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Medical Malpractice
Case Update
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Medical Malpractice Insurer May Be Liable For Abuse of Process When (a) It Makes Substantial Settlement Offer To Parents Which Is Rejected In Case Involving Injuries To Son And (b) Then Files Petition To Remove Parents as Plaintiffs And Substitute Guardian *Ad Litem*.

In Cruz v. Princeton Ins. Co., 972 A.2d 14 (Pa. Super. 2009), the Superior Court was required to consider whether the plaintiffs adduced sufficient evidence to raise a genuine issue of material fact concerning the harm element of their claim for Abuse of Process.

In the underlying litigation, the plaintiffs secured a \$15,000,000.00 judgment in favor of their son for injuries he sustained during birth. While the appeal was pending before the Superior Court, the parties began settlement negotiations before a mediator selected by Princeton Insurance Company, the hospital's insurance company. The mediator suggested a settlement in the range of \$8 to \$10 million. Settlement discussion continued, but the plaintiffs rejected Princeton's offer to settle the case for \$7,000,000.00. Immediately thereafter, Princeton filed a petition for appointment of a guardian *ad litem* that sought to supersede the plaintiffs' authority as parents to negotiate a post-trial settlement offer that Princeton made on behalf of its insured, Northeastern Hospital. The trial court subsequently denied the Petition and the case ultimately settled for \$7,100,000.00 a week later. Two months later, the plaintiffs commenced an action for Abuse of Process against Princeton for filing the petition the appointment for a guardian *ad litem*.

The trial court granted summary judgment in favor of Princeton and the plaintiffs appealed. A panel of the Superior Court reversed the lower's court granting of summary judgment, reasoning that the evidence adduced in discovery raised a genuine issue of material fact concerning the extent to which Princeton and its counsel commenced the guardianship action for an improper purpose of forcing the plaintiffs to settle the action for less than the judgment amount. Subsequently, however, the Superior Court granted reconsideration *en banc* and a Majority of *en banc* panel rejected the rationale of the original merits panel, concluding that the evidence did not raise a question of material fact. After an appeal by the plaintiffs, the Supreme Court reversed the *en banc* panel's holding that there was no genuine issue of material fact and then directed the Superior Court to consider the harm element of an Abuse of Process claim.

On remand, the Superior Court solely considered whether the evidence of record establishes a genuine issue of material fact surrounding the plaintiffs' claim that they sustained harm as a result of Princeton's effort to impose a guardian *ad litem*. Relying on Shiner v. Moriarty, 706 A.2d 1228 (Pa. Super. 1998), the Court held that, "[i]n the absence of a need to prove physical impact or to introduce medical testimony to establish emotional harm, the plaintiffs here are at liberty to prove their claims of abuse of process by way of any admissible evidence. Such evidence will be sufficient to raise a question of material fact and thereby survive summary judgment if either direct testimony or circumstantial evidence indicates that the [plaintiffs] suffered emotional harm as a result of Princeton's filing of the guardianship petition." Id. at 19. After reviewing the record, including the plaintiffs' deposition testimony

demonstrating they were emotionally harmed, the Court concluded that the plaintiffs had adduced sufficient evidence to raise a genuine issue of material fact concerning the harm element of the plaintiffs' abuse of process claims and remanded to the trial court for disposition at a trial.

Plaintiff Claiming Lack Of Informed Consent Need Not Testify To Make Out Prima Facie Case

In Fitzpatrick v. Natter, 961 A.2d 1229 (Pa. 2008), the Supreme Court addressed whether a patient, seeking to prove a lack of informed consent claim in a medical malpractice case, may rely solely upon circumstantial evidence to demonstrate that the information that the physician allegedly failed to disclose would have been a substantial factor in the patient's decision to undergo the procedure. Specifically, the Court considered whether the substantial factor element of the claim may be established solely through the testimony of the patient's spouse. The trial court and the Superior Court answered the question in the negative. The Supreme Court reversed and held that the testimony of the patient's spouse may be sufficient to prove the substantial factor element.

The Plaintiff below, Carol Fitzpatrick, was born with multiple sclerosis ("M.S."). M.S. is an incurable condition that attacks the nerve fibers of the brain, spinal cord and eyes, resulting in progressive physical deterioration. It is often attended by multiple spasticity or flaccidity, and eventually necessitates the use of a wheelchair. Carol married Thomas Fitzpatrick when the two were in their early twenties. Carol's condition had progressed to the point where she was taking daily oral doses of Baclofen, an anti-spasticity drug. Her neurologist, Dr. Nader, suggested that she consider undergoing surgery to have a subcutaneous pump implanted that would administer Baclofen continuously and uniformly. Carol subsequently had an implant with Dr. Munz, her neurosurgeon, who performed pump implantation procedures. Carol signed two consent forms, one prior to undergoing the test for Baclofen, and a second prior to the surgery itself. Carol underwent the implantation procedure in May of 1999. Subsequently, she was diagnosed with a urinary tract infection, and following her infection, her ability to walk decreased until she ultimately became wheelchair bound. She continued to deteriorate to the point where she became paraplegic, incontinent, and wholly dependent upon Thomas for caretaking. In 1999, Thomas left his job to care for Carol full time.

The jury trial was limited to the claims of lack of informed consent and loss of consortium. Thomas testified that he and Carol made all medical decisions jointly, and that, had the risks of the surgery been fully disclosed, Carol would not have undergone that procedure. Carol did not testify. Thomas testified that, prior to the procedure, Dr. Munz did not inform him and Carol that the pump implantation might not be successful in controlling Carol's spasticity, that it might cause weakness, or that it might exacerbate her incontinence. Plaintiffs argued that the undisclosed risks of the pump implantation were loss of the ability to walk from too large a dosage of Baclofen and that the procedure may not work due to an inability to correctly calibrate the dosage.

The jury found that Dr. Munz, the neurosurgeon, failed to obtain Carol's informed consent before performing the pump implantation surgery and that the missing information would have been a substantial factor in Carol's decision whether to undergo the surgery. The jury awarded damages in the amount of \$1.5M on the informed claim and \$1.7M on the loss of consortium claim. The trial court granted judgment n.o.v. for Dr. Munz. It did so on the basis that the claim failed as a matter of law because the informed consent statute, 40 P.S. § 1301.811-A, required that the patient herself testify that the allegedly undisclosed information would have

been a substantial factor in her decision to undergo the procedure. Further, the trial court ruled that the experts proffered by the Plaintiffs on the informed consent issue, an anesthesiologist and a neurosurgeon, were not qualified to testify against the Defendant neurosurgeon. Thus, the trial court record was devoid of any expert testimony on the risks involved, how likely the risks are to occur, and the nature of the harms inherent in those risks. Thus, the trial court found that Plaintiffs did not produce sufficient expert testimony to establish the elements of an informed consent claim.

On the substantial factor issue, the Supreme Court held as follows:

The patient need not show that she would have chosen differently had she possessed the missing information, but only that the missing information would have been a substantial factor in this decision. Whether the information would have been a substantial factor is a question of fact for the jury. If there were other factors that completely dominated the patient's decision to move forward with the procedure, the jury may find the element missing.

Thomas, the husband, testified that he and Carol had a joint decision-making process. