbitration pursuant to the signed agreement. The issue before the court was whether the arbitration agreement was binding on the wrongful death claimants.

The court found the defendant nursing home only had an agreement with Pisano, and not his heirs. The court further held wrongful death actions are derivative of the decedent’s injuries, but are not derivative of the decedent’s rights; therefore, wrongful death actions are the claims of the decedent’s heirs. Relying on the neutral principle of contract law that one who is not a party to a contract cannot be bound by it, the court held the non-signatory wrongful death claimants were not bound by the decedent’s contracts and their claims could remain before the court, avoiding arbitration. The Superior Court noted that Pennsylvania’s wrongful death statute does not characterize wrongful death claimants as third-party beneficiaries, as a finding to the contrary might have compelled arbitration of their claims. The court felt that the claimants’ constitutional right to a jury trial would be infringed if they were compelled to arbitrate their claims.

It appears that a petition for review of this decision by the Supreme Court was denied. Pisano, 2013 Pa. LEXIS 3236 (Pa. Dec. 24, 2013).

In Tyler v. Kindred Healthcare Operating, Inc., 2013 Phila. Ct. Com. Pl. LEXIS 370 (Ct. Com. Pl. Phila. Cty. Nov. 20, 2013), Ruth McNear fractured her leg in February 2012 and was admitted to Mercy Fitzgerald Hospital in Philadelphia. After being admitted to the hospital, Ms. McNear was then transferred to defendant Kindred Hospital South Philadelphia for about one month before being transferred to defendant St. Francis Country House, where she remained for approximately three weeks before her death. Both defendants sought to arbitrate the claims they faced and both defendants failed at compelling arbitration.

With respect to Kindred Hospital South Philadelphia, five days after her admission, Ms. McNear signed an Admission Agreement and aDR Agreement. However, documents and hospital charts made by medical professionals on the same day she signed both of those documents indicated that she was disoriented and not of sound mental capacity. The court held that given her state, there was no valid and binding agreement to arbitrate.

At the time of her admission to St. Francis Country House, one of Ms. McNear’s daughters, signed an Admission Agreement and a Responsible Person Agreement. The Admission papers contained an ADR clause. The court looked to whether at the time of her signature, Ms. McNear’s daughter was acting as her agent. As there was no evidence that Ms. McNear gave her daughter power of attorney or even authorized her to make legal decisions on her behalf, the court declined to find an agency relationship and refused to compel arbitration.

In Lipshutz v. St. Monica Manor, 2013 Phila. Ct. Com. Pl. LEXIS 396 (Ct. Com. Pl. Phila. Cty. Nov. 12, 2013), Plaintiff’s decedent, Ms. Fitzsimmons, suffered a stroke in November of 2011 that left her physically and mentally incapacitated. As a result of her stroke, Ms. Fitzsimmons was ultimately transferred to defendant, St. Monica Manor’s facility for care. As...
part of her formal admission to St. Monica Manor, Ms. Fitzsimmons was presented with an
admission agreement that contained a mandatory arbitration clause. Ms. Lipshutz, Ms.
Fitzsimmons’ daughter, signed the admission agreement pursuant to her authority under a power-
of-attorney that had been executed eight years earlier.

Upon Ms. Fitzsimmons’ death, Ms. Lipshutz and another executor filed suit in the
Philadelphia County Court of Common Pleas setting forth wrongful death claims as well as
survivorship claims. Preliminary Objections, seeking to compel arbitration of the claims against
them, were granted in part and overruled in part. They were granted as to Plaintiffs’ survival
claims, but overruled as to Plaintiffs’ wrongful death claims.

The court explained in defending its ruling that while Pa. R.C.P. 213(e) requires claims
for wrongful death and survival actions be consolidated for trial and litigated together,
Pennsylvania state law was preempted by the Federal Arbitration Act in the presence of an
arbitration agreement as to the survival claims, but not the wrongful death claims. As the court
explained succinctly:

This Trial Court was guided both by the U.S. Supreme Court
decisions and by the valid Pennsylvania Superior Court holdings.
The Pisano Court held that arbitration agreements are not binding
on non-signatory beneficiaries. The Pisano Court relied on the
neutral principle of contract law that one who is not a party to a
contract cannot be bound by it. Here, Ms. Lipshutz, a Plaintiff,
signed the arbitration agreement in her capacity as attorney-in-fact
for her mother. When she signed the agreement, she bound the
decedent and the decedent's survival claims to arbitration. Wrongful
death and survival claims are distinct actions with differing parties.
Therefore, when Ms. Lipshutz signed the arbitration agreement
strictly, and only, in her representative capacity, she did not affect
her own right, or the rights of the other beneficiaries, to bring
wrongful death claims before this Court.

Due to FAA preemption, this Court remanded the survivor claims to
arbitration. Although bifurcation of wrongful death claims from the
survival claims runs afoul of the clear import and intent of Pa.R.C.P.
213(e), the main policy considerations underlying this Rule are to
prevent the duplication of damages and thus promote judicial
economy. However, compensation for loss of earnings is the only
significant overlap in damages between the two statutes. Here, there
could be virtually no significant claim for lost earnings. Therefore,
this concern was insufficient to override shared state and federal
policy promoting arbitration. Similarly, an interest in promoting
judicial economy is insufficient, standing alone, to override a joint
state and federal policy and Federal preemption. Thus, the wrongful
death claims must remain before this Court, and the survival claims
were remanded to arbitration.
In Washburn v. N. Health Facilities, Inc., 121 A.3d 1008 (Pa. Super. Ct. 2015) appellant, a nursing home facility, appealed the trial court’s order overruling preliminary objections in the nature of a petition to compel arbitration. The decedent had been transferred to appellant’s nursing facility, and upon arrival at the nursing facility, nursing facility personnel pulled decedent’s wife aside to sign paperwork to enable her husband’s admission to the facility. Id. at 1010. The staff member assisting her was not the usual intake person and when decedent’s wife (appellee) informed her that she did not have power of attorney for her husband, the staff person insisted that all the paperwork had to be signed prior to his admission. Id. Among the documents executed by appellee, there was a stand-alone “Alternative Dispute Resolution Agreement” between the nursing facility on behalf of its affiliates and subsidiaries and the resident, the decedent. Id. The decedent did not sign the document. Id.

After decedent’s death, appellee filed a survival action in her capacity as Administratrix of the Estate of the decedent, and alleged that the nursing facility was negligently understaffed and mismanaged and unable to meet the decedent's needs. Id. at 1011. She averred that the nursing facility’s care violated the Neglect of a Care/Dependent Person Statute, 18 Pa.C.S. § 2713, and the Older Adults Protective Services Act, 35 P.S. § 10225.101 et seq. Id. She also maintained that, due to the nursing facility’s failure to provide sufficient food, water, medication and overall care, decedent became dehydrated, contracted pneumonia, urinary and respiratory infections, and sepsis, all of which contributed to his death. Id.

Appellant nursing facility filed preliminary objections to both the original and amended complaints seeking to compel arbitration of the claim pursuant to the ADR agreement signed by appellee in her representative capacity on behalf of her husband. Id. The trial court overruled the preliminary objections. Id. The Superior Court held that while there was evidence that appellee had previously acted on her husband’s behalf, the record was devoid of evidence that the husband ever authorized her to do so, and the fact that she affixed her husband’s signature to joint tax returns and healthcare forms did not establish that her husband authorized her to act as his agent in the present circumstances as conspicuously absent was the authority from the principal to act as his agent; when the arbitration agreement was signed appellant was unaware that the wife had been signing her husband’s name to some documents, and thus it had no basis to infer that she was authorized to act on his behalf. Id. at 1016.

In Wert v. Manorcare of Carlisle PA, LLC, 2015 Pa. LEXIS 2422, (Pa. Oct. 27, 2015), petition for cert., filed at 15-820 (Dec. 18, 2015), the decedent resided in appellant’s long-term skilled nursing care facility between March and August, 2010. Due to the alleged abuse and neglect inflicted upon her throughout her stay, Decedent suffered a multitude of injuries and illnesses that eventually resulted in her death. Appellee filed suit claiming Appellants knowingly sacrificed the quality of care given to their residents. Relevant to this appeal, Appellants filed preliminary objections seeking to enforce an arbitration agreement which Appellee signed, along with general admission paperwork upon decedent’s admission to the facility. Id. at *2. The trial court overruled the preliminary objections
and found the agreement unenforceable because the agreement relied, as part of an essential term, upon the National Arbitration Forum ("NAF") Code procedures that were void at that time with respect to consumer arbitration disputes. Id. at *2-3.

In coming to its opinion, the trial court relied upon, Stewart v. GGNSC-Canonsburg, L.P., 2010 PA Super 199, 9 A.3d 215 (Pa. Super. 2010) (declining to enforce a nursing home's identical agreement because the “NAF can no longer accept arbitration cases pursuant to a consent decree it entered with the Attorney General of Minnesota” and the term was non-severable). Appellants appealed, claiming Stewart was either wrongly decided or, in the alternative, was distinguishable because the NAF provision was not integral to the Agreement at issue herein. Id. at *3. The Superior Court affirmed in an unpublished memorandum opinion. Finding itself bound by Stewart, the Superior Court declined to distinguish the NAF provision as non-integral based upon appellee's deposition testimony that the NAF provision had nothing to do with her decision to sign the agreement. Instead, the Superior Court found appellee's statements showed that she did not consider the importance of the NAF provision. Id.

The Supreme Court affirmed the Superior Court’s affirmance of the trial court’s order overruling appellant’s preliminary objections seeking to compel arbitration and reserving for trial the underlying negligence action filed by the decedent’s daughter, appellee, on the ground that the parties’ arbitration agreement relied, as part of an essential term, upon the NAF Code procedures that were void with respect to consumer arbitration disputes. Id at *32. The parties agreed that any disputes would be resolved exclusively by binding arbitration to be conducted in accordance with the NAF Code of Procedure, which was incorporated into the agreement, and thus, the provision was integral and non-severable. Id.

In MacPherson v. Magee Mem. Hosp. for Convalescence, 2015 PA Super 248 (Pa. Super. 2015), appellants appealed the trial court’s order overruling their preliminary objections to the trial court’s jurisdiction and venue in an action filed by appellee, the executor of the estate of his bother, the decedent. The preliminary objections were based on the existence of an arbitration agreement between appellants and the decedent. Id. Decedent, who was fifty-four (54) years old at the time and did not have any history of dementia or mental illness, was admitted to a rehabilitation hospital. Approximately one month later, decedent was admitted to appellant’s facility, a nursing home. After his admission, decedent and a representative of appellant’s nursing home, executed an arbitration agreement, which provided that any dispute between the parties would be submitted to binding arbitration. Id. Decedent signed this agreement on October 6, 2009 and remained a resident of appellant’s nursing facility until his death on February 1, 2010. On January 27, 2012, appellee filed a complaint advancing claims of negligence, negligence per se, corporate negligence, wrongful death, and survivorship in connection with the decedent’s stay at the rehabilitation hospital as well as appellants’ nursing facility. In response to appellee’s complaint, appellant filed preliminary objections seeking transfer of the case to arbitration pursuant to the agreement signed by the decedent. Id. After the trial court overruled the preliminary objections, appellants appealed the decision.
A Superior Court panel filed an opinion reversing and remanding this case for referral to arbitration. MacPherson v. The Magee Memorial Hospital for Convalescence, 2014 PA Super 143 (Pa. Super filed July 10, 2014). Thereafter, appellee filed a motion for reargument en banc. The agreement between appellants and the decedent stated “VOLUNTARY AGREEMENT: if you do not accept this Agreement, the Patient will still be allowed to live in, and receive services in, this Center”. The arbitration agreement did not evince an intent to arbitrate only before the National Arbitration Forum, rather the agreement provided a hierarchy that placed the NAF in the initial position. The court employed the two (2) part test as set out in Pisano, supra.

The court rejected appellee’s contention that the agreement’s reference to the use of the NAF Code of Procedure in effect as of May 1, 2006, renders the agreement unenforceable. The court held that the trial court erred when it overruled preliminary objections to jurisdiction and venue, as the dispute was subject an arbitration agreement between the nursing home and the decedent. It was error to conclude that the decedent lacked the requisite capacity to enter into the arbitration agreement, as despite numerous physical ailments, there was no indication that he suffered from dementia, mental illness, disorientation, or even confusion. Moreover, the action was brought solely for the benefit of the estate under § 8301(d) and the appellee was subject to the arbitration agreement.

In Taylor v. Extendicare Health Facilities, Inc., 113 A.3d 317 (Pa. Super. Ct. 2015), the Superior Court affirmed an order overruling a motion to compel arbitration of co-executor’s wrongful death and survival claim. For our purposes, the key issue turned on whether the wrongful death and survival actions had to be bifurcated to permit arbitration of the survival action. The Superior Court held that an arbitration agreement signed by decedent is not binding upon non-signatory wrongful death beneficiaries and they cannot be compelled to litigate their claims in arbitration. Applying Pa.R.C.P. 213(e), the wrongful death beneficiaries’ constitutional right to a jury trial and the state’s interest in litigating wrongful death and survival claims together required that they all proceed in court rather than arbitration.

The Supreme Court granted a petition for allowance of appeal in Taylor, on the following issues:

(1) Does the Superior Court's decision, which refused to compel arbitration of the arbitrable survival claim, violate the Federal Arbitration Act requirement that arbitration agreements "shall be valid, irrevocable and enforceable save upon grounds as exist at law or in equity for the revocation of any contract?"

(2) Does the Superior Court's conclusion that the Pennsylvania Rules of Civil Procedure, Rule 213(e), require the consolidation of the otherwise arbitrable survival action with the non-arbitrable wrongful death action on grounds of efficiency violate the Federal Arbitration Act as it has been interpreted.
by the United States Supreme Court which has consistently ruled that arbitration is required when there is an agreement to arbitrate even when compelling arbitration results in duplication and piecemeal litigation?


In Burkett v. St. Francis Country House, 2016 PA Super 15 (January 25, 2016), the Superior Court affirmed the denial of motion to compel arbitration of the administrator’s wrongful death and survival claims. The Superior Court held that appellee had signed the admission agreement containing an arbitration clause in his representative capacity, and as such, he did not modify or disrupt his own rights to bring a wrongful death claim in court. Although survival claims fell within the scope of the arbitration clause, the fact that appellee was suing on behalf of the decedent’s estate, as well as bringing claims under the wrongful death act, precluded bifurcation of wrongful death and survival claims. The Superior Court also observed that state laws were not preempted by Federal Arbitration Act.

C. Discovery of Experts

1. 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.

In In Re: Asbestos Products Liability Litigation (No. VI), 2011 U.S. Dist. LEXIS 143009 (E.D. Pa. 2011) the District Court held that a party could not get around the “facts or data” exception to Rule 26(b)(4) by including facts or data in a “transmittal letter” to its experts.
Additionally, the court cautioned against protecting facts or data from discovery by placing them in draft expert reports.

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

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

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

(1) A party may through interrogatories require

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

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

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

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

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

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

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

(4) A party may not discover the communications between another party's attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) or from whom discovery is permitted under subdivision (a)(3) regardless of the form of the communications, except in circumstances that would warrant the disclosure of privileged communications under Pennsylvania law. This provision protects from discovery draft expert reports and any communications between another party's attorney and experts relating to such drafts.

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

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

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

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

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

The federal rules of civil procedure permit an expert to be deposed after the expert report has been filed. The exceptions enumerated above simply describe some of the matters that may be covered in a deposition. However, in the absence of cause shown, the Pennsylvania rules of civil procedure do not permit an expert to be deposed. Thus, the exceptions within the federal rule are inconsistent with the restrictions of the Pennsylvania rules of civil procedure governing discovery of expert witnesses.

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

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

Pa. R.C.P. 4003.5 Explanatory Comment. Emphasis added.
On July 10th, 2014, the Supreme Court amended Rule 4003.5 as cited above. On October 8, 2014, the Supreme Court heard argument in the Polett v. Public Communns., Inc., 126 A.3d 895 (Pa. 2015), which was decided on October 27, 2015. In Polett, appellants argued that the trial court abused its discretion in ruling that Dr. Robert Booth, appellant Margo Polett’s treating orthopedic surgeon, expert testimony was not excludable under Rule 4003.5. On appeal, the Superior Court found that the trial court abused discretion in permitting Dr. Booth to offer expert testimony on the issue of the causation of appellant, Ms. Polett’s injuries in the absence of a formal report and when his opinions were formed during the course of treatment. Polett v. Pub. Communns., Inc., 83 A.3d 205 (Pa. Super. Ct. 2013). Appellant argued that Rule 4003.5 applies only to those expert opinions “acquired or developed in anticipation of litigation or for trial”, and therefore, does not preclude the admissibility of a treating physician’s opinion developed during the time he or she was caring for the patient.

Appellees argued that Rule 4003.5 may prevent a treating physician from testifying as an expert if the physician did not acquire or develop his opinions during the normal course of treatment, but did so in anticipation of litigation. Appellees further argued that in their view, as illustrated by Kurian and Smith, Dr. Booth’s mere observations made during the course of treatment, such as those reflected in Dr. Booth's treatment notes, are not enough to establish causation. Appellees argued, as endorsed the Superior Court, that Dr. Booth's treatment notes constituted only his observations, and not an expert causation analysis.

The Court held that the trial court's ruling that Dr. Booth's expert testimony as to causation was not barred by Pa. R.C.P. 4003.5 was amply supported by the evidence of record, and thus was reasonable. The Court therefore affirmed that the trial court acted within its discretion by allowing appellant’s treating physician to give expert testimony on causation where the physician reached his causation opinion during the course of treating appellant and before litigation was anticipated.

In Mina v. Hua Mei, Inc., et al., CCP Lackawanna Co. 2012 – Civ – 7781 (2016) (Mazzoni, J.), the treating physician rendered a report, and defendant sought discovery through interrogatories. Recognizing it was a close question as to whether the opinions expressed were part of treatment or with an eye toward litigation, the court allowed some discovery.

In Karim v. Reedy, et al., 2011-Civ-4598 (Ct. Com. Pl. Lacka. Co. Jan. 11, 2016) (Nealon, J.), the court compelled defendant doctor and nurse to answer standard of care questions including current interpretation of monitor strips as well as questions concerning standards, protocol and medical issues, even though defendant stipulated that they would not offer opinion testimony at trial.
2. **Interfering With Your Adversary’s Expert**


As plaintiff’s expert witness, Dr. Porges was acting in her individual capacity as a licensed medical doctor and was not offering expert opinion on behalf of her employer, HUP, as they were not a party to the litigation. On January 13, 2012, counsel for defendants sent an extrajudicial letter to the senior counsel for Dr. Porges’ employer. The letter referenced the legal case by name and explained that the “plaintiff has retained one of Penn’s emergency room physicians, Stafani B. Porges, M.D., who has offered an untenable opinion” and counsel for defendant further stated that she “thought you might want to know that, if this is her position and plaintiff’s attorneys become aware of it, it could expose the Hospital of the University of Pennsylvania to significant liability”. Counsel for defendants further added that she would “find it very difficult to believe that [Dr. Porge’s testimony] could be the official position of the Hospital …”. 

Dr. Porges and plaintiff became aware of the letter when it was brought to the attention of the chairman of the Department of Emergency Medicine. Thereafter, counsel for defendants sent subsequent letters to plaintiff’s counsel inquiring as to whether Porges would still be offering her expert testimony, and if not, to provide the information of the new expert. 

Subsequently, plaintiff filed a Motion for Sanctions against Counsel for the communications outlined hereabove. A hearing was held on the motion April 19, 2012. On April 30, 2012, an order was issued partially granting relief to plaintiff and imposing sanctions. Specifically, counsel was directed to refrain from further contact with plaintiff's expert witness. In addition, the Order stayed consideration of additional sanctions to a time subsequent to trial and after further hearing. During a hearing on the sanctions, counsel for defendant justified the letter by stating, "I could have called. I could have done it by other means, but I felt secure in my position. It was outside of this litigation, and I sent a letter to [senior hospital counsel]. This is the type of thing — not that this really is the issue here, but to respond to [plaintiff's counsel] this is the type of thing that happens all the time. It could have been information relayed at lunch or at cocktail party." 

The court found that counsel for defendants’ conduct in this case was willful and unconscionable and her conduct could have had the potential effect of witness intimidation and the potential obstruction of a party's access to evidence. Moreover, if permitted, counsel’s improper conduct may have far-reaching consequences that could threaten the integrity of the bar. The totality of counsel's improper conduct and the absence of any legally cognizable explanation for such conduct warranted sanctions and disqualification to ensure the parties received a fair trial. Counsel was sanctioned in the amount of $44,603.25 and


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.

4. **Civil Procedure Case Law**

   (a) **Discovery of Experts**

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

   In *Barrick*, 5 A.3d 404 (Pa. Super. 2010), 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 correspondence was discoverable. The Court concluded that the situation in *Barrick* was nearly identical to that of *Pavlak v. Dyer*, 59 Pa. D. & C.4th 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 was the opposite of new Fed. R. 26(b)(3).

The Superior Court withdrew its first opinion in Barrick and granted reargument. 2010 Pa. Super. LEXIS 3833 (Pa. Super. Nov. 19, 2010). On reargument, the Superior Court departed from the conclusion reached in its withdrawn opinion. It held:

In closing, based upon our interpretation of the Pennsylvania Rules of Civil Procedure, drawing upon the plain language of the rules and the case law of this jurisdiction, we conclude that the trial court committed an error of law in granting Sodexho's motion to enforce. As our Supreme Court has previously determined, other than the interrogatories described in Pa. R.C.P. 4003.5(a)(1), the Rules of Civil Procedure require that a party show cause to obtain further discovery from an expert witness. Cooper, supra at 492. Sodexho in this case failed to make any such showing. Thus, we hold that Sodexho's subpoena seeking documents from Appellants' expert witness was beyond the scope of Pa. R.C.P. 4003.5, without first showing cause as to why such a discovery request was needed. Furthermore, the written communication between counsel and an expert witness retained by counsel is not discoverable under the Pennsylvania Rules of Civil Procedure to the extent that such communication is protected by the work-product doctrine, unless the proponent of the discovery request shows pursuant to Pa. R.C.P. 4003.5(a)(2) specifically why the communication itself is relevant. As such, we also hold that Pa. R.C.P. 4003.3 immunizes from discovery any work product contained within the correspondence between Appellants' counsel and Dr. Green.


In 2014, the Supreme Court evenly divided in deciding whether Barrick should be affirmed – resulting in the affirmance of the Superior Court’s Opinion. Barrick, 91 A.3d 680, (Pa. 2014). Writing the opinion in support of affirmation, Justice Baer wrote:

While some documents might solely contain an attorney's mental impressions and legal theories, most correspondence between counsel and an expert witness will necessarily entail substantial overlap and intermingling of core attorney work product with facts which triggered the attorney's work product, including the attorney's opinions, summaries, legal research, and legal theories.
In contrast to our esteemed colleagues writing in support of reversal, we conclude that attempting to extricate the work product from the related facts will add unnecessary difficulty and delay into the discovery process. Redaction followed by in camera review would result in needless litigation adding expense to the parties and tying up the trial courts.

We additionally recognize that the Procedural Rules Committee has proposed an amendment to Rule 4003.5 which would embrace unambiguously the bright-line rule denying discovery of all attorney-expert communications: "[a] party may not discover the communications between another party's attorney and any expert who is [expected to testify as an expert witness at trial] regardless of the form of communications." 40 Pa. Bull. 7334 (Dec. 25, 2010). Without further comment, we acknowledge that the explanatory comment to the proposal indicates that the "[c]urrent practice in Pennsylvania has not been to seek discovery of communications between the attorney and his or her expert." Id. Although we do not rely upon this statement as substantive justification for our analysis of the current rule, nonetheless, it would appear that the Rules Committee believes that adoption of a bright-line test for denying discovery of communications between counsel and expert witnesses would not result in a change of practice in Pennsylvania. Our consideration of the proposed amendment to the rule is entirely separate, however, from the determination of the case before us, which, as initially noted, is governed by the current rule.

Barrick, 91 A.3d at 687. Writing in favor of reversal, Justice Saylor was notably of the view that, “This Court’s procedural rules simply do not establish a categorical prohibition against discovery of all correspondence between an attorney and an expert . . . it seems apparent that correspondence containing no core attorney work product lies outside of the protective ambit of Rule 4003.3’s exception, while documents consisting solely of core work product are protected in their entirety. If a communication contains a mixture of such work product and other material, both sets of policy objectives are served if that portion of the document consisting of core work product is protected, while the remainder is subject to discovery.” Barrick, 91 A.3d at 689, 697-698.

In St. Luke's Hosp. of Bethlehem v. Vivian, 99 A.3d 534 (Pa. Super. Ct. 2014), the Superior Court considered, inter alia, whether the trial court properly directed discovery of the plaintiff’s invoices for its attorneys’ fees, in a Dragonetti Action in which the plaintiff sought recovery of attorneys’ fees incurred in the course of underlying litigations. The Superior Court noted that in Barrick, it denied discovery of correspondence between appellant and its expert witness based on the work product doctrine by finding that:
Although the work-product doctrine is not absolute, we noted above that the privilege only surrenders to the need for discovery when the attorney's work product itself becomes relevant to the action. Pa.R.C.P. 4003.3, Explanatory Comment at ¶ 4-5. Here, unlike the examples in the explanatory comment accompanying Pa.R.C.P. 4003.3, the correspondence is only relevant because of the subject matter discussed between Appellants' counsel and Dr. Green. The correspondence itself is not relevant to this action. In stark contrast to the examples in the explanatory comment, Appellants' action relies upon the opinions and analyses of the expert witness, not those of their attorneys. Id. (providing examples illustrating that attorney work product "is not protected against discovery" where a party's claim or defense relies upon the opinion of its attorney).

St. Luke’s Hosp. of Bethlehem, 99 A.3d at 551-552 (quoting, Barrick, 32 A.3d at 813). In contrast, the Superior Court concluded that it was proper to find that the invoices were discoverable, seemingly because they, inter alia, had been placed in issue by the very nature of the appellant’s Dragonetti Act claims.

D. Release


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.


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.

E. **No Tort for Negligent Spoliation of Evidence**

In Pyeritz v. Commonwealth, 32 A.3d 687 (Pa. 2011), the Supreme Court decided an issue with potentially frequent and far-reaching implications – whether a tort exists for negligent spoliation of evidence. In Pyeritz:

. . . Appellants sued Appellees based on the destruction of personal property, to wit, a black nylon tree stand safety harness, or belt, that allegedly was crucial evidence in a separate civil action. The Pennsylvania State Police ("State Police") had seized this item during a criminal investigation of a suspicious death. A state trooper had agreed to retain the belt in the custody of the State Police, apparently for a longer period of time than permitted by internal State Police regulations, for Appellants' later use. However, the belt was destroyed before Appellants' counsel asked for its return. Appellants sued, and the trial court granted summary judgment to Appellees, which judgment the Commonwealth Court affirmed. The Commonwealth Court held, *inter alia*, that no cause of action exists against a third party — someone other than the original alleged tortfeasor — for negligent spoliation of evidence.
Pyeritz, 32 A.3d at 689. The Pennsylvania Supreme Court\(^\text{11}\) concluded that Pennsylvania law does not recognize a cause of action for negligent spoliation of evidence. In reaching the conclusion that it did, the Supreme Court determined that in weighing whether to impose a duty – examining factors of (a) the relationship between the parties, (b) the utility of the defendant’s conduct, (c) the nature and foreseeability of the given risk, (d) the consequences of imposing the duty, and (e) the overall public interest in imposing a given duty – the factors weighed against the creation of duty. Notably, the Court indicated, in varying with the Superior Court’s decision in Elias v. LANCASTER GEN. HOSP., 710 A.2d 65 (Pa. Super. 1998), that not even a special relationship can serve to give rise to a cause of action for negligent spoliation. Pyeritz 32 A.3d at *18; see also, Payne v. Whalen, 122 A.3d 509 (Pa. Commw. 2015) (citing Pyeritz, for the proposition that a cause of action for negligent spoliation of evidence does not exist under Pennsylvania law).


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.

2. **Pringle Under Review**

The Superior Court ordered a new trial for the plaintiffs in the medical malpractice case of Passarello v. Grumbine, 29 A.3d 1158 (Pa. Super. 2011). The Superior Court did so because of defense counsel’s argument in favor of the jury evaluating a defendant’s conduct with reference to the error-in-judgment concept and the use of an error in judgment charge, in contravention of Pringle v. Rapaport, 980 A.2d 159 (Pa. Super. 2009). In May 2012 the Supreme Court granted a Petition for Allowance of Appeal to determine, among other things, whether it is ever within the discretion of the trial judge to instruct the jury in a medical

\(^{11}\) Justice McCaffery wrote the majority opinion in which Chief Justice Castille, Justice Saylor, and Justice Baer joined. Justice Eakin and Justice Todd wrote concurring opinions.
malpractice case that a doctor is not liable for a non-negligent error in judgment. The Court was also to examine the retro-active application of Pringle.

On February 7, 2014, the Supreme Court, with Justice McCaffrey writing for the majority, joined by Justices Baer, Todd, and Stevens, rendered its opinion in Passarello. The Majority wrote that the appeal was granted for purposes of determining whether the trial court properly gave an error in judgment instruction, i.e., “an instruction that physicians are not liable for their ‘errors in judgment’ when making medical decisions.” The Majority wrote that it did not interpret its decision, or the decision in Pringle, as finding fault with the “substance” underlying error in judgment instructions, but rather the “terminology” employed. The Majority indicated that the principles underlying error in judgment instructions can be communicated without reference to phrases such as “error in judgment,” favorably referencing an instruction to the effect that an unfortunate result does not itself establish negligence. The Majority described phrases such as “error in judgment” or “mistake in judgment” as “ambiguous and problematic.” Notably, the Majority opinion left open the possibility that an error in judgment instruction may be acceptable in a “two schools of thought” case, however, it expressed concern that the same considerations making the charge inappropriate in ordinary medical malpractice cases would apply in “two schools of thought” cases.

Therefore, the Superior Court did not err by generally rejecting “error in judgment” instructions, i.e., instructions that physicians are not liable for errors in judgment when making medical decisions, because such instructions pose palpable and substantial risks of confusing juries with respect to the standard of care in medical malpractices cases, and appellants illustrated the lack of any necessity to use such instructions.

The Majority also spoke to, among other things, whether the decision in Pringle was properly applied retroactively, since Pringle was not decided by the Superior Court at the time the jury was charged in Pringle. The Court noted that generally, appellate courts apply the law in effect at the time of appellate review, though whether a rule should apply retroactively is still a matter of judicial discretion, determined on a case-by-case basis. Important to the determining retroactive application, is whether an appellate decision created a new rule of law. The Majority felt that Pringle did announce a new rule of law, but that it was nonetheless properly applied by the Superior Court in Passarello.

Justice Saylor filed a concurring and dissenting opinion. Notably, Justice Saylor “joined the majority in establishing a bright-line rule proscribing the errors-in-judgment instruction in medical malpractice cases,” but would do so only prospectively.

Justice Eakin filed a dissenting opinion in which Chief Justice Castille joined. Justice Eakin believed that the appellees’ had waived any objection that the error in judgment instruction was inherently confusing. Justice Eakin also took issue with the “majority’s adoption of Pringle’s wholesale ban on the ‘error in judgment’ instruction in medical malpractices,” describing it as troubling for multiple reasons. Justice Eakin seemed supportive of an error in judgment charge where the jury is properly instructed on the standard of care and there is no language concerning the physician’s state of mind.
Chief Justice Castile filed a dissenting opinion. Justice Castile also felt that Pringle should not be applied retroactively so as to benefit appellee’s whom he did not feel properly preserved the issue for review, also taking issue with the view that the Superior Court could itself craft a new rule of law. Further, Chief Justice Castille did not feel that the appellees had been prejudiced by the charge at issue, finding it to be distinct from the charge that was given in Pringle. While Chief Justice Castille felt that there would be some instances in which an error in judgment charge was inappropriate, e.g., straight-negligence cases involving leaving something in a patient’s body, he disagreed with the notion of a wholesale ban.

F. Wrongful Birth

Pennsylvania law codifies that there is no cause of action for wrongful birth. See, 42 Pa.C.S. § 8305(a), which provides:

There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L.1109, No.261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L.457, No.112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.

In Sernovitz v. Dershaw, 2015 Pa. LEXIS 2660 (Pa. Nov. 18, 2015), the Supreme Court reversed the Superior Court, which reversed the trial court’s order granting a demurrer on preliminary objections to a complaint claiming that had a couple learned of their child’s genetic condition while in utero, they would have aborted the pregnancy. The Superior Court had reserved, with a focus on the idea that there was no single subject on which this provision and three others applied, relative to “post-trial matters in criminal cases.” The Supreme Court reversed the Superior Court, noting that it was improper for the Superior Court's to sever portions of Act 47 and that “even if Act 47 contains more than one subject, the substantially belated nature of the present challenge, arising 22 years after enactment, renders the legislation immune to attack on that basis. Accordingly, we need not resolve definitively whether Act 47 violates the single-subject rule — either pursuant to the standards in effect at the time of its passage, or under the precepts set forth in City of Philadelphia and its progeny — or whether it would be appropriate to apply City of Philadelphia retroactively to legislation enacted before it was decided.”
G. Damage Cap Under 42 Pa. C.S. § 8553

Exceptions to governmental immunity are found at 42 Pa. C.S. § 8542. Generally speaking, to even to begin to fit within the exception to governmental immunity, a party must demonstrate both that, the “damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under [42 Pa. C.S. §] 8541 (relating to governmental immunity generally) or [42 Pa. C.S. §] 8546 (relating to defense of official immunity)” and the “injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed”, which categories speak to vehicle liability, and liability in connection with personal property, real property, trees, traffic control and street lighting, utility service facilitates, streets, sidewalks, and the care, custody, and control of animals. Even where governmental immunity is subject to attack, 42 Pa. C.S. § 8553 provides for a cap on recovery of $500,000, limited to specific items of damage for past and future lost earnings, death and specific bodily harm, medical and dental expenses, loss of consortium, loss of support, and property losses. In Zauflik v. Pennsburg Sch. Dist., 104 A.3d 1096 (Pa. 2014), the Pennsylvania Supreme Court upheld the $500,000 cap on damages under 42 Pa. C.S. § 8553 against an attack that, inter alia, it was unconstitutional, resulting in the drastic reduction of a damages award of $14,000,000 to $500,000, plus delay damages.

H. Trial Issues

On the issue of jury selection, a notable case is Cordes v. Assoc. of Internal Med., 87 A.3d 829 (Pa. Super. Ct. 2015) (en banc), appeal denied, 102 A.3d 986 (Pa. 2014). The Court in Cordes voted in favor of reversing the trial court judgment in favor of the medical malpractice defendants. There are two opinions in favor of reversal, both equally supported by three judges, in terms of number of justices joining in the opinion. The first, written by Judge Wecht, finds reversal appropriate on the basis of trial court abuse of discretion, in rejecting challenges for cause by the plaintiff against three venire-persons. Two of the venire-persons had immediate family members who were current patients of the defendant physician – one venire person’s wife, the other’s parents. Another had what the plaintiff argued “close” financial relationship with the defendant physician, in that they were employed by the same corporation. Judge Wecht, joined by Judges Bender, Bowes and Gantman, notably wrote:

We conclude only that the close situational, familial, and financial relationships presented in the instant case necessarily stripped the trial court of its discretion to rely upon the challenged jurors' assurances of impartiality. Rather, those relationships required exclusion per se. Given the presence on the jury of Ms. Kaelin and Messrs. Snowden and Majors, the trial resulted in a verdict more readily questioned, and more vulnerable to the taint of partiality, than a jury comprised solely of individuals with no such relationship to case participants. Justice aspires to avoid circumstances in which lurks the specter of partiality or bias. We seek with today's holding to reinforce the importance of erring on the side of caution emphasized in Schwarzbach, Stewart, and other pertinent cases, and, in so doing, to protect the reputation of
Pennsylvania courts for the fair and impartial administration of justice.

Judge Donahue, joined by Judges Gantman, Ott, and Bowes, writing separately, agreed with Judge Wecht as to the reason the trial court erred in discharging of one of the venire-persons, but departed from his reasoning with respect to the other two. Judge Donahue wrote:

I agree with Judge Wecht's conclusion that a potential juror's familial, financial or situational relationship with a party, victim, witness, or attorney involved in the case need not be direct in order to warrant his or her disqualification as a matter of law. See W.O.S.R. at 13-20. A potential juror may testify to a relationship with a party or case participant that, on its face, does not appear to be sufficiently close to warrant a presumption of prejudice, but when the juror reveals more information, a presumption of prejudice arises. As the situational relationship is flushed out, striking the juror for cause is required regardless of whether the juror believes the relationship would affect his or her ability to be fair and irrespective of whether there is a direct relationship between the potential juror and the party, participant or the case. . . . Indeed, when a presumption of prejudice applies, there is no place for a juror's assertion of fairness because an inability to be fair is presumed.

Judge Donahue wrote that he departed from Judge Wecht’s reasoning, in that he did not believe that, in the case of one juror, “that the simple fact that the juror's parents were patients of the defendant doctor in this medical malpractice case required her exclusion from the jury.” However, Judge Donahue nonetheless was of the view that “a presumption of prejudice would be warranted where the minor child of a juror is a patient of a defendant or witness in a medical malpractice action.” Judge Donahue also felt an ownership interest by the employer of one juror, in the entity that was the parent company of the group which was a defendant and owned the physician defendant’s practice, was not itself sufficient to warrant a challenge for cause; however, the juror’s answer to whether his employer would be impacted by an adverse verdict, did.

Judge Olsen wrote a dissenting opinion, finding that, “I cannot conclude that the trial court otherwise erred in failing to grant Appellant's for-cause challenge to the empanelment of those jurors.”

But note the Superior Court’s recent decision in DeFrancesco v. Lehigh Valley Health Network, 122 A.3d 457 (Pa. Super. Ct. 2015) (non-precedential decision), which does not recognize Cordes as binding. The DeFrancesco court recognized that the trial judge is entitled to discretion, and held that the fact that the partner of the lawyer defending certain parties in the action before the trial court, in another office, represented the juror in an unrelated estate matter, did not constitute grounds for striking the juror for cause.
Another notable case is Deeds v. Univ. of Pa. Med. Ctr., 110 A.3d 1009, 1011 (Pa. Super. Ct. 2015). In Deeds, the Superior Court reversed a jury verdict in favor of defendants in a claim for medical negligence brought on behalf of a minor (hereinafter, the “minor-plaintiff”). Essentially, it was alleged on behalf of the minor-plaintiff that the negligent rendition of medical care to the minor-plaintiff’s mother while pregnant with minor-plaintiff, in failing to diagnose the mother with preeclampsia, ultimately resulted in placental abruption, birth via an emergency caesarian section, and severe birth defects.

In the course of trial, counsel for plaintiff advised the court that the parties stipulated that all persons who provided treatment to plaintiff were agents of the defendant-hospital, Hospital of the University of Pennsylvania. However, the trial court denied the motion to dismiss the other defendants to the action, which included the Trustees of the University of Pennsylvania. As a result, the trial court permitted both HUP and the Trustees to be represented by separate counsel at trial, and each defendant’s counsel presented “separate arguments and conducted separate examinations of witnesses throughout trial.” Id. at 1011.

A jury verdict in favor of defendants followed and Deeds timely filed post-trial motions requesting JNOV or new trial. The trial court denied Deeds’ applications and a timely appeal ensued, presenting the Superior Court with three questions for its consideration:

1. In accordance with this Court's recognition of a per se rule entitling the plaintiff to a new trial following a defense verdict where counsel for defendant has improperly informed the jury that the plaintiff's injuries are being adequately cared for due to the availability of government benefits, should not [Deeds] receive a new trial here because [Appellees'] counsel committed this very transgression, to the likely prejudice of [Deeds]?

2. Did the trial court err or otherwise abuse its discretion in not granting [Deeds] a new trial because the trial court improperly allowed two separate attorneys representing two separate defendants to question witnesses and present closing arguments even after the parties stipulated that this case would proceed only against a single defendant?

3. Did the trial court err or otherwise abuse its discretion in permitting defendant Dr. Samuel Parry to testify as an expert witness beyond the scope of his actual treatment of the birth mother, even though defense counsel failed in violation of applicable procedures to identify him as an expert witness and disclose his expert opinions during discovery?

Id. at 1012.
The Superior Court observed that as to the first issue raised, the defendants did on multiple occasions inform the jury of collateral sources of compensation to Deeds for Deeds’ care. The Superior Court further observed that:

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

Id. at 1013. The Superior Court felt that the appellee-plaintiff was not adequately shielded from the inappropriate references to collateral sources of recovery, noting that, “Although the trial court sustained Deeds’ objections in the first two instances, it offered no curative or limiting instructions, nor did it otherwise direct the jury as to how it could or should evaluate the objectionable testimony.” Id. at 1014.

For purposes of new trial on remand, the Superior Court then directed its attention to the remaining issues raised by Deeds on appeal. The Superior Court framed Deeds’ position on the second issue on appeal as follows:

In her second issue, Deeds contends that the trial court erred in permitting separate counsel - - one representing the Trustees and one representing HUP - - to examine witnesses and present arguments individually to the jury, despite the fact that the Trustees were not an active party in the litigation and despite the fact that the Trustees did not appear on the verdict sheet. Deeds argues that this had the effect of "allowing the lone defendant on the verdict slip to present two separate closing arguments and to examine witnesses as though the case involved two separately represented defendants." Deeds' Brief at 35.

Id. at 1014. Ultimately, the Superior Court concluded that it was reversible error to permit counsel for the Trustees to remain. The Superior Court concluded in reliance on, inter alia, Pa. R.C.P. 223(2) - permitting trial courts to limit the number of attorneys representing the same party, or same group of parties who can actively participate in trial or examine or cross-examine witnesses - that the trial court abused its discretion on this issue. The Superior Court found persuasive that the remaining defendants faced the identical claims, had no cross-claims between them and shared expert witnesses, as well as the fact that they belonged to the same group of parties.

The final issue Deeds raised on appeal concerned whether the trial court committed reversible error in permitting the attending physician performing the caesarian section delivering the minor plaintiff, to offer expert opinion testimony about the care the plaintiff-minor’s mother received at HUP two days earlier. Deeds objected on the basis that the physician was not previously identified as an expert witness, nor in answers to interrogatories as a treating
physician who would be providing opinion testimony. Nonetheless, the physician was asked at
trial whether Deeds’ mother suffered from preeclampsia at the time of her earlier HUP visit. The
Superior Court noted the dividing line between fact and opinion testimony can be difficult to
discern, and that the physician’s testimony in this instance, was based on his treatment and
observation of the minor-plaintiff’s mother. Ultimately, the Superior Court concluded that:

Although Dr. Parry discussed the basis for the course of Peterson's medical treatment and provided an explanation as to how she received care at the PEC based on his experience as an attending physician at the PEC, he did not render any opinion as to whether the PEC violated a standard of care on January 18. Therefore, the trial court did not err in admitting his testimony as a fact witness.

Id. at 1019.

One judge in Deeds concurred that Deeds’ third-allegation of error did not warrant a new trial, but otherwise dissented on the basis that Deeds’ other two-allegations of error, also did not require a new trial. As to the issue of assignment of error for bringing up collateral sources of recovery, the dissenting judge felt that there was no reversible error because the jury had concluded that Defendants were not liable, and that any prejudice from collateral source references would speak to the amount of damages to be awarded. The dissenting judge was also not persuaded that the trial court committed reversible error in denying Deeds’ request to limit the number of counsel for the defense.


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.


In Stacey v. City of Hermitage, 02-CV-1911, 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, 275, 714 A.2d 1027, 1030 (Pa. 1998)). 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. Twombley, 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. See also Watson v. Cmty. Legal Servs., No. 3947, 2011 WL 2138505 (C.P. Phila. May 18, 2011) (granting a motion to dismiss a legal malpractice cause of action filed by a pro se Plaintiff where complaint failed to allege the basis of the underlying cause of action or that the Plaintiff would have been successful in underlying cause of action).

In Bayview Loan Servicing, LLC v. Law Firm of Richard M. Squire & Assoc., LLC, No. 10-1451, 2010 WL 5122003 (E.D. Pa. Dec. 14, 2010), the Plaintiff acquired the mortgage of an individual who later defaulted on the mortgage. The Plaintiff retained the Defendants to commence a foreclosure action and obtained an in rem judgment and a judgment against the individual in the amount of $287,992.56. The property was sold at a sheriff’s sale. The Plaintiff later instructed the Defendants to seek a deficiency in the amount of $374,998.01 against the individual. Defendants filed the lawsuit but failed to file a petition to fix a fair value within six
months of the sheriff’s sale, which is required in a deficiency action. The judgment in the foreclosure action was marked satisfied based on the failure to file the required petition to fix fair value. The deficiency action also was dismissed. The United States District Court for the Eastern District of Pennsylvania found the complaint sufficiently alleged the Defendant’s malpractice caused the plaintiff’s injury where the complaint alleged the property was sold below market value, the individual owed the Plaintiff in excess of $377,499.00 as a deficiency, the Plaintiff instructed the Defendants to pursue the resulting deficiency, the Defendants failed to file a petition to fix fair value, which is required when pursuing a deficiency, and, as a result of the Defendants’ failure, the Plaintiff suffered damages.

In Kuniskas v. Walsh, No. 09-CV-120, 2011 WL 841436 (M.D. Pa. Mar. 8, 2011), the Plaintiff suffered injuries after the police engaged him in a chase. The Plaintiff later pled guilty to various offenses. The Plaintiff filed a lawsuit against numerous defendants, including his attorney in a civil suit he commenced, arising from the incident. The Plaintiff alleged he asked his attorney to secure a video recording of the accident, which the attorney failed to do. The recording subsequently was destroyed. The Court granted the Defendant’s Motion to Dismiss because the complaint failed to explain how the attorney failed to exercise ordinary skill and knowledge. In addition, the Court took judicial notice of the underlying civil suit filed by the Plaintiff against the state police for negligence, in which the court granted the state police’s Motion for Summary Judgment, not for failure to meet an evidentiary burden, but because the officers owed no duty of care to a fleeing driver. The court therefore found that the Plaintiff failed to establish the defense attorney’s alleged negligence was the proximate cause of damage to the plaintiff.

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 pursue post-trial remedies and obtained relief which was dependent 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.


As an aside, note the 2014 case of Zarenkiewicz v. Lefkowitz, 2014 Phila. Ct. Com. Pl. LEXIS 255 (Pa. C.P. 2014), a legal malpractice action, wherein the court recommended its order holding venue improper against the attorney defendant as either an individual or a business association in Philadelphia, be affirmed. Id. Important to the Court’s consideration, as to the defendant as an individual, the action in which defendant previously represented plaintiff was brought in Bucks County and no transactions or occurrences out of which the cause of action arose, transpired in Philadelphia. See, Pa. R.C.P. 1006(a). As to defendant as an incorporated business association, the Court found persuasive that:

[D]efendant does not regularly conduct business in Philadelphia. Defendant's occasional meetings with clients in Philadelphia are not essential to defendant's business and thus do not satisfy the quality of acts portion of the quality/quantity test. Defendant's occasional meetings in Philadelphia are not continuous and sufficient enough to be considered general and habitual and so the quality of acts portion of the quality/quantity test is not satisfied.


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.”); Knopick v. Downey, No. 01-09-CV-1287, 2013 WL 4000838 (M.D. Pa. August 5, 2013) (legal malpractice breach of contract claims are subject to the four-year statute of limitations).

Additionally, see Ali v. Williams, supra, (“The plaintiff in a legal malpractice action has the burden of proving the following claims: 1. Employment of the attorney or others basis for a duty; 2. Defendant failed to exercise ordinary skill and knowledge; 3. The Defendant's negligence was the proximate cause in bringing about the damages to the plaintiff; and, 4. The extent of damages caused by the Defendant-Attorney's negligence.”).

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 attorney’s 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.

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., 2008 U.S. Dist. LEXIS 66703, 1, 2008 WL 3540538 (W.D. Pa. Aug. 12, 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 contact 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, 1 (Pa. C.P. 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, 2009 Pa. Super. LEXIS 7016, 1 (Pa. Super. Ct. Dec. 11, 2009), the Superior Court rejected a legal malpractice claim predicated on the supposition that plaintiffs were improperly advised of the effect of a lien on their settlement. The court held that the plaintiffs’ challenge in this regard 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. The Superior Court therefore held that the trial court properly rejected this claim on preliminary objections. In doing so, the court quoted language from the Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, 587 A.2d 1346 (Pa. 1991), 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.


The court considered the controlling case law and held that the facts were more analogous to Muhammad than McMahon. In this case Plaintiff alleged that Defendants were negligent in not filing a survival action on her behalf following the death of her husband in August 2008 from non-small cell lung cancer. However, Plaintiff and her husband voluntarily signed releases with the various silica defendants, thereby releasing the silica defendants from future claims, including potential malignancy claims. The court opined that whether or not a potential survival action would have resulted in a recovery greater than the settlement amount was mere speculation, and therefore the failure to advise Plaintiff to pursue a survival action was not actionable legal malpractice. The court indicated that, unlike McMahon, Plaintiff could not point to a procedural or substantive error that definitively resulted in harm to her position. Additionally, the court noted that the Plaintiff did not allege that she was fraudulently induced into settling her claims, so the exception in Muhammad did not apply.
Recently in Silvagni v. Shorr, 2014 Phila. Ct. Com. Pl. LEXIS 152 (Pa. C.P. 2014), the trial court granted summary judgment in favor of the legal defendants, in a suit brought by their former client, where plaintiff alleged that he was fraudulently induced to settle a worker’s compensation claim. In writing in support of its decision, the trial court noted that there was no evidence that plaintiff was misinformed about the legal consequences of the settlement or that the agreement was improperly drafted. The trial court observed, “Well established precedent in Pennsylvania holds that a litigant's dissatisfaction with the value of a voluntary settlement cannot form the basis of a subsequent legal malpractice action against the attorney who represented that litigant for the purpose of settlement.” Id. at *6.

E. Damages


In Ammon v. McCloskey, 440 Pa. Super. 251, 655 A.2d 549, 1995 Pa. Super. LEXIS 18 (Pa. Super. Ct. 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.


In Abood v. Gulf Group Lloyds, 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 (3d Cir. N.J. 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.” Abood, 2008 U.S. Dist. LEXIS 51406 at *14. (citation omitted).

In Giesler v. 1531 Pine St. Ass’n, L.P., 2010 Phila. Ct. Com. Pl. LEXIS 152 (Pa. C.P. 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., 727 F. Supp. 2d 377 (W.D. Pa. 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.”

In Bayview Loan Servicing, LLC v. Law Firm of Richard M. Squire & Assoc., LLC, No. 10-1415, 2011 U.S. Dist. LEXIS 51412 (E.D. Pa. May 11, 2011), the court found that an essential element in a legal malpractice claim, whether the action is in trespass or assumpsit, is proof of actual loss. The court found to prove actual loss the plaintiffs were required to establish they would have recovered a judgment in the underlying action but for the defendant’s actions. The court found the plaintiff failed to establish they would have recovered a judgment, as the plaintiffs offered “little more than assertions that the damages are ‘liquidated’ in the amount of the lost deficiency.”

In Coleman v. Duane Morris, LLP, 2011 Phila. Ct. Com. Pl. LEXIS 309 (Pa. C.P. 2011), the plaintiffs did not pay the attorney fees in the underlying cause of action. The underlying cause of action involved an agreement of sale for the plaintiffs’ company and the plaintiffs contended the defendant attorney informed the plaintiffs they would not be personally liable for unpaid taxes after the sale of the company. After discovering the plaintiffs still were liable for the unpaid taxes, the plaintiffs filed a breach of contract claim against their attorney. The court relied on Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108, 115 (Pa. 1993), which found damages for a breach of contract claim “will be limited to the amount actually paid for the services plus statutory interest.” The court in Coleman concluded that recovery for legal malpractice actions in assumpsit is limited to the amount paid for the legal services plus statutory interest and found the plaintiffs could not state a cause of action because they failed to pay the defendant for legal services in connection with the underlying action.

Subsequently, the Superior Court of Pennsylvania reversed the Coleman decision, holding that the limitation of damages discussed in Bailey v. Tucker only applied to legal malpractice in the context of criminal cases. 58 A.3d 833, 838 (Pa. Super. 2012). The Supreme Court of Pennsylvania has since granted appeal to determine whether “the limitation on damages in a legal malpractice action sounding only in contract set forth in Bailey v. Tucker, 533 Pa. 237, 252, 621 A.2d 108, 115 (1993)—which limited such damages to “the amount actually paid for the services plus statutory interest” in a case involving an underlying criminal representation—appl(ies) where the underlying representation is a civil one”. Coleman v. Duane Morris, 68 A.3d 328 (Pa. June 13, 2013). The Coleman decision is discussed further, infra.

The Eastern District of Pennsylvania has also taken the issue under consideration in Lodato v. Silvestro, and held that the Bailey limitations do not apply in the context of non-criminal legal malpractice proceedings. Instead, it wrote “contract-based civil attorney malpractice action(s) are not limited solely to legal fees paid.” 2013 WL 172203, *4 (E.D. Pa. Jan. 15, 2013). The Eastern District noted that substantial differences between a criminal and a civil proceeding were persuasive in its decision-making.

where the defendant has engaged in conduct that is outrageous because of the defendant’s evil motive or reckless indifference to the rights of others.” The Court found the complaint sufficiently stated a punitive damages claim where the complaint alleged the defendants took unauthorized actions on the plaintiffs’ behalf and failed to notify the plaintiffs of such actions. Id., at *3. The complaint alleged the defendants filed a complaint in New York even though the defendants knew the complaint was frivolous and without merit because venue was not proper. In addition, the complaint alleged that after the case was transferred to Pennsylvania, the defendants failed to file a statement of material facts or memorandum in opposition to the motion to dismiss. The court noted the listed conduct was “not an exhaustive list of the plaintiff’s allegations.” Id. The complaint also alleged the actions were intentional, fraudulent, and/or reckless to hide the defendant’s professional negligence.

In Kirschner v. K & L Gates LLP, 2010 Pa. Dist. & Cnty. Dec. LEXIS 387, 20 Pa. D. & C.5th 129 (Pa. County Ct. 2010), reversed, 46 A.3d 737 (Pa. Super. Ct. 2012), the Court of Common Pleas of Allegheny County addressed whether a company insolvent at the time of the alleged attorney negligence for failing to uncover a fraud, was harmed because the company’s insolvency increased by more than $500 million from the time of the alleged negligence to the time when the fraud was uncovered. The court discussed case law addressing whether deepening insolvency can be either an independent cause of action or a form of damages. Following this discussion, the Kirschner court found the losses of the new creditors was not caused by the defendant’s malpractice because there was no link between the defendant’s report and the losses of new creditors. On appeal, the Superior Court reversed the trial court’s decision, determining that the company’s Trustee did not claim “deepening insolvency,” either as a separate cause of action or as a separate theory of damages. Rather, the Trustee sought traditional tort damages. See Kirschner v. K & L Gates LLP, 46 A.3d 737, 753 (Pa. Super. Ct. 2012). As such, the Superior Court concluded that the Trustee had averred legally compensable and cognizable damages for the alleged professional negligence.

Gordon v. Herman, 2014 Phila. Ct. Com. Pl. LEXIS 378 (Pa. C.P. 2014), wherein the Court wrote in support of affirmance of its underlying decision assessing damages against counsel in a legal malpractice action concerning a shareholder’s Agreement, is notable for its rejection of disgorgement of fees as part of plaintiff’s recovery. The trial court acknowledged plaintiffs’ citation to Bailey v. Tucker, wherein the Court limited malpractice damages in an underlying criminal matter to fees paid, plus interest. However, the trial court still declined to award disgorgement, beyond consequential damages.

F. Collectability

In Kituskie v. Corbman, 552 Pa. 275, 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.

In Bayview Loan Servicing, LLC v. Law Firm of Richard M. Squire & Assoc., LLC, No. 10-1415, 2011 U.S. Dist. LEXIS 51412 (E.D. Pa. May 11, 2011), the Court found an affidavit from the defendant in the underlying lawsuit describing his limited resources and stating he did not and does not have the financial capacity to pay a deficiency judgment was sufficient “to give rise to a genuine issue of fact regarding collectability.”

G. Privity

In Cost v. Cost, 450 Pa. Super. 685, 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.

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.

In Kirschner v. K & L Gates LLP, 2010 WL 5504811 (C.P. Allegheny Dec. 28, 2010), reversed, 46 A.3d 737 (Pa. Super. Ct. 2012), Gregory Podlucky was the company’s sole shareholder of common stock and its chief executive officer. Three investors owned preferred stock in the company. The defendant law firm was hired to provide legal advice to a special committee created in 2003 by Le-Nature’s board of directors to investigate allegations raised by three financial managers who resigned due to concerns about the accuracy of the company’s sales figures. The special committee and the defendants failed to uncover the fraud being committed by Gregory Podlucky. The fraud was not uncovered until 2006.

The engagement letter from the defendant to the chair of the special committee stated “[y]ou have asked us to represent the Special Committee . . . of Outside Directors of Le-Nature’s Beverages, Inc. . . .” The defendant hired an accounting firm to assist in its investigation. The
retention letter sent to the accounting firm stated “[i]t is understood that P&W is being retained to assist K&L as a financial expert related to the special investigation of certain transactions involving Le-Nature’s, Inc. . . . . P&W shall provide general consulting, financial, accounting, and investigative or other advice as requested by K&L to assist it in rendering legal advice to Le-Nature’s. . . .” In addition, the letter’s section governing payment stated, *inter alia*, “P&W will render monthly invoices to K&L. K&L will then include our charges as part of its regular monthly invoices to LaNature’s.”

After the fraud was uncovered, bankruptcy proceedings were instituted. The court created the Le-Nature’s Liquidation Trust, which held Le-Nature’s assets and property. The trustee of the trust initiated the action against the defendants on behalf of Le-Nature’s creditors.

The trial court found no attorney-client relationship existed between the defendant and the creditors. *Kirschner*, 2010 WL 5504811. The trial court distinguished the case from a hypothetical in which a company appoints a special committee to conduct an investigation into whether a vice president is purchasing property at inflated rates from her family and to report its results to the entire board. In the hypothetical, the committee hired a law firm which failed to discover the vice president’s activities, which were discovered three years later. The trial court noted that in the hypothetical the corporation could bring an action against the law firm because the alleged misconduct impacted each shareholder, no shareholder was involved in the misconduct, and the law firm knew it was being retained to protect each shareholder from future misconduct. In the present case, however, there were two groups of equity holders, Podlucky and the investors. The law firm understood it was being hired to protect only the investors, who were not involved in the operation of the company. Therefore, the investors were the only parties that could sue.

The trial court also found no implied attorney-client relationship existed. It noted an implied “attorney-client relationship exists, absent an express contract, where (1) the purported client seeks advice or assistance from the attorney; (2) the advice is within the attorney's professional competence; (3) the attorney expressly or implicitly agrees to render such assistance; and (4) the putative client reasonably believes the attorney was representing it. *Kirschner*, 2010 WL 5504811 (*citing* Cost v. Cost, 677 A.2d 1250, 1254 (Pa. Super. 1996)). The trial court found no implied relationship because an express contract existed and the investigation was not conducted to protect Podlucky’s interests. Rather, it was conducted to protect the interest of the remaining equity holders.

On appeal, the Superior Court reversed the decision of the trial court, holding that the trial court erred in sustaining the preliminary objections of Defendant as to all causes of action. See *Kirschner v. K & L Gates LLP*, 46 A.3d 737 (Pa. Super. Ct. 2012). The Superior Court ruled that an attorney-client relationship did in fact exist between the defendant and the creditors. The Court held as such even though the retention letter expressly identified the Special Committee of Board of Directors as the client. The Superior Court concluded that (1) the corporation, through its Board and Special Committee, sought Defendant’s legal advice and assistance in investigating alleged fraudulent transactions and preparing findings/recommendations for the corporation’s Board; (2) the investigation of financial fraud and the preparation of findings and recommendations was within the professional competence of
Defendant; (3) Defendant agreed to render such assistance to the corporation, through its Board and Special Committee; and (4) it was reasonable for the corporation to believe that Defendant was representing it in the investigation of fraud and the preparation of findings/recommendations. See Id. at 751.

In Solow v. Berger, No. 10-CV-2950, 2011 U.S. Dist. LEXIS 29691 (E.D. Pa. Mar. 22, 2011), the plaintiffs alleged a legal malpractice claim against an attorney who prepared a will for the plaintiffs’ step-grandmother. The will did not name the plaintiffs as beneficiaries. The United States District Court for the Eastern District of Pennsylvania dismissed the case pursuant to the probate exception to federal subject matter jurisdiction. The court found that even if the probate exception did not apply, the legal malpractice claim would be dismissed for failure to state a claim. The court found no attorney-client relationship existed between the plaintiffs and the defendant. The court noted “certain non-client third-party beneficiaries can bring legal malpractice claims on a breach-of-contract theory.” The court found, however, to state a claim the third-party beneficiary must be named in the will the attorney drafted. The court rejected the plaintiffs’ argument that they should be accorded third-party beneficiary status because the defendant’s failure to draft a will which accurately represented their step grandmother’s intent deprived the plaintiffs of their bequest, which was contained in an earlier will. The court reasoned the decedent contracted with the defendant to draft her later will and the fact the plaintiffs were mentioned in an earlier will did not accord them third-party beneficiary status.

H. Comments on Dragonetti Act

The Dragonetti Act, 42 Pa.C.S.A. § 8351 – 8354, provides in relevant part:

§ 8351 Wrongful Use of Civil Proceedings:

(a) Elements of action. A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]:

1. he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
2. the proceedings have terminated in favor of the person against whom they are brought.

§ 8352 Existence of Probable Cause:

A person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either:
(1) reasonably believes that under those facts the claim may be valid under the existing or developing law; or

***

(3) believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil case is not intended to merely harass or maliciously injure the opposite party.

In Villani v. Seibert and Seibert v. Villani, consolidated cases reported at 63 Ches. Co. Rep. 326 (2015), the defendant attorney filed Preliminary Objections and challenged the constitutionality of the Dragonetti Act as it pertains to attorneys. The underlying action involved an ejectment action whereby the defendant attorney (representing plaintiff’s attorney in the underlying action) had summary judgment entered clients. The summary judgment was upheld by the Superior Court and petition for allowance of appeal was denied.

In an extended footnote to the order sustaining the preliminary objection brought by the defendant-attorney, the court, concluded,

[t]he Dragonetti Act is a legislative attempt to intrude upon the Supreme Court’s exclusive authority to regulate the conduct of attorneys in the practice of law. It is for the judiciary to sanction lawyers from bringing actions that are baseless or otherwise engaging in inappropriate conduct. The Dragonetti Act, as it pertains to lawyers, is unconstitutional and unenforceable.

In coming to this conclusion, the court compared the language of the Dragonetti Act with the Pennsylvania Rules of Professional Conduct, which were promulgated by the Supreme Court as opposed to the legislature, and the two are not in perfect harmony. By way of example, Section 8352(1) of the Dragonetti Act states that “an attorney has probable cause, if [the attorney] ‘reasonably believes’ that under the facts upon which the underlying claim was based, the claim may be valid under ‘existing or developing law.’” However, Pa. R.P.C. 3.1 (Meritorious Claims and Contentions), which regulates the same behavior, provides attorneys broader protection because it allows an attorney “to advocate for the ‘extension, modification or reversal of existing law.’” By way of further example, Section 8352(3) of the Dragonetti Act attempts to regulate attorney conduct by permitting “‘an attorney of record’ to prosecute an action ‘believe[ed] … in good faith … not [to be] intended to merely harass or maliciously injure the opposing party.’” However, in contrast, Pa. R.P.C. 3.1, regulating the claims that an attorney can bring, does not address an attorney’s beliefs in any way. Thus, the Dragonetti Act impermissibly seeks to usurp the function of the judiciary, inasmuch as it seeks to regulate attorney conduct. See also, Smith v. Freehand H.J., Inc. Et. Al., No. 2011-04211-TT (Chester Cty. 2015) (Dragonetti Act unconstitutional as applied to attorneys).
I. Waiver of Meritorious Defense

In Ammon v. McCloskey, 440 Pa. Super. 251, 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.

J. Duty to Keep Client Informed


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.

K. 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, 600 Pa. 515, 968 A.2d 1253 (Pa. 2009), that plaintiffs had waived their right to argue that their professional malpractice claim should be construed as a contract claim, in order to avoid the two-year limitation, when their Complaint did not contain a claim described as a breach of contract claim. Additionally, the Court held that the Superior Court may not sua sponte, search within a
complaint to find a cause of action that plaintiffs never argued was present in their complaint. Id.

Similarly, in Javaid v. Weiss, No. 4:11-CV-1084, 2011 U.S. Dist. LEXIS 145513, *5 (M.D. Pa. Dec. 19, 2011), plaintiff’s Complaint made clear that he was only asserting claims for professional malpractice, and couched these claims as arising either in tort or contract. However, the court held plaintiff had failed to adequately plead a separate claim sounding in contract. Id. Specifically, the court found plaintiff was proceeding under the theory that his attorney failed to exercise the appropriate duty of care towards him, but had not attached an engagement letter or other contract to his complaint, and had supplied only the barest of allegations regarding any agreement he may have had with defendant regarding his representation. Id. at *6. Plaintiff’s attempt to bolster his contract theory via a brief opposing defendant’s motion to dismiss was misplaced because a complaint cannot be amended in that manner. Id. Further, the court reasoned, plaintiff’s complaint attempted to set forth two distinct causes of action, one sounding in contract and one in tort, but the claims as plead in the complaint were substantially identical. Id. Accordingly, the complaint lacked any distinct factual allegations to support the distinct claim of breach of contract. Id. at *5, *7. The court also noted that plaintiff was still able to file an amended complaint more adequately pleading his claims, provided he reasonably believed he had a legal basis for bringing claims under either or both theories. Id. at n.3.

Under Pennsylvania law, the “occurrence rule” is used to determine when the statute of limitations begins to run. Fiorentino, 693 A.2d at 208. Under this rule, “the statutory period commences when the harm is suffered, or if appropriate, at the time an alleged malpractice is discovered.” Id.; see also Deere & Co. v. Reinhold, 2000 U.S. Dist. LEXIS 5276, 2000 WL 486607 (E.D. Pa. Apr. 24, 2000) (a cause of action for legal malpractice accrues on the date the harm is suffered and not on the date that the attorney-client relationship ends); Tower Investments, Inc. v. Rawle & Henderson, LLP, 2009 WL 8151571, 2009 Phila. Ct. Com. Pl. LEXIS 18 (Pa. C.P. 2009) (holding “[t]he statute of limitations in legal malpractice actions begins upon the happening of an alleged breach of duty and is tolled only when the client, despite the exercise of due diligence, cannot discover the injury or its cause”).

To date, Pennsylvania courts have expressly rejected the “continuing representation exception” under which a claim for malpractice accrues upon termination of the professional relationship which gave rise to the alleged malpractice. See, e.g., Glenbrook Leasing Co. v. Beausang, 2003 PA Super 489, 839 A.2d 437, 441-42 (Pa. Super. Ct. 2003), appeal granted, 870 A.2d 318 (Pa. 2005), aff’d, 881 A.2d 1266 (Pa. 2005); see also Ward v. Knox McLaughlin Gornall & Sennett, 2009 U.S. Dist. LEXIS 20302, 2009 WL 693260 (W.D. Pa. Mar. 13, 2009) (citing Glenbrook, court refused to apply “continuous representation rule”). It is noteworthy, however, that after the Superior Court’s discussion of the continuous representation rule in Glenbrook, and acknowledgment there that adoption of this rule would have to come from the Supreme Court, the Pennsylvania Supreme Court granted an appeal in this case limited to the issue of “whether the continuous representation rule should be adopted in Pennsylvania to toll the applicable statute of limitations in an action for legal malpractice.” Glenbrook Leasing Co. v. Beausang, 582 Pa. 101, 870 A.2d 318 (Pa. 2005) (Pa. 2005). Without issuing a written opinion, the Superior Court affirmed the Superior Court’s decision. Glenbrook Leasing Co. v. Beausang, 584 Pa. 129, 881 A.2d 1266 (Pa. 2005).
If the discovery rule applies, the statutory period commences at the time the alleged malpractice is discovered. Davis v. Grimaldi, Haley & Frangiosa, P.C., 1998 U.S. Dist. LEXIS 15681, 1998 WL 967516 (E.D. Pa. Sept. 29, 1998) (citing Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993)). The discovery rule “provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible.” Id. at 4-5 (citing Dalrymple v. Brown, 549 Pa. 217, 701 A.2d 164, 167 (Pa. 1997)). The Dalrymple Court discussed the standard for the application of the discovery rule:

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

Id. at 167; see also Radman v. Gaujot, 53 Fed. Appx. 606 (3d Cir. 2002) (not precedential) (the happening of the breach and the injured party’s awareness of the breach, not his knowledge of the resulting damage, is the focus of Pennsylvania law) Igbonwa v. Cameron, No. Civ. A. 03-5407, 2004 WL 257358 (E.D. Pa. 2004), motion to vacate denied, 2004 WL 1505352 (E.D. Pa. 2004) (in order to qualify for the discovery rule, a plaintiff must have made reasonable efforts to protect his own interests, and must show why he was unable to discover the facts necessary to plead the cause of action); Fouke v. Dugan, 187 F. Supp. 2d 253 (E.D. Pa. 2002) (to bring a claim outside of the statute of limitations, a plaintiff faces the burden of demonstrating that his claim falls into one of the exceptions to the occurrence rule); Amoroso v. Morley, 2002 U.S. Dist. LEXIS 4989 (E.D. Pa. Mar. 25, 2002) (the statute of limitations is tolled only if a person in the plaintiff’s position exercising reasonable diligence would not have been aware of the salient facts) (citing Baily v. Lewis, 763 F. Supp. 802, 806 (E.D. Pa. 1991), aff’d, 950 F.2d 721 (3d Cir. 1991); Edwards v. Duane, Morris & Heckscher, LLP, et al., 2002 U.S. Dist. LEXIS 16301, 2002 WL 32348269 (E.D. Pa. Aug. 7, 2002)(discovery rule may be applied to breach of contract actions “where the injured party is unable, despite the exercise of due diligence to know of an injury or its cause”); cf. Fine v. Checcio, 582 Pa. 253, 870 A.2d 850 (Pa. 2005) (medical malpractice case in which Supreme Court held that “discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises” and rejected argument that rule should not extend statute of limitations in any case where cause of injury is discovered within original statutory period.)


By way of background, defense attorney represented plaintiff in the first of two petitions of post-conviction relief (“PCRA”) and not the underlying criminal trial. The initial PCRA
petition was denied. Id. Plaintiff subsequently filed a second PCRA petition. Plaintiff informed the court that he was no longer represented and requested appointment of counsel. Different counsel was appointed; but defense attorney did not formally withdraw. Plaintiff alleged that the criminal defense attorney disregarded his duty to plaintiff by failing to communicate with plaintiff and failing to perform a proper investigation, which resulted in plaintiff suffering a prolonged incarceration.

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

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

In Wachovia Bank, N.A. v. Ferretti, 2007 PA Super 320, 935 A.2d 565 (Pa. Super. Ct. 2007), the Superior Court examined when a cause of action for legal malpractice accrues when an attorney fails to mark a judgment as satisfied. The Superior Court reiterated that “the trigger for the accrual of a legal malpractice action, for the statute of limitations purposes, is not the realization of actual loss, but the occurrence of a breach of duty.” Id. at 572. The court explained that an exception to the occurrence rule is the equitable discovery rule, which provides the statute of limitations is tolled when the “injured party is unable, despite the exercise of due diligence, to know of the injury or its cause.” The court cautioned, “[l]ack of knowledge, mistake or misunderstanding will not toll the running of the statute.” Id. The Superior Court stressed that Pennsylvania does not follow the actual loss rule, where the statute of limitations is told in the legal malpractice suit until a final judgment is entered in the underlying lawsuit. Id.

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

The United States Court of Appeals for the Third Circuit addressed the applicability of the discovery rule to legal malpractice claims in *Knopick v. Connelly*, 639 F.3d 600 (3d Cir. 2011). In *Knopick*, plaintiff hired the Connelly defendants to represent him in a lawsuit involving a motion to set aside a separation and property agreement between him and his wife. His wife alleged plaintiff failed to disclose two million dollars’ worth of stock prior to entering the agreement. Plaintiff informed defendants of four witnesses who could testify as to his wife’s knowledge of the assets. At the August 2, 2004, hearing, defendants called no witnesses, and assured plaintiff the agreement would not be set aside. On July 7, 2005, the Court granted the motion to set aside the agreement and subjected plaintiff’s assets to an equitable distribution hearing. On July 28, 2006, plaintiff met with defendant Downey to discuss a legal malpractice action against the Connelly defendants. On October 26, 2006, Downey sent a letter to the Connelly defendants indicating they committed malpractice, informing the Connelly defendants to inform their insurance carrier, and stating the statute of limitations began to run on July 7, 2005, the date of the judge’s order. On March 30, 2007, plaintiff signed an official agreement to file suit, but Downey did not file the lawsuit. On February 25, 2008, Downey sent plaintiff a letter terminating the representation because the two-year statute of limitations began to run on August 2, 2004, the date of the hearing, and, therefore, it expired on August 2, 2006, before plaintiff met with Downey. Plaintiff filed suit on July 6, 2009 against the Connelly defendants and against Downey, alleging legal malpractice. Downey filed a Motion for Summary Judgment alleging the statute of limitations barred any cause of action against the Connelly defendants, and, therefore, the legal malpractice claim against Downey failed as a matter of law. The district court applied the occurrence rule, and found the claim barred by the statute of limitations, which began to run on August 2, 2004, the date of the hearing. The Third Circuit reversed, finding the discovery rule applied and the statute of limitations did not begin to run until July 7, 2005, the date of the order.

The court noted that “under the occurrence rule, ‘the statutory period commences upon the happening of the alleged breach of duty.’” *Knopick*, 639 F.3d at 607 (citing *Wachovia Bank N.A. v. Ferretti*, 935 A.2d 565, 572 (Pa. Super. Ct. 2007)). “Where a plaintiff could not reasonably have discovered his injury or its cause, however, Pennsylvania courts have applied the discovery rule to toll the statute of limitations.” Id. (citing *Wachovia*, 935 A.2d at 572–74). If the discovery rule applies, the statute of limitations begins to run when the plaintiff knew or in the exercise of reasonable diligence should have known of the injury and its cause. Id. (citing *Crouse v. Cyclops Indus.*, 560 Pa. 394, 745 A.2d 606, 611 (Pa. 2000)). The court noted the discovery rule is “grounded on considerations of basic fairness.” Id. (quoting *Taylor v. Tukanowicz*, 290 Pa. Super. 581, 435 A.2d 181, 183 (Pa. Super. Ct. 1981)).
The court outlined cases in which the discovery rule applied, including medical malpractice claims. It noted the principle for the discovery rule’s applicability in medical malpractice claims, i.e., that the plaintiff is not held responsible for knowing of an injury until the abnormal condition manifests itself, is applicable in the context of legal malpractice. Id. at 609. The court noted Pennsylvania courts and federal courts applying Pennsylvania law have applied the discovery rule to legal malpractice causes of action. Id. Courts apply the discovery rule where “the injured party is unable, despite the exercise of due diligence, to know of his injury or its cause.” Id. It is applied where requiring the plaintiff’s knowledge would be unreasonable and it tolls the statute until the plaintiff is put in a position to discover the injury or its cause. The court noted knowledge can be imputed where an adverse action is taken against plaintiff.

The court noted the Pennsylvania Supreme Court has not addressed the discovery rule’s applicability to legal malpractice actions in a civil suit. It analyzed the Pennsylvania Superior Court decisions discussing the rule’s applicability in the civil context as well as the Pennsylvania Supreme Court’s discussion of the discovery rule in medical malpractice cases.

The court noted “[o]f critical importance in this case is the distinction between the act constituting the alleged breach—the Connelly defendants’ failure to call witnesses, which would start the statute under the occurrence rule—and the injury that flowed from this failure, constructive knowledge of which would trigger the statute of limitations under the discovery rule.” Id. at 615. The court found, although it is undisputed the plaintiff knew the witnesses were not called, “it remains in dispute, and a question . . . a jury should decide, when [plaintiff] knew that he was injured as a result of the witnesses not being called.” The court concluded “reasonable minds could disagree in determining whether Knopick knew or should have known, through the exercise of reasonable diligence, of his alleged injury as early as August 2, 2004, the date of the hearing.” Id. at 616.

In Walker v. Stern, 2012 U.S. Dist. LEXIS 122763, 2012 WL 3731375 *1 (E.D. Pa. Aug. 29, 2012), plaintiff alleged that defendants, his child’s mother and her attorney, “tricked” him into signing a waiver of claims relinquishing his rights in a medical malpractice suit involving his child. Plaintiff signed this waiver on August 25, 2005. Id. In 2006, the medical malpractice suit resulted in a settlement agreement in favor of the child. Id. During this time, plaintiff received a notice of the child’s estate, stating he was entitled to a portion of the settlement, and then requested a hold be placed on the funds, pending the determination of the administration of the child’s estate. Id. On December 14, 2006, the Philadelphia Court of Common Pleas, allocated the settlement agreement and did not distribute any of the settlement funds to plaintiff. Plaintiff filed suit against defendants on March 8, 2011. Id. In analyzing the case in light of the discovery rule, the court held that the statute of limitations for plaintiff’s fraud and misrepresentation claims against defendants was tolled until the entry of the court’s December 14, 2006 order, when plaintiff discovered the waiver he signed precluded him from recovering any settlement proceeds. Id. at *4. Consequently, plaintiff’s claims were untimely because he failed to file his complaint by December 14, 2008. Id.

The Third-Circuit affirmed the dismissal of Plaintiff’s suit. Id., 525 Fed. Appx. 84 (3d Cir. 2013) (non-precedential opinion). As to the dismissal of Plaintiff’s claim for legal
malpractice, the Third Circuit agreed that Plaintiff could not maintain this claim, as he could not
demonstrate employment of the attorney.

Courts are also willing to permit the fact finder to determine whether the discovery rule
27, 2012), plaintiffs, after discovering their guaranty obligations under a loan agreement were
greater than originally believed, brought suit claiming that defendants were liable for failing to
obtain signed copies of certifications clarifying that the plaintiffs’ guaranty obligation was
limited to 25% of the outstanding loan balances. Defendants asserted that plaintiffs’ claims
sounding in tort were brought after the expiry of the statute of limitations, as the alleged breach
had occurred on December 27, 2005, nearly four (4) years before plaintiffs commenced the
action. Id. at *15. Specifically, defendants alleged that any breach of legal duty occurred in late
December 2005, when plaintiffs alleged defendant breached his legal obligations to ensure
timely filing of certain certifications needed for loan documents, and alleged plaintiffs should
have reasonably known that the certifications were not signed by February 2006, when plaintiffs
received copies of the executed loan documents. Id. at *16. According to defendants, the
absence of the certifications within the loan document was, at a minimum, sufficient to trigger a
duty on the part of plaintiffs to exercise reasonable diligence to discover any failure to act on the
part of defendants. Id. Plaintiffs, on the other hand, argued the statute of limitations did not
begin to run until 2009, when they suffered harm by first making payments on the loan
guarantees, and until that time, they had not been injured as there was only the theoretical
possibility they would have to pay. Id. The court agreed with plaintiffs that disputed questions
of fact existed with respect to whether and when the discovery rule applied to their malpractice
claim, and held that the dispute should await resolution by a jury. Id. at *16-*17.

NYCMI the United States District Court for the Middle District of Pennsylvania, resolved to
dismiss an action against an attorney and the attorney’s firm for legal malpractice, on statute of
limitations grounds, importantly holding that the two-year statute of limitations for tort actions
applied, rather than the four-year statute of limitations for breach of contract. Essentially, a
motor vehicle accident resulting in personal injury resulted in a pre-suit demand for the insured's
policy limit of $25,000. The insurer refused to tender the full $25,000, instead, offering a lesser
sum. The injured individual then brought suit, and demanded $200,000. The insurer retained
counsel for purposes of determining, inter alia, the viability of a bad-faith suit, and counsel
determined that a bad-faith suit would not likely succeed, and that the insurer should not offer in
excess of the policy limits. This opinion was repeated by counsel in an additional letter.
Ultimately, the injured party recovered nearly $1,000,000 at trial. The insured assigned their
rights against the insurer to the prevailing injured party, resulting in the insurer paying the
injured party $2,000,000 in settlement of the ensuing bad-faith suit.

The insurer then brought suit against counsel, for allegedly deficient legal advice,
approximately four years from the day that counsel authored the second opinion letter re-
affirming that a bad-faith claim would not likely be successful. Following amendments to the
complaint on account of subject matter jurisdiction issues related to matters of diversity of the
parties, defendants moved to dismiss on statute of limitations grounds, contending that the gist of the insurer's claims was for negligence, and the two-year statute of limitations applied.

The District Court's analysis recognized that there is no dispute that a legal malpractice breach of contract claim can be brought under a four-year statute of limitations, nor that a legal malpractice claim can be brought under a breach of contract theory. Instead, the District Court concluded that the insurer failed to state a claim for breach of contract for violating a specific instruction or provision in the agreement between counsel and the insurer. The District Court's decision is particularly notable for this latter point, which may be viewed as the subject of seemingly disparate state and federal law.

The District Court expressly recognized that in Gorski v. Smith, 812 A.2d 683 (Pa. Super 2002), the Superior Court articulated that a "plaintiff's successful establishment of a breach of contract claim against an attorney . . . does not require proof by a preponderance of the evidence that an attorney failed to follow a specific instruction of the client . . ." Gorski, 812 A.2d at 697. However, the District Court cited to several sources of authority, to support its variance from Gorski's holding. One of these was Knopick v. Downey, 963 F. Supp. 2d 378 (M.D. Pa. 2013), another legal malpractice action, with a somewhat complex procedural history. However, for our purposes, it suffices to note that the District Court in Knopick opined:

Gorski is a Pennsylvania Superior Court decision, and not a Supreme Court decision, and although the decisions of intermediate appellate courts are afforded due weight, it is less than clear that Gorski was controlling [on the facts before it]. Indeed, even following this court's December 29, 2009 decision, federal courts applying Pennsylvania substantive law to professional malpractice breach of contract actions continued to hold that plaintiffs "may not repackage a negligence based malpractice claim under an assumpsit theory to avoid the statute of limitations." . . . Rather, it remained consistent that, in a claim based on breach of an attorney-client agreement, the attorney's liability "must be assessed under the terms of the contract." . . .

Knopick, 963 F. Supp. 2d at 390-391 (citations omitted; emphasis added by the NYCMI Court not included). The District Court in NYCMI further bolstered its conclusion in reliance on the decision reached in another case before it, Frantz v. Fasullo, Civ. Act. No. 3:13-CV-02345, 2014 WL 6066020 (M.D. Pa. Nov. 13, 2014), wherein it wrote:

In addition to the express provisions of an attorney-client agreement, "[a]n attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large." . . . Thus, absent allegations that the attorney failed to follow specific client instructions or breached a specific provision of their contract, a client's breach of contract claim against a lawyer "is not a true contract cause of action but sounds in
negligence by alleging [that the attorney] failed to exercise the appropriate standard of care." . . .

Frantz, 2014 WL 6066020 at *4 (citations omitted; emphasis added by the NYCMI Court not included). The District Court also relied, quite substantially, on Bruno v. Erie Ins. Co., 2014 WL 7089987 (Pa. December 15, 2014), discussed elsewhere infra. Suffice it to say here that in Bruno, part of the Pennsylvania Supreme Court's analysis in considering an interlocutory appeal turned on whether the plaintiffs' negligence claims for an insurance company's engineer's allegedly improper analysis concerning mold in the home, were barred by the gist of the action doctrine, on the grounds that the true nature of plaintiffs' claims were for breach of an insurance contract. The NYCMI District Court quoted Bruno at length. The quote is excerpted here as follows:

[T]he substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by the plaintiff of a claim as being in tort, e.g., for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract--i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract--then the claim is to be viewed as one for breach of contract. . . . If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort. . . . Although this duty-based demarcation was first recognized by our Court over a century and a half ago, it remains sound, as evidenced by the fact that it is currently employed by the high Courts of the majority of our sister jurisdictions to differentiate between tort and contract actions. We, therefore, reaffirm its applicability as the touchstone standard for ascertaining the true gist or gravamen of a claim pled by a plaintiff in a civil complaint. . . . [T]he mere existence of a contract between two parties does not, ipso fact, classify a claim by a contracting party for injury or loss suffered as the result of actions of the other party in performing the contract as one for breach of contract. Indeed, our Court has long recognized that a party to a contract may be found liable in tort for negligently performing contractual obligations and thereby causing injury or other harm to another contracting party . . . or to a third person . . .

Consequently, a negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract. Instead, the contract is regarded merely as the vehicle, or mechanism, which established the
relationship between the parties, during which the tort of negligence was committed.

Bruno, 2014 WL 7089987 at *18-19. Thus, in examining the allegations in the insurer-plaintiffs’ complaint, which alleged breach of the standard of care, rather than violation of a specific instruction or agreement, the NYCMJ Court concluded that insurer-plaintiffs’ claims sounded in negligence, and were therefore time-barred under the two year statute of limitations applicable to tort claims. Compare NYCMJ, supra, with Coleman v. Duane Morris, 58 A.3d 833 (Pa. Super. 2012), supra and infra.

In Coleman, it appeared that plaintiff’s breach of contract claim for legal malpractice, entailed the allegedly negligent/incorrect rendition of advice concerning tax consequences, but no violation of a specific instruction or agreement. However, the reader should note that the particular issue of the viability of a breach of contract legal malpractice claim absent breach of a specific instruction or agreement, was not itself critically analyzed and there was no argument that the claim was not legally cognizable on that basis. Indeed, Coleman’s analysis focuses mostly on what damages are available in a civil breach of contract claim for attorney malpractice.

L. 

**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.
However, 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.

M. Subrogation

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

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

In 2011, the Supreme Court of Pennsylvania addressed the issue of whether a restoration of employer subrogation rights arising from payment of workers’ compensation benefits also afforded public employers, such as the city, a right of subrogation for benefits paid under the Heart and Lung Act (HLA). Oliver v. City of Pittsburgh, 11 A.3d 960, 961 (Pa. 2011).

The relevant facts are as follows: a city employee, injured in a motor-vehicle accident in her capacity as a police officer, sued the city, seeking a judgment declaring that it had no subrogation claim against the civil settlement she received to recover the benefits the city paid her under the HLA Act (53 Pa. Stat. Ann. §§ 637-638). Id. Plaintiff alleged that an employer, such as the city, should be precluded from obtaining reimbursement of HLA benefits paid to employees through subrogation. Id.

In response, the city, citing Brown v. Rosenberger, 723 A.2d 745, 747 (Pa. Cmwlth. 1999), argued that the amendments to the Workers’ Compensation Act implemented via Section 25(b) of Act 44 not only restored a right of subrogation for benefits paid under the WCA, but also conferred a subrogation right relative to HLA benefits. In response, Plaintiff argued that the

In its decision, the Court, agreeing with Plaintiff, found Section 25(b) repealed Sections 1720 of the MVFRL "insofar as [it] relate[d] to workers' compensation payments or other benefits under the Workers' Compensation Act." Act of July 2, 1993, P.L. 190, No. 44, §25(b). Id. at 966. The Court noted however, that provision does not impact any anti-subrogation mandates pertaining to HLA benefits. Id.

N. Venue

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

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

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

In addressing this question, the Court applied the required qualitative/quantitative analysis. The Court noted that Defendant lawyer testified that he and the firm were in the business of providing legal representation, that he appeared and would continue to appear in federal courts in Philadelphia as a solicitor for several townships, and that he appeared and would continue to appear in state courts in Philadelphia as a litigator. The firm also submitted an affidavit stating that for the past two years no more than three (3) to five (5) percent of the firm’s gross revenue was generated by Philadelphia cases. Based on this information, the Superior Court ruled that the trial court had not abused its discretion in determining that the firm’s acts were of sufficient quality and quantity to qualify as regularly conducting business, and so to sustain venue, in Philadelphia.

law firm corporation. The court noted that, pursuant to Pennsylvania Rule of Civil Procedure 2179(a), venue against a corporation, was appropriate in the county where its principal place of business is located, a county where it regularly conducts business, the county where the cause of action arose, or a county where an occurrence took place out of which the cause of action arose. The Defendant had its sole office in Chester County, did not maintain a registered office in Philadelphia County, and the underlying litigation giving rise to Plaintiff’s claim occurred in Chester County, the only possible basis for venue in Philadelphia would be Defendant’s regular transacting of business in Philadelphia County. The court first held that Defendant’s contacts with Philadelphia County did not satisfy the “quality prong” of Rule 2179(a)(2) because Defendant’s contacts with Philadelphia County, namely advertisement and participation in hearings, appellate proceedings and arbitrations in Philadelphia, were not essential to or in direct furtherance of corporate objects, but were rather mere incident acts insufficient to impose venue jurisdiction. Additionally, the court held Defendant’s contacts with Philadelphia County did not satisfy the “quantity prong” of Rule 2179(a)(2) because the 1.7% of revenue its revenue Defendant generated from representing clients in Philadelphia was insufficient to confer venue and compel Defendant to defend itself in Philadelphia. The Superior Court would disagree, overturning the trial court’s decision. In a concurring decision, citing to the Superior Court’s holding, Judge Strassburger noted, “under our current rules and case law, Lentz Cantor, by deriving 1.7% of its revenue from Philadelphia County by representing clients in courts or arbitrations there, meets the current criteria for regularly conducting business; accordingly, the trial court erred in transferring this case to Chester County.” 39 A.3d 1008 (Pa. Super. Ct. 2012).

Courts are still bound by standard jurisdictional principles in determining venue in legal malpractice cases. In Lay v. Bumpass, 2012 U.S. Dist. LEXIS 111728, (M.D. Pa. Aug. 6, 2012), Plaintiff, a resident of the Middle District of Pennsylvania, secured Defendant, an attorney with a business address in Arkansas, to file a personal injury claim in accordance with the Federal Tort Claims Act (FTCA). Plaintiff brought suit against Defendant in the Middle District, alleging Defendant failed to timely provide notice pursuant to the FTCA’s terms, resulting in a violation of the statute of limitations. Id. In determining venue, the court recognized that it is the location of the events or omissions giving rise to the claim that are important. Id. at *4.

Plaintiff alleged venue in the Middle District was proper, as a substantial part of the events or omissions precipitating the legal malpractice action arose in the Middle District and the dismissal of the FTCA action, Plaintiff’s actual harm, occurred in the Middle District. Id. at *4. The court rejected this notion, holding that proper venue for a legal malpractice action is not necessarily commensurate with proper venue in the underlying tort claim. Id. The court held that venue depended on the court’s personal jurisdiction over Defendant, who did not solicit Plaintiff’s business in Pennsylvania, did not travel to Pennsylvania, was not admitted to practice law in Pennsylvania, and did not maintain a business in Pennsylvania. Id. at *8. Consequently, the court held that Plaintiff failed to set forth contacts sufficient to establish general jurisdiction over Defendant. Id. at *11. Further, Plaintiff’s complaint failed to establish any specific contact with Pennsylvania, aside from the fact of Defendant’s representation of Plaintiff, a Pennsylvania resident, in an action in Arkansas. The court held it would be improper to deem the attorney-client relationship between Plaintiff and Defendant, alone, was tantamount to an intentional direction of activity toward Pennsylvania warranting personal jurisdiction over Defendant. Id. Accordingly, the court held that the Middle District was an improper venue for the suit. Id.
Of course, it is important to remember that venue and jurisdiction are distinct concepts.

In Zurich Am. Ins. Co. v. Budzowski, 95 A.3d 339 (Pa. Super. 2014), appeal denied, 2014 Pa. LEXIS 3248 (Pa. Dec. 11, 2014), the Court addressed a venue challenge in a personal injury action in which Plaintiff claimed that the matter, originally filed in Philadelphia, should be transferred to Dauphin County. The issue before the Court was where venue would be proper when actions were pending in different counties involving a common question of law and fact which arose from the same transaction or occurrence.

In addressing this issue, the Court cited to Pa. R.C.P. 213.1, which states, in relevant part:

a) In actions pending in different counties which involve a common question of law or fact or which arise from the same transaction or occurrence, any party, with notice to all other parties, may file a motion requesting the court in which a complaint was first filed to order coordination of the actions. Any party may file an answer to the motion and the court may hold a hearing.

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(c) In determining whether to order coordination and which location is appropriate for the coordinated proceedings, the court shall consider, among other matters:

(1) whether the common question of fact or law is predominating and significant to the litigation;

(2) the convenience of the parties, witnesses and counsel;

(3) whether coordination will result in unreasonable delay or expense to a party or otherwise prejudice a party in an action which would be subject to coordination;

(4) the efficient utilization of judicial facilities and personnel and the just and efficient conduct of the actions;

(5) the disadvantages of duplicative and inconsistent rulings, orders or judgments;

(6) the likelihood of settlement of the actions without further litigation should coordination be denied.

(d) If the court orders that actions shall be coordinated, it may
(2) transfer any or all further proceedings in the actions to the court or courts in which any of the actions is pending, or
(3) make any other appropriate order.

However, the Court determined that in the present matter, the Moving Defendant could not attempt to cite to Pa.R.C.P. 213.1 in attempt to “deprive [Plaintiff] of the benefit of her chosen forum in which to litigate [the] malpractice case.” Id. at 342, see generally Dillon McCandless King Coulter & Graham, LLP v. Rupert, 81 A.3d 921 (Pa. Super. 2013).

Another important case on the issue of venue, though turning on principles of forum non conveniens, is Bratic v. Rubendall, 99 A.3d 1 (Pa. 2014), decided by the Pennsylvania Supreme Court in August 2014. In Bratic, appellant-attorneys had on behalf of their clients, filed an earlier lawsuit against appellees in Dauphin County, which action ended with the trial court granting summary judgment in favor of the appellees. The appellees then initiated an action in Philadelphia County, for wrongful use of civil proceedings and abuse of process. The Bratic Supreme Court was left to determine whether the Superior Court of Philadelphia trial court (the Honorable Mark Bernstein presiding), which had granted the appellants’ application for transfer based upon forum non conveniens. The Supreme Court determined that Superior Court erred in reversing the trial court, and so reversed the order from the Superior Court.

The Bratic opinion represents a watershed decision in clarifying what factors a trial court is permitted to consider in assessing petitions to transfer venue for forum non conveniens purposes. In holding as it did, the Bratic Court removed the prohibition on trial courts’ consideration of a number of factors that case law subsequent to Cheeseman v. Lethal Exterminator, Inc., 701 A.2d 156 (Pa. 1997), suggesting trial courts could not consider in evaluating a petition to transfer for forum non conveniens. For instance, the Bratic appellees argued that the Bratic trial court erred in considering the fact that none of the appellees were from Philadelphia. Yet, the Supreme Court's opinion in Bratic makes clear that whether a plaintiff is from the venue chosen for their action, is a factor which may be considered in resolving a motion for forum non conveniens. Bratic, 99 A.3d at 8. Additionally, under Bratic, courts may once again consider their own congestion as a factor in evaluating a motion to transfer venue, in so far as congestion may bear upon the determination of whether a plaintiff’s chosen venue is oppressive or vexatious. Bratic, 99 A.3d at 8. Further, the Supreme Court’s holding in Bratic makes clear that there is no particular form of proof required to make a showing of entitlement to relief in bringing a petition for forum non conveniens. As observed by the Supreme Court:

We thus cannot accept appellees' argument that appellants' affidavits were "plainly inadequate to overcome the great deference owed to a plaintiff's choice of forum[]." Appellees' Brief, at 11. A petition to transfer venue must be supported by

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12 The original Superior Court panel, divided, but affirmed the trial court; however, at argument before the Superior Court, sitting en banc, the Superior Court divided in favor of reversal.
detailed information on the record, but "Cheeseman and Rule 1006(d) do not require any particular form of proof. All that is required is that the moving party present a sufficient factual basis for the petition[, and t]he trial court retains the discretion to determine whether the particular form of proof is sufficient." Wood [v. E.I du Pont de Nemours & Company, 829 A.2d 707 (Pa. Super. 2003)], at 714 (citing Cheeseman, at 162); see also [Wood], at 714 n.6 (collecting cases and noting affidavits have never been held necessary to obtain transfer).

Bratic, 99 A.3d at 9-10 (emphasis added).

By permitting trial courts to consider factors that had earlier been removed from their purview following Cheeseman, the Bratic Supreme Court has signaled to all courts that defendants need not demonstrate "near-draconian" levels of oppression in order to secure transfer, all the while reinforcing the substantial discretion that trial courts have in evaluating petitions to transfer. As the Bratic Supreme Court wrote:

We reaffirm the Cheeseman standard, but hold the showing of oppression needed for a judge to exercise discretion in favor of granting a forum non conveniens motion is not as severe as suggested by the Superior Court's post-Cheeseman cases. . . . there is no burden to show near-draconian consequences.

Id., 99 A.3d at 10. Note too, the Supreme Court’s suggestion of increasing indicia of oppressiveness as parties are forced to travel 100 or more miles for plaintiff’s selected forum:

As between Philadelphia and adjoining Bucks County, the situation in Cheeseman, we speak of mere inconvenience; as between Philadelphia and counties 100 miles away, simple inconvenience fades in the mirror and we near oppressiveness with every milepost of the turnpike and Schuylkill Expressway.

Id., 99 A.3d at 10.

Fessler v. Watchtower Bible and Scott v. Menna and WaWa Inc. are consolidated cases, retrievable at 2015 Pa. Super. 274 (Pa. Super. 2015). The Superior Court held it improper to have transferred the actions for forum non conveniens. The opinion (J. Jenkins) has a good summary of the post–Bratic requirements.

Richman v. Perelman, 121 A.3d 1136, 2015 Pa. Super. Unpub. LEXIS 1053 (Pa. Super. 2015), is another non-precedential opinion from April 21, 2015 authored by Judge Platt (with Judges Wecht and Donohue concurring, and Judge Donahue also joining in Judge Platt’s opinion), which affirmed preliminary objections to improper venue in Philadelphia and transferred the case to York county. The Superior Court wrote:
We discern no abuse of discretion or error of law in the trial court's determination that Appellee is a resident of York County, and any alleged transactions complained of would have occurred in York. "[I]f there exists any proper basis for the trial court's decision to grant the petition to transfer venue, the decision must stand."


O. Certificate of Merit

Pennsylvania Rule of Civil Procedure 1042.3 provides in pertinent part:

(a) In any action based upon an allegation that a license professional deviated from an acceptable professional standard, the attorney for the Plaintiff, ..., shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney ... that either

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm .... Pa. R. Civ. P. 1042.3.

In Parkway Corp. v. Margolis Edelstein, 861 A.2d 264 (Pa. Super. Ct. 2004), appeal denied, 912 A.2d 1293 (Pa. 2006), the Superior Court addressed whether a judgment of non pros is properly entered upon plaintiff when the Complaint was unaccompanied by a Certificate of Merit, and Plaintiffs failed to request an extension of the filing period.

Plaintiffs instituted a claim for legal malpractice after a verdict in a wrongful death action was rendered against them for approximately $7 million. The complaint was unaccompanied by a Certificate of Merit, and appellants never requested an extension of time in which to file one. Defendants successfully moved for judgment of non pros. Thereafter, plaintiffs filed a Petition to Open and/or Strike, which was denied by the trial court.

On appeal, plaintiffs claimed they had substantially complied with the Certificate of Merit requirements because two partners in the law firm had outlined the bases for legal malpractice in the underlying wrongful death suit, and that such an outline satisfied the requirement of a written statement by “an appropriate licensed professional.” In addition, Plaintiffs asserted that verification submitted by their attorney constituted substantial compliance because it was served the same function as the Certificate of Merit. Id.
The Superior Court disagreed, reasoning that plaintiffs’ interpretation of an “appropriate licensed professional” was overly broad in that it would encompass almost every member of the firm representing appellants, and would allow certification by parties who have a vested interest in the case. Moreover, the court asserted that attorney verifications are not sufficient substitutes for Certificates of Merit. Verifications can be submitted by any person with sufficient knowledge, information and belief. Pa. R. Civ. P. 1024(c). Therefore, if verifications were appropriate substitutes for a Certificate of Merit, the requirement that the certificate be submitted by an “appropriate licensed professional” would be nullified.

In Moore v. John A. Luchsinger, P.C., 862 A.2d 631 (Pa. Super. Ct. 2004), the Superior Court determined that a praecipe for non pros cannot be filed for failure to timely file a Certificate of Merit, or a petition to extend the time for filing, after a Certificate of Merit has already been filed, regardless of whether the certificate was filed late.

In Scaramuzza v. Sciolla, 345 F. Supp. 2d 508 (E.D. Pa. 2004), the United States District Court for the Eastern District of Pennsylvania, sitting in diversity, declared that Rule 1042.3 was controlling substantive state law. The court further concluded that Plaintiff’s failure to file a Certificate of Merit within sixty days of filing original complaint did not warrant dismissal with prejudice where defendants did not show prejudice from the delay and responded to defendants’ motion to dismiss by filing a proper certificate. The court found that plaintiff was entitled to the relief provided by Rule 3051 (relief from entry of judgment for non pros) and denied Defendants’ Motion to Dismiss.

The United States District Court for the Western District of Pennsylvania has held that Rule 1042.7 (Entry of Judgment of Non Pros for Failure to File Certification) is procedural in nature and thus inapplicable to federal practice. Because the Federal Rules of Civil Procedure do not provide for a judgment of non pros, the proper procedure in federal court is to treat a motion to dismiss a professional negligence action for failure to comply with Rule 1042.3 as a motion to dismiss, without prejudice. Ward v. Knox, McLaughlin, Gornall & Sennett, No. 08-43 Erie, 2009 WL 693260 (W.D. Pa. Mar. 13, 2009).


In order to proceed with a legal malpractice claim in Pennsylvania, a Plaintiff must file a Certificate of Merit with his complaint or
within sixty days thereafter. Pa. R. Civ. P. 1042.3(a)(3). This requirement is a substantive rule and applies in federal court. Liggon–Redding v. Estate of Sugarman, 659 F.3d 258, 264–65 (3d Cir. 2011). It is undisputed that, in the two years his case was pending before the District Court, Slewion never filed a Certificate of Merit. Nor did he indicate that he intended to proceed without expert testimony, or that such testimony was unnecessary to advance his legal malpractice claims. See id. at 265. Importantly, Slewion did nothing to comply with the certificate of merit requirement or provide a reasonable excuse for his noncompliance, even after Appellees raised the issue in both state and federal court. (Dkt. No. 27, p. 6 (citing Womer v. Hilliker, 589 Pa. 256, 279 (Pa. 2006)).

The District Court correctly noted that, generally, a Plaintiff's failure to comply with the certificate of merit requirement would result in the dismissal of his complaint without prejudice. (Dkt. No. 27, p. 7.) However, Slewion's legal malpractice claims were time-barred by Pennsylvania's two year statute of limitations, see 42 Pa. Stat. Ann. § 5524, as they arose at the latest in January of 2009. Therefore, the District Court properly dismissed Slewion's complaint with prejudice as amendment would have been futile.

Id., 2013 WL 979432 at *1.

In Cuevas v. U.S., No. 09-43J, 2010 WL 1779690, *3 (W.D. Pa. April 29, 2010), the court addressed whether pro se prisoner Plaintiff substantially complied with the certificate of merit requirement. 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 responded that the two physicians would testify that the incident in question caused Plaintiff’s fractures and that 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 the 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.

On appeal, Cuevas v. U.S., 422 Fed. Appx. 142 (C.A. 3 Pa. April 6, 2011), the Court of Appeals remanded the case to the lower court, holding that because they had not yet determined if the Pennsylvania Rules of Civil Procedure regarding malpractice claims and specifically the certificate of merit requirement constituted substantive law, it was uncertain whether the Rules applied to the instant case. Id. at 146. Consequently, whether Plaintiff’s claim was foreclosed based upon failure to file a certificate of merit was not yet settled. Id. Further, the court reasoned, assuming the Rules did apply, Plaintiff’s argument that a certificate of merit was unnecessary tolled the requirement until a judicial ruling on the subject was made. Id.
In Liggon-Redding v. Estate of Robert Sugarman, 659 F.3d 258 (3d Cir. 2011), the United States Court of Appeals for the Third Circuit found Pennsylvania’s Certificate of Merit statute was substantive law. Although district courts recognized Rule 1042.3 was substantive law, no precedential Third Circuit opinion previously addressed the issue. The Court applied the Chamberlain v. Giampapa, 210 F.3d 154 (3d Cir. 2000) three-part test to determine whether the statute was procedural or substantive. The Court found there was no direct collision between the Certificate of Merit statute and Federal Rules of Civil Procedure 7, 8, 9, 11 or 41(b). The Court also found failure to apply the Certificate of Merit statute would be outcome determinative and failure to apply the statute would “frustrate the twin aims of the [Erie Rail Road v. Tompkins, 304 U.S. 64 (138)] Rule: discouraging forum shopping and avoiding inequitable administration of the laws.” Liggon-Redding, 659 F.3d at 264. The Court noted that if a Plaintiff fails to comply with the statute in state court, a Defendant may file a Praecipe for Entry of Judgment of non pros, which would result in dismissal of the Plaintiff’s claims. Id. “Dismissing a claim or case can certainly determine the outcome of the matter.” Id. The Court also reasoned failing to apply the statute in federal court would encourage forum shopping because, if the rule was found procedural and inapplicable in federal court, it would theoretically be easier to pursue a frivolous or meritless professional liability cause of action in federal court in diversity or pendent jurisdiction cases than in state courts. Id. Failure to apply the rule also would result in an inequitable administration of the law. If the state rule did not apply, a Defendant in federal court would be forced to engage in additional litigation and expense in a non-meritorious malpractice suit simply because the Plaintiff was from a different state. Id. In addition, non-diverse Plaintiffs would be required to follow the rule in state court, but diverse Plaintiffs could avoid the rule in federal court. The Court also found there was no countervailing federal interest that would prevent the application of the rule. Id.

In Liggon-Redding, the Third Circuit found the pro se Plaintiff complied with the Rule when she filed two documents labeled certificate of merit stating expert testimony would not be required to prove her claim. 659 F.3d at 265. It found the district court erred when it characterized her statements as an argument that she was not required to file a certificate of merit, rather than a statement that expert testimony was not required, which was permitted under Rule 1042.3(a)(3). Liggon-Redding, 659 F.3d at 265. The Court found a court cannot reject a filing under Rule 1042.3(a)(3) in favor of a filing under 1042.3(a)(1). Id. The Third Circuit noted that if a certificate asserts that no expert testimony is required, the Plaintiff is prohibited from offering expert testimony at a later date, absent “exceptional circumstances.” Id.

In Perez v. Griffin, 2008 WL 2383072 (M.D. Pa. June 9, 2008), aff’d, 304 Fed. Appx. 72 (3d Cir. 2008) (not precedential), cert. denied, 129 S.Ct. 2439 (2009), the pro-se plaintiff failed to file a Certificate of Merit in accordance with Rule 1042.3. The court noted that plaintiff failed to file a Certificate of Merit or request an extension and explained that “[f]ailure to file either a Certificate of Merit under Rule 1042.3(a) or motion for extension under Rule 1042.3(d) is fatal unless the Plaintiff demonstrates that his or her failure to comply is justified by a ‘reasonable excuse.’” Plaintiff maintained that the attorney-defendant’s actions constitute common law fraud, not legal malpractice, and as such no Certificate of Merit is required. In dismissing Plaintiff’s legal malpractice claim, the court reasoned that Plaintiff’s allegations of fraud cannot serve as a ‘reasonable excuse’ for his failure to file a Certificate of Merit.

In Bruno v. Erie Ins., Co., 2014 Pa. Lexis 3319 (Pa. Dec. 15, 2014), the Pennsylvania Supreme Court addressed among other things, the issue of whether a Certificate of Merit was necessary in situations where there is no direct client relationship with a licensed professional. The Court determined that a Certificate of Merit in a professional liability claim is necessary only if the Plaintiff is in a direct client relationship with the licensed professional.

The facts of the case, in relevant part, are as follows: The Brunos filed a claim with their homeowner’s insurance after discovering mold in their home during their remodeling. The homeowner’s policy included coverage for mold and other related issues. As part of the original claim adjustment, Erie hired an engineer to inspect the mold and to provide an opinion based on whether there was mold, and if so, how much cost would be required to remedy it. The engineer, led Mr. Bruno (and therefore his family) to believe that the mold was harmless, and that the Brunos would be able to continue with their renovations, without worry regarding the mold.

The Brunos thereafter began experiencing multiple health-related problems attributed to the mold and as a result got a second opinion at their own expense. The second engineer determined there to be a problem. As a result, the Brunos filed a complaint against both Erie and the original engineer, alleging, among other things, negligence for failing to recognize the nature and severity of the mold problem and creating a dangerous condition. Defendants in turn, argued that Plaintiff’s claims should be stricken due to their failure to file a Certificate of Merit. In ruling on this specific issue, the Court looked to Pa.R.C.P. 1042.1, which provides:


(a) The rules of this chapter govern a civil action in which a professional liability claim is asserted by or on behalf of a patient or client of the licensed professional against

(1) a licensed professional, and/or

(2) a partnership, unincorporated association, corporation or similar entity where the entity is responsible for a licensed professional who deviated from an acceptable professional standard, and

(b) A professional liability claim asserted against a licensed professional includes a claim for lack of informed consent.

(c) As used in this chapter, “licensed professional” means

(1) any person who is licensed pursuant to an Act of Assembly as
a health care provider as defined by Section 503 of the Medical Care Availability and Reduction of Error (MCare) Act, 40 P. S. § 1303.503;

(ii) an accountant;

(iii) an architect;

(iv) a chiropractor;

(v) a dentist;

(vi) an engineer or land surveyor;

(vii) a nurse;

(viii) an optometrist;

(ix) a pharmacist;

(x) a physical therapist;

(xi) a psychologist; and

(xii) a veterinarian.

(2) an attorney at law; and

(3) any professional described in paragraphs (1) and (2) who is licensed by another state.

In its review, the Court determined it was evident that the language of Rule 1042.1 expressly cabins the application of the requirements of Rule 1042.3 (as listed above) for the filing of a Certificate of Merit to only those professional liability claims which are asserted against a licensed professional "by or on behalf of a patient or client of the licensed professional." Id. at 69. Accordingly, because the [first] engineer was hired by Erie, not the Brunos, the Brunos were not a patient or client and thus were not required to file a Certificate of Merit.

In Schmigel v. Uchal, Defendant, Dr. Uchal performed laparoscopic band surgery on Plaintiff, which failed, leaving the band free floating in the patient’s abdomen. Schmigel v. Uchal, 800 F.3d 113, 2015 U.S. App. LEXIS 15581, *2 (3d Cir. Pa. 2015). Plaintiff, Mr. Schmigel, filed suit against Dr. Uchal after Dr. Uchal had moved to Florida. Therefore, Mr. Schmigel was able to sue in the United States District Court for the Western District of Pennsylvania on the basis of diversity jurisdiction. Id. at *3. Realizing that there was no Certificate of Merit attached to the original Complaint, Defendant Dr. Uchal waited out the sixty day window which Plaintiff had to file a COM after initiating suit and then filed a Motion to Dismiss. The very next day, Plaintiff filed the COM.

In addressing the issue at hand, the United States Court of Appeals for the Third Circuit held that Pennsylvania’s notice requirement, Pa. R.C.P. 1042.7(a)(4), like the
certificate of merit requirement itself, is substantive state law under Erie and therefore must be applied by federal court sitting in diversity. *Id.* at *24.

Pursuant to the *Erie* doctrine, the Court, sitting in diversity, was required to apply state substantive law and federal procedural law. *Id.* at *13. Consistent with *Erie*, the Court applied a three part test to determine whether the state law was substantive or procedural. The Court, in its analysis "determine[d] whether there is a direct collision between a federal rule and the state law or rule that the court is being urged to apply." See, *Liggon-Redding*, 659 F.3d at 262. If there was a direct conflict, and the federal rule is "constitutional and within the scope of the Rules Enabling Act," [the Court] appl[ies] the federal rule. *Chamberlain*, 210 F.3d at 159. Next, "[i]f there is no direct collision," the Court examines "whether the state law is outcome-determinative and whether failure to apply the state law would frustrate the twin aims of the Erie Rule to discourage forum shopping and avoid inequitable administration of the law." *Liggon-Redding*, 659 F.3d at 262. Finally, the Court considered "whether any countervailing federal interests prevent the state law from being applied in federal court." *Id.* The Court concluded that Pennsylvania’s notice requirement, as with the COM requirement was substantive state law and therefore must be applied in Federal Court pursuant to *Erie*.

Additionally, the Court noted no conflict between the substance of Rule(s) 1042.6-.7 and Federal Rules 7(b) and 12(b), which governed the application to the court for an order and required that any application for that order be to the court by motion. *Schmigel*, 800 F.3d at *20. The Court determined that since there was no federal interest weighing against applying the same notice requirements as set forth by Pennsylvania law, the notice requirement as set forth above was substantive and must be applied by federal court. *Id.* at *24.

**P. Requirement and Substance of Expert Testimony / Expert Qualification**


to timely resolve the case, the duty of diligence and the duty of honest and timely dealing with the client”).

Expert testimony is also required to demonstrate that plaintiff would have won the underlying case had defendant not been negligent. Int’l Land Acquisitions, 39 Fed. Appx. 751.

Expert testimony in a legal malpractice case must be based on facts in the record, and exclusion of expert testimony that is without proper foundation is not excluded in error. Jones v. Wilt, 871 A.2d 210 (Pa. Super. Ct. 2005) (trial court correctly excluded expert testimony premised on fact for which there was no support in the record; order granting summary judgment in favor of Defendant lawyer was affirmed).

In Frost v. Fox Rothschild, 18 Pa. D. & C.5th 295, 2010 Phila. Ct. Com. Pl. LEXIS 346, No. 03292 (Nov. 12, 2010), Plaintiff alleged legal malpractice claims of negligence against his divorce attorney, as well as a claim of breach of fiduciary duty. Defendant filed a motion for summary judgment, which raised the issue of whether Plaintiff was required to provide an expert witness and report in support of his claims.

Noting that “expert testimony becomes necessary when the subject matter of the inquiry is one involving special skills and training not common to the ordinary lay person,” the court addressed each of the Plaintiff’s claims to assess the need for an expert. Id. quoting Storm v. Golden, 371 Pa. Super. 368, 376, 538 A.2d 51, 64 (1988). The court determined that whether Defendant’s analysis and recommendation of a settlement agreement was reasonable, whether Defendant failed to exercise reasonable care and skill in choosing not to obtain a vocational expert, whether Defendant should have filed a post-trial motion on the issue of the trial court’s right to impose an obligation of evaluation of Plaintiff’s business, and whether Defendant should have had an expert do a valuation of Plaintiff’s personal effects were all issues that required an expert witness, which Plaintiff failed to produce. Therefore, the court granted summary judgment in Defendant’s favor on those claims. Plaintiff’s remaining claims were determined to have no supporting evidence, or evidence that directly contradicted Plaintiff’s position and were, therefore, dismissed.

Courts are willing to scrutinize the substance of an expert’s testimony when evaluating whether such testimony is sufficient to support Plaintiff’s claims. In Cruickshank-Wallace v. Klehr, Harrison, Harvey, Branzburg & Ellers LLP, 2011 Phila. Ct. Com. Pl. LEXIS 374 (Pa. C.P. 2011), Defendants represented Plaintiff in an underlying action in which the claims were dismissed before trial. Plaintiff then initiated a legal malpractice claim, alleging Defendant failed to plead and prosecute her claims properly in the underlying action, and failed to disclose to Plaintiff a conflict of interest during the course of the underlying action. The expert Plaintiff presented in support of her claim opined that Defendant breached its duties by laboring under a conflict of interest, failing to properly plead abuse of process, and failing to take discovery in the underlying action, citing the facts giving rise to the claim and relevant malpractice law in support. The court held that the expert’s opinions regarding failure to take discovery and laboring under a conflict of interest included sufficient evidence of duty and breach to support that claim. However, because the expert’s opinion that the abuse of process claim in the underlying action was not properly plead since it did not offer any facts or law in support of this
notion, it was insufficient to sustain Plaintiff’s claim that Defendant breached any professional
duty to Plaintiff. Specifically, the expert failed to describe what Defendants improperly omitted
or misstated in the pleadings in the underlying action, instead making only vague and non
conclusory statements. Importantly, the court then held that, in order to withstand a motion for
summary judgment, Plaintiff was required to offer expert evidence to prove Defendant’s
breaches of duty caused Plaintiff not to obtain her damages claimed in the underlying action, a
complicated issue requiring a determination of the viability of Plaintiff’s legal claims and the
sufficiency of Defendant’s professional acts in the underlying action. Plaintiff’s expert
testimony on this point was insufficient because it failed to describe how Defendant’s breaches
duty caused the dismissal of the underlying action, or increased the risk that the underlying
action would be wrongfully dismissed.

Recent decisions have also emphasized breach of fiduciary duty, as a matter that is not
within the range of ordinary experience and comprehension of non-professional persons, and is
one matter which requires the support of expert testimony. See, e.g., Bancroft Life & Cas. ICC,
Pa. Nov. 8, 2012) (holding expert testimony was necessary to support Plaintiff’s claim against
Defendant attorney, which alleged breach of fiduciary duty by failing to inform Plaintiff that
Defendant was never licensed to practice law in Pennsylvania and failing to ensure Plaintiff was
in compliance with all laws governing insurance companies in St. Lucia, because the claims
involved issues beyond the knowledge of the average layperson); ACC Fin. Corp. v. Law Office
fiduciary duty claim required the support of expert testimony because the jury would need to
consider whether Defendant law office breached a standard of care by failing to collect on
thousands of consumer credit card accounts in collection actions which, by Plaintiff’s own
admission, was an unpredictable enterprise within the realm of consumer debt assignments, a
field which itself required specialized knowledge to understand).

In Amato v. Bell & Gossett, 116 A.3d 607 (Pa. Super. Ct. 2015), rehearing denied,
Superior Court considered whether the trial court erred in, inter alia, excluding certain
expert testimony. More particularly, defendant asserted that the trial court erred by
excluding the testimony of its psychology expert, Dr. Weaver, whose testimony was being
offered in an attempt to refute the plaintiffs’ identification, 40 years after the fact, that
Cranite, a sheet gasket material, along with other asbestos-related material, was present in
their workplaces. Defendant Crane offered Dr. Weaver "to address the complex intricacies
of refreshing human recollection, which are particularly apposite in an asbestos case,
where the plaintiff's lawyer, not plaintiff, often controls the product identification
evidence." This testimony was critical to Crane, because Crane maintained that "neither
Crane Co. nor Cranite was ever identified as a qualified supplier or product for use on
Navy ships" and, thus, would not have been present at the Navy Yard, despite claims to the
contrary. Plaintiff, in response argued a jury is "fully equipped, by virtue of its collective
knowledge and experience," to assess the reliability of an eyewitness, and that "[t]he
workings and reliability of memory and the possibility of forgetting over time are not
concepts that elude the jury without the aid of expert testimony." Id. at *7-8.
The Superior Court ruled that the trial court properly excluded Dr. Weaver’s testimony, finding that expert testimony would not have aided the jury in evaluating the reliability of his testimony. The Superior Court reasoned that “the average person understands not only that memories fade and people forget, but that the human mind may be susceptible to suggestion.” Accordingly, the trial court did not abuse its discretion in excluding the testimony of Dr. Weaver.

Q. **Immunity From Liability**

In a case involving a question of first impression, the Third Circuit Court of Appeals in *Carino v. Stefan*, 376 F.3d 156 (3d Cir. 2004), considered the issue of whether an attorney hired by a labor union to represent a union member in an arbitration hearing as part of a collective bargaining agreement is immune from liability to the member for legal malpractice.

In *Carino*, an attorney, Stefan, was hired by the United Food and Commercial Workers International Union (“Union”) to represent Plaintiff, Ms. Carino, in an employment dispute against Prudential Insurance Company of America (“Prudential”). Union had entered into a collective bargaining agreement with Prudential. The Union was dissatisfied by the initial grievance procedure and exercised its right to have the matter arbitrated. Id. at 158.

Shortly before the arbitration was to commence, Stefan contacted Ms. Carino to discuss the matter. Id. Stefan asked Carino what she hoped to gain from the arbitration, to which she replied with several conditions, including having her employment record cleared, having a federal investigation closed, and having her pension reinstituted. Id. Stefan stated that he would be able to satisfy her wishes in return for her withdrawal of her grievance against Prudential. Ms. Carino released Prudential, but none of her concessions were ever granted. Id.

The trial court dismissed Carino’s claim under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The Third Circuit agreed, stating that the Labor Management Relations Act barred the suit. The court relied on the Supreme Court’s interpretation of Section 301(b) of the LMRA, 29 U.S.C. § 185(b), and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) 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. However, in 1970, *Atkinson* was overruled by the United States Supreme Court in *Boys Markets, Inc. v. Retail Clerk’s Union*. There, the Court found that the anti-injunction provisions of the Norris-LaGuardia Act did not preclude a Federal District Court from enjoining a strike in breach of a no-strike obligation under a collective-bargaining agreement containing provisions, enforceable under 301(a) of the Labor-Management Relations Act, for binding arbitration of the grievance dispute concerning which the strike was called. 398 U.S. 235, 237 (U.S. 1970).

In *Cole v. Beros*, No. 2:08-cv-541, 2008 WL 2225825 (W.D. Pa. May 29, 2008), the district court held that the LMRA “[j]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.

R. No Liability Under UTPCPL

In Beyers v. Richmond, 937 A.2d 1082 (Pa. 2007), the Supreme Court of Pennsylvania held that (1) Unfair Trade Practices and Consumer Protection Law (UTPCPL) does not apply to an attorney’s misconduct, and (2) the Rules of Professional Conduct and Rules of Disciplinary Enforcement provided the exclusive remedy for attorneys’ misconduct. The case arose from the admitted conversion of funds by an associate of Appellants’ Pennsylvania law firm in the underlying case, for which the firm was held vicariously liable. Id. at 1084.

Appellee contended that deductions reflected on her settlement distribution schedule were improper. See Id. at 1085. Appellee filed suit against the firm alleging, inter alia, negligence by her former attorneys and violation of consumer protection laws (UTPCPL). See Id. A bench trial was held on the sole issue of damages and the court found in favor of appellee as to all claims. See Id.

The Superior Court affirmed the decision of the trial court, and adopted its reasoning that “appellants’ actions did not arise from the practice of law, and therefore, appellants could not use their profession as a shield from the application of the UTPCPL.” Id.

In addressing applicability of the UTPCPL to attorney conduct, the Supreme Court stated that “[a]lthough we find the egregious conduct of appellants in this case to be reprehensible, we decline to hold that Pennsylvania’s UTPCPL applies to an attorney’s conduct in collecting and distributing settlement proceeds. Applications of the UTPCPL under these circumstances would encroach upon this Court’s exclusive power to regulate the practice of law in this Commonwealth.” Id. at 1085-86.

In reaching its holding, the Pennsylvania Supreme Court pointed out that the Superior Court of Pennsylvania had held that the UTPCPL does not apply to treatment provided by physicians and that it is clear that the legislature did not intend the Act to apply to medical services rendered by physicians. See Id. at 1088. Extending this reasoning to professional
services provided by attorneys, the Supreme Court held that the UTPCPL does not apply to services provided by attorneys. See Id.

Additionally, to support its holding, the Pennsylvania Supreme Court relied on the power granted to it by Article V, Section 10(c) of the Pennsylvania Constitute, 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 Pennsylvania Supreme Court held that the Pennsylvania Rules of Professional conduct and Rules of Disciplinary Enforcement “exclusively address the conduct complained of in this case.” See id. at 1092 (citing Pa. Rules of Prof’l Conduct 1.5(c), 1.15(b), 8.4(b) and 8.4(c)). Therefore, the Court found that the appellants’ conduct in “collecting and distributing settlement proceeds does not fall within the purview of the UTPCPL, but rather within this court’s exclusive regulatory powers.” Id. at 1093.

In Strayer v. Bare, 2008 WL 1924092 (M.D. Pa. Apr. 28, 2008), Plaintiff, Pennsylvania Lawyers Fund for Client Security (“PLFCS”), made payments to a number of former clients of the Frankel firm in exchange for subrogation agreements and assignment of rights. Those who assigned their rights to the PLFCS had received awards from personal injury litigation which were placed in the Frankel firm’s trust account, but, the funds were never paid to the clients. Id. at *2. Claims were filed with the PLFCS by these people and they received a portion of the funds which the Frankel firm allegedly misappropriated. Plaintiff Strayer was involved in a personal injury litigation which resulted in a settlement of $530,000, which was paid to the Frankel firm, but, never properly paid out to Strayer. Id. at *3. Plaintiffs brought suit against the Frankel firm and other Defendants, alleging, inter alia, a claim under the UTPCPL. Defendants filed a motion to dismiss the complaint and the court, as to the UTPCPL claim, granted the motion to dismiss and held that the misappropriation of client funds “[d]oes not fall within in the purview of the UTPCPL, but rather within the Court’s exclusive regulatory powers.” Id. at *41.

Recent decisions have emphasized that attorney immunity under the UTPCPL does not extend to attorneys whose debt collection practices are challenged under the statute. In Yelin v. Swartz, 790 F. Supp. 2d 331, 333 (E.D.Pa. Mar. 24, 2011), Plaintiff brought suit against Defendant law firm and attorneys, alleging that debt collection practices used by Defendant violated, inter alia, the UTPCPL. Defendants moved to dismiss, arguing attorney immunity from the UTPCPL pursuant to Beyers, supra. Id. at 337. Plaintiff contended that Beyers was a plurality opinion, and noted that Beyers involved Defendants’ mishandling of their own client’s funds, while Defendants in the instant case were not Plaintiff’s attorneys and were attempting to collect a debt owed to a third party. Id. Plaintiff averred this distinction was important because the Eastern District of Pennsylvania had previously allowed for the application of the UTPCPL to attorneys engaged in debt collection. Id. The court noted that the Supreme Court in Beyers did not hold that an attempt to collect a debt constituted the practice of law, but rather
acknowledged that debt collection was “an act in trade or commerce” within the meaning of the UTPCPL. Id. at 337-38 (citing Beyers, supra, 937 A.2d at 1089). Consequently, the court continued, if a complaint did not allege a Defendant committed misconduct during the course of practicing law, the mere fact that the Defendant happened to be an attorney would not trigger immunity pursuant to the UTPCPL. Id. at 338. Because Plaintiff was challenging Defendants’ debt collection practices, and not the adequacy of their legal representation, the court held application of the UTPCPL to Defendants would not infringe upon the Pennsylvania Supreme Court’s exclusive power to regulate attorneys, and denied Defendants’ motion to dismiss. Id. See also Fratz v. Goldman & Warshaw, P.C., 2012 U.S. Dist. LEXIS 148744 (E.D. Pa. Oct. 16, 2012) (holding that the UTPCPL applied to Defendant law firm because Plaintiff challenged Defendant’s debt collection practices and not the adequacy of their legal representation); Beckworth v. Law Office of Thomas Landis, LLC, 2012 U.S. Dist. LEXIS 55007, 2012 WL 1361671 *1, *7 (E.D. Pa. Apr. 18, 2012) (holding that Plaintiff had identified Defendant’s debt collection attempts as an “act in trade or commerce” within the meaning of the UTPCPL and had consequently properly stated a claim under the UTPCPL. Wilcox v. Bohmueller, 2011 Pa. Dist. & Cnty. Dec. LEXIS 403 (Pa. County Ct. 2011)(holding Defendant attorney immune from prosecution under the UTPCPL because Defendant’s actions challenged by Plaintiff, namely the collection and distribution of settlement proceeds, were part of the practice of law and not, as Plaintiff alleged, tantamount to selling a product on behalf of or in connection with a company).

In 2014, the Supreme Court of Pennsylvania considered whether the “UTPCPL” defines a “person” subject to liability as including both private entities and political subdivision agencies in Meyer v. Cmty. College of Beaver County, 93 A.3d 806 (Pa. 2014).

The Meyer case involved the Community College of Beaver County (“CCBC”), a political subdivision agency that offered a variety of educational services in exchange for tuition and fees. Former CCBC students brought suit when their schooling was cut short when, in 2002, the school’s alleged malfeasance caused the program to become decertified. Accordingly, the students alleged, any degree or time spent at the school thereafter would be worthless. As a result, the students filed a breach of contract and breach of warranty action under the UTPCPL’s provision allowing a cause of action for “persons” injured by other “persons”’ employment of unfair trade practices. Id. at 808.

In response, CCBC sought summary judgment on two grounds. Firstly, CCBC cited to the UTPCPL, stating that a “person” as described under the provision, was defined as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.” Id. citing 73 P.S. § 201-2(2). In doing so, CCBC argued this definition excluded community colleges. Secondly, CCBC cited to the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541 et seq., under the belief that they were provided immunity from all statutory and UTPCPL liability not listed within the enumerated exceptions.

On remand, the Commonwealth Court affirmed the trial court’s order denying summary judgment, finding the use of the phrase “any other legal entities” rendered it ambiguous as to the inclusion of political subdivision agencies, such as community colleges. Id. at 816. The Pennsylvania Supreme Court would hear the case on review and would address the single issue of whether the UTPCPL’s definition of “person”—“natural persons, corporations, trusts,
partnerships, incorporated or unincorporated associations and other legal entities” included political subdivision agencies, like CCBC. Id. at 813. The Court noted that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." Id., citing 1 Pa.C.S.A. § 1921(a). Furthermore, the Court added, "[i]n giving effect to the words of the legislature, we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear." Id., citing Giant Eagle, Inc., v. W.C.A.B. (Givner), 614 Pa. 606, 39 A.3d 287, 290 (Pa. 2012).

Therefore, the Court determined “the UTPCPL is ambiguous as to whether political subdivision agencies constitute "persons…” However, based on [the Court’s] consideration of the law prior to the UTPCPL’s enactment, the UTPCPL’s purpose, and the consequences of a holding that it applies to such agencies, [the Court] conclude[d] the legislature did not intend for the definition of "person” to include political subdivision agencies. Id. at 815. As a result, the Court reversed the Commonwealth Court’s affirmance of the trial court, and remanded for further proceeding.

Chief Justice Castille would write a concurring opinion, reasoning that in order to be liable under the UTPCPL, a party must, in addition to being a person under the statute’s definition, be engaged in “the conduct of any trade or commerce.” Id. Therefore, in his opinion, the CCBC was not a merchant, nor was it engaged in trade or commerce as envisioned in the UTPCPL. Id.

S. 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. Duffield, 537 Pa. at 500. It noted that an aggregating factor was that the lawyer had made no voluntary payment on the civil judgment, which had been final for several years.

T. Suspension of License - Interplay Between State and Federal Authority

In Surrick v. Killion, 449 F.3d 520 (3d Cir. 2006), the Third Circuit addressed the peculiar situation of an attorney who was licensed to practice before the District Court for the Eastern District of Pennsylvania, but was not licensed to practice before the Pennsylvania state courts.

In Surrick, a Pennsylvania attorney, Robert B. Surrick, was suspended from the Pennsylvania Bar for five years following disciplinary proceedings. Id. at 522. Subsequently, the District Court ordered a reciprocal thirty-month suspension of his license to practice before the federal courts. Id. at 533. Following his readmission to the Federal Bar (and while his Pennsylvania license was still suspended), Surrick sought a declaratory judgment from the District Court allowing him to open a law office in the state of Pennsylvania, for the sole purpose of supporting his practice before the federal courts, without fear of reprisal from the Pennsylvania Office of Disciplinary Counsel (ODC). Id. at 525.

The ODC opposed Surrick’s attempt to find relief before the federal courts, arguing that as a matter of state sovereignty, the Commonwealth of Pennsylvania retained the authority to regulate the practice of law within its borders without federal interference.

The District Court ultimately ruled in favor of Surrick, and allowed him to open a law office in Pennsylvania for the sole purpose of handling cases before the federal courts, subject to certain conditions (most notably, he was compelled to comply with all Pennsylvania procedures for reinstatement to the state bar, he was prohibited from posting signs outside of his office or
anywhere else in public and he was required to indicate on his letterhead that he was not licensed to practice before the state courts in Pennsylvania). Id. at 522. The ODC also raised several justiciability arguments in opposition to Surrick’s argument for a declaratory judgment, which were denied.

Departing from (although not expressly overruling) the Pennsylvania Supreme Court’s pronouncement in Office of Disciplinary Counsel v. Marcone, 855 A.2d 654 (Pa. 2004), cert. denied, 543 U.S. 1151 (2005), that an attorney is not permitted to open a law office in the state of Pennsylvania for the purpose of practicing before the federal courts if his Pennsylvania license is suspended, the Third Circuit Court of Appeals upheld the District Court’s entry of a declaratory judgment in favor of Surrick (subject to the conditions noted above), and held that under the Supremacy Clause of the United States Constitution, a state may not prohibit an attorney admitted to the bar of a federal district court, but suspended from the state bar, from maintaining a legal office for the sole purpose of handling federal cases. Id. at 534.

Arriving at this holding, the court explained that the central issue of this case was whether a state law prohibiting Surrick from maintaining a law office was preempted by the exclusive authority vested in the Eastern District of Pennsylvania, under federal law, to determine who may practice law before it. The court started with the proposition that the establishment of a law office is necessary for the effective practice of law. The court held, in turn, that the state law prohibiting Surrick from maintaining a law office in Pennsylvania would effectively prohibit him from practicing before the federal courts in Pennsylvania, and would thus place “additional conditions,” not contemplated by congress, on the Eastern District’s ability to determine who is permitted to practice before it. Id. at 532. In other words, the court was concerned that if the state restriction were upheld, it would be necessary for Surrick to be admitted to practice in Pennsylvania before he could be permitted to practice before the federal courts in Pennsylvania, thus undermining the power retained by the District Court under federal law. Under principles of federalism, the Third Circuit thus reasoned that the Commonwealth of Pennsylvania could not wield such power over the United States Congress, and ruled that the Pennsylvania law prohibiting Surrick from establishing a law office in Pennsylvania, under the facts of this case, was preempted by federal law. Id.

It should also be noted that the Third Circuit gave no credence to the ODC’s argument that Surrick should be prohibited from maintaining a legal office in Pennsylvania with a suspended Pennsylvania license because Surrick would be handling federal cases based predominantly on diversity of jurisdiction and would therefore essentially be practicing Pennsylvania law. Rejecting this argument, the Court explained that it was not willing to base its decision whether or not to allow Surrick to open a law office in Pennsylvania on the particular facts of each case that Surrick might handle.

U. Disqualification of Trial Counsel in Civil Case – Not Immediately Appealable

In Vaccone v. Syken, 899 A.2d 1103 (Pa. 2006), the Pennsylvania Supreme Court addressed the issue of whether an order disqualifying trial counsel in a civil case is an interlocutory order, which is not immediately appealable. In Vaccone, counsel for Plaintiffs in an attorney malpractice action was disqualified by the trial court because he was scheduled to appear as a witness in the case and because he had previously served as co-counsel with
Defendant attorney in the underlying matter, thus giving rise to a conflict of interest. Plaintiffs appealed the trial court’s order to the Superior Court, but the Superior Court quashed the appeal as interlocutory and unappealable. Plaintiffs then appealed to the Pennsylvania Supreme Court. Id. at 1105.

Upholding the Superior Court’s Order quashing Plaintiff’s appeal as interlocutory, the Pennsylvania Supreme Court explained that in determining whether the disqualification of trial counsel in a civil matter is immediately appealable, the court must determine whether such an order is a “collateral order” under Pennsylvania Rule of Civil Procedure 313, and therefore appealable before a final judgment is rendered. The Court explained that the collateral order doctrine allows for immediate appeal of an order which:

(1) is separable from and collateral to the main cause of action; (2) concerns a right too important to be denied review; and (3) presents a claim that will be irreparably lost if review is postponed until final judgment in the case.


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, and order disqualifying counsel could not be separated from the merits of the case; (2) although Plaintiffs would be inconvenienced if they were compelled to find new counsel, they would not be unable to find substitute counsel; and (3) Plaintiffs would not irreparably lose their right of review of the disqualification order, as the Superior Court could order a new trial on appeal if it saw fit to do so, with Plaintiffs free to choose their counsel as they pleased. The Supreme Court specifically held, in turn, that “a trial court order disqualifying counsel in a civil case is an interlocutory order.” Vaccone, 890 A.2d at 1108; see also, Commonwealth v. Knauss, No. CR-5595-2010, 2012 Pa. Dist. & Cnty. Dec. LEXIS 65 (Lehigh Ct. Com. Pl. March 12, 2012) (in case involving, inter alia, attempt by criminal Defendant to proceed pro se, noting “Claims regarding counsel have been treated as interlocutory and unappealable.”). See also Commonwealth v. Scarborough, 64 A.3d 602 (Pa. 2013) (Effective March 7, 2011, the Rules of Appellate Procedure were amended to provide that such challenges should proceed by petition for allowance of appeal).

To be immediately appealable, a trial court order must be either a final order under Pa.R.A.P. 341, or a collateral order under Pa. R.A.P. 313. Dougherty v. Phila. Newspapers, LLC, 85 A.3d 1082, (Pa. Super. Ct. 2014), citing Vaccone v. Syken, 899 A.2d at 1106. For the collateral order doctrine to apply, the Pennsylvania Superior Court has delineated three requirements that must be satisfied (as listed above):

(1) The order must be separable from and collateral to the main cause of action; (2) it must involve a right that is too important to be denied review; and
(3) if review is postponed until final judgment, the claim will be irreparably lost.

see also Rae v. Pennsylvania Funeral Directors Association, 977 A.2d 1121, 1126 (Pa. 2009).

The issue before the Pennsylvania Superior Court in Dougherty was whether an order denying a motion to disqualify counsel was appealable as a collateral order. In reaching its decision the Superior Court referenced the Vaccone Court, wherein the Supreme Court concluded that an order disqualifying counsel was not appealable as a collateral order. The Dougherty Superior Court concluded that inasmuch as Dougherty had averred facts establishing a colorable claim of the potential disclosure of attorney work product and breach of attorney-client privilege leading to irreparable harm, the trial court order denying disqualification, was appealable as a collateral order. Dougherty, 85 A.3d 1086.

V. 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. Id. at 1206. Czmus subsequently completed a year of residency at Thomas Jefferson University in Philadelphia, and was issued a license to practice medicine in the state of New York in November 1978. Id. After engaging in private practice in New York and serving as Assistant Clinical Professor of Ophthalmology at New York Medical College, St. Vincent’s Hospital and Medical Center and the New York Eye Infirmary, Czmus was granted a license to practice medicine and surgery in California in 1984, and moved there in 1985. Id. On his applications to several hospitals in California, Czmus falsely represented that he was certified by the American Board of Ophthalmology. Id. at 1200. In 1986, upon learning of these false representations and Czmus’ grossly negligent treatment of six of his patients, the Attorney General of California revoked Czmus’ license to practice medicine in California. Id. at 1199. Czmus’ New York license was also revoked after a reciprocal disciplinary proceeding was conducted by the New York Licensing Board. Id. at 1200.

In 1992, unable to practice medicine, Czmus was accepted at Temple University School of Law. In his law school application, Czmus failed to disclose that he had attended medical school, received medical licenses, lived in California, worked as a physician, had disciplinary proceedings in California and New York and had both states’ medical licenses revoked. Furthermore, Czmus falsely represented in an application to a law firm that he held medical licenses in California and New York. Id.

In 1995, Czmus submitted applications to sit for the Pennsylvania and New Jersey bar examinations, and failed to include in either bar application any mention of his medical education, career, or disciplinary proceedings. Id. at 1199. Additionally, Czmus falsely
represented that he lived in Delaware and worked for Kennard Lab Associates as a lab supervisor during the time he was actually working as a physician in California. Czmus passed both bar examinations, and each state’s character and fitness evaluation failed to reveal his falsifications. Id. at 1200.

In 1998, the New Jersey disciplinary authorities learned that Czmus was a former physician with a record of professional misconduct and discipline, and they began an investigation into Czmus’ background. During an interview with an investigator, Czmus lied about his past and attributed the discrepancies on his application to confusion. Id.

In November 1999 and January 2000, Czmus began seeing two psychiatrists who diagnosed him with various psychiatric disorders. Although Czmus’ psychiatrists attributed his falsifications, in part, to his psychiatric disorders, the New Jersey Supreme Court found that Czmus had violated two rules of professional conduct, and his license to practice law was revoked for two years. Id.

Subsequently, the Pennsylvania Office of Disciplinary Counsel filed a petition for discipline charging Czmus with violations of Pennsylvania Rules of Profession Conduct 8.1(a) and 8.4(b)-(d). Id. at 1201. On June 5, 2001, a Hearing Committee appointed by the ODC recommended that Czmus’ license to practice law be suspended for five years, followed by a two-year probationary period. Id. at 1205. The ODC rejected the recommendation of the Hearing Committee, however, and held that Czmus’ violations “required disbarment.” Id.

The Supreme Court reviewed the ODC’s disciplinary actions and upheld Czmus’ disbarment, holding that, “we find respondent’s level of fraud, which transcended professions and jurisdictions, requires disbarment.” Czmus, 889 A.2d at 1205. Discussing the distinction between disbarment and suspension, the Court explained that disbarment is appropriate in cases of such blatant untruthfulness:

Only disbarment, which places a higher burden on respondent if he should seek readmittance, will properly protect the goals of the profession and require respondent to be totally candid to the reviewing tribunal before his readmittance will be considered. Id.

Rejecting revocation and suspension of Czmus’ license, the Pennsylvania Supreme Court held that disbarment is the best method of discipline for transgressions based upon such blatant and repeated episodes of deceit and untruthfulness.

W. Standing to Assert Claim

In Hess v. Fox Rothschild, LLP, 925 A.2d 798 (Pa. Super. Ct. 2007), appeal denied, 945 A.2d 171 (Pa. 2008), the Superior Court was asked to determine whether Plaintiffs had standing to bring a legal malpractice action against Defendant law firm based on the estate planning advice and services provided by Defendants to Plaintiffs’ deceased stepmother.
Defendant law firm was retained by the deceased, Mr. and Mrs. Rosewater, to provide estate planning services, which included drafting their wills and the creation of various trusts. Plaintiffs, who are the stepsons of Mrs. Rosewater, brought an action against Defendant law firm sounding in negligence, breach of contract, intentional breach of the covenant of good faith and fair dealing. Plaintiffs also sought punitive damages. All of Plaintiffs’ claims involved Mrs. Rosewater’s will, which established several trusts including a marital trust and a residuary trust. Plaintiffs were named as beneficiaries of the residuary trust.

Shortly after Mrs. Rosewater died, Mr. Rosewater withdrew $5 million from the marital trust. Mrs. Rosewater’s will provided that her husband had the unlimited right to withdraw as much of the principal as he wished from the marital trust during his lifetime, and provided him a testamentary power of appointment, which if not exercised, would result in the corpus remaining in the trust at his death to pass into the residuary trust and, therefore, to Plaintiffs. In their Complaint, Plaintiffs alleged that their inheritance was improperly diminished and that the withdrawal of funds from the marital trust was contrary to the testamentary wishes of Mrs. Rosewater. Defendant law firm filed preliminary objections to Plaintiffs’ Amended Complaint averring that Plaintiffs lacked standing to raise their claims, and that Plaintiffs Amended Complaint was factually deficient. Following oral argument, the trial court sustained Defendant’s preliminary objections.

The Superior Court was presented with the following issues: (1) whether a Plaintiff has standing to bring a malpractice suit against an attorney with whom they did not have an attorney-client relationship, and (2) whether Plaintiffs in Hess raised a cognizable claim sounding in negligence or contract.

In addressing the merits of Plaintiffs’ claims, the Superior Court applied the rule of Guy and its progeny, which stand for the proposition that although a Plaintiff in a legal malpractice claim must generally show an attorney-client relationship (or analogous professional relationship), persons who are legatees under a will “and who lose their intended legacy due to the negligence of the testator’s attorney should be afforded some remedy.” Hess, 925 A.2d at 806 (citing Guy v. Liederbach, 459 A.2d 744, 746, 750 (Pa. 1983)). The Supreme Court’s holding in Guy carved out a narrow class of third-party beneficiaries of the contract between the testator and the attorney who have standing to assert a legal malpractice claim. To determine whether a particular legatee is an intended third-party beneficiary our Court has established a two-part test:

(1) recognition of the beneficiary’s right must be “appropriate to effectuate the intention of the parties,” and
(2) the performance must “satisfy an obligation of the promisee to pay money to the beneficiary” or “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” The first part of the test sets forth a standing requirement. For any suit to be brought, the right to performance must be “appropriate to effectuate the intentions of the parties.”

Id. at 807 (citing Guy, 459 A.2d at 751-52).
The Superior Court recognized the class of legatees that may bring suit under the third-party beneficiary theory is narrow. Applying Guy to the case before the Superior Court, the Court stated that Mrs. Rosewater’s intentions under her will were clear and that the rule of Guy did not allow Plaintiffs to bring suit simply because they felt Mrs. Rosewater’s intent was to bequeath them a greater legacy than they received.

Thus, the Superior Court held that Plaintiffs did not have standing to bring their legal malpractice action against Plaintiffs and that the trial court properly dismissed their action.

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

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

On remand, the Superior Court considered three questions relating to the entry of non pros:

1. Where a case had been non prosed 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.

Y. Insurance Coverage as to Professional Liability Claim

In Post v. St. Paul Travelers Insurance Co., 593 F. Supp. 2d 766 (E.D. Pa. 2009), Benjamin Post, Esquire, (“Post”) was hired by Mercy Hospital in Wilkes-Barre, Pennsylvania to defend a medical malpractice case. The Plaintiffs William and Tukishia Bobbett, claimed that their four year old son had died as a result of medical malpractice while at Mercy Hospital. The Bobbetts’ attorney claimed discovery abuses against Post. Id. at 769. The case was settled, in part due to allegations against Post for improperly abusing discovery procedures. Id.

After the medical malpractice action was settled, Post was put on notice from Catholic Health East Partners that Mercy Hospital intended to sue Post. Post then retained George Bochetto (“Bochetto”) as his attorney. The Bobbetts’ attorney filed a Sanctions Petition against Post for the alleged discovery violations which took place in the medical malpractice action. Mercy Hospital effectively joined in the petition against Post. Post notified his Professional Liability Insurance carrier, St. Paul Travelers Insurance Co. (“St. Paul”) of the pending Sanctions Petition against him, and they denied him coverage. Id. It was St. Paul’s position that the Sanctions Petition only sought relief in the form of sanctions which are excluded under his Professional Liability Policy (“Policy”). Id.

Post, through Bochetto, attempted to discuss coverage responsibilities with St. Paul regarding the Sanctions Petition. St. Paul offered to pay $36,220.26 when Post had already accrued $400,000 in attorneys’ fees. Id. Post declined the offer and proceeded to file suit.

Post filed a Complaint against St. Paul alleging a breach of contract. He then filed a Motion for Partial Summary Judgment as to Count I, II and V in his Complaint. Those Counts alleged, a Breach of Contract as to the insurance policy, breach of contract as to the agreement to pay the costs of the sanctions proceeding and declaratory judgment, respectively. In analyzing Post’s Motion for Partial Summary Judgment the Court stated:

The sanctions exclusion in the Liability Policy, however, under the commonly understood definition of sanctions as discussed above, refers to sanctions motions brought by opposing counsel. This exclusion does not preclude from coverage a sanctions petition joined by a lawyer’s former client, particularly one brought in anticipation of a malpractice suit based on identical allegations of
wrongdoing. The attorney-client relationship between Post and Mercy indicates that the damages Mercy requested in the sanctions petition were actually malpractice damages, though Mercy termed them “sanctions.” As Post’s former client, the fact alleged by Mercy in the sanctions petition sound in malpractice, even though brought under a cause of action for sanctions. It is the facts in the complaint that dictate whether the exclusion in the liability policy applies, not the cause of action selected by Mercy. If the sanctions petition were excluded from coverage, Mercy could choose whether to proceed with an action where Post was covered by his insurance carrier, or an action where Post was not, and potentially be awarded similar relief in either action.

A professional liability insurance carrier should not be able to avoid coverage for what is essentially a malpractice claim simply because of how an attorney’s former client chooses to term the requested relief. Because the sanctions exclusion in the liability policy was unclear, it must be construed in favor of the insured. Therefore, the sanctions petition was not excluded from coverage under the liability policy after Mercy joined the sanctions petition and St. Paul had a duty to defend Post at that time. St. Paul breached their duty to defend Post under the Liability Policy and are therefore liable for breach of contract.

Id. at 13.

The court proceeded to Grant Post’s Motion for Partial Summary as to Count I and V, and denied relief at to Count II, with the amount of the reimbursement to be determined. Id. at 775.

Z. Consequential Damages in Breach of Contract Action Re: Civil Litigation

Coleman v. Duane Morris, LLP, 58 A. 3d 833 (Pa. Super. 2012), involved a legal malpractice claim concerning advice provided in connection with the sale of a company, and more particularly, advice the Plaintiffs received regarding whether the sale of that company would, as structured, terminate the Plaintiffs’ personal liability for unpaid taxes. The Coleman Plaintiffs complained that following the consummation of the transaction at issue, they learned that they remained personally liable for unpaid taxes, the company’s assets were plundered, and the unpaid taxes at issue were not paid until the IRS seized a bank account held in the company’s name. Id. at 835.

The Plaintiffs filed a breach of contract action against Defendant-counsel and her firm rather than one sounding in trespass for professional negligence. In the Defendants’ response to the claims brought against them, they maintained that the Plaintiffs had failed to pay for the legal services with which they were provided, and thus had no actionable damages. Id. Defendants brought a motion for judgment on the pleadings, which the trial court granted, in reliance on the Supreme Court’s decision in Bailey v. Tucker, 621 A. 2d 108 (Pa. 1993). Bailey, addressing claims of malpractice in a criminal matter, limited damages sought on a breach of contract theory
to attorneys’ fees, plus statutory interest. The Plaintiffs maintained that they were entitled to pursue their consequential damages, and the Superior Court agreed, finding that the Supreme Court’s limitation in Bailey on damages recoverable in a breach of contact malpractice action was limited to the criminal arena. Id. at 836.

The Supreme Court determined to hear an appeal of the Superior Court’s decision, as to the following issue:

Does the limitation on damages in a legal malpractice action sounding only in contract set forth in Bailey v. Tucker, 533 Pa. 237, 252, 621 A.2d 108, 115 (1993) - which limited such damages to "the amount actually paid for the services plus statutory interest" in a case involving an underlying criminal representation - apply where the underlying representation is a civil one?

68 A. 3d 328, 328 (Pa. 2013). However, we understand that the Coleman action has been resolved.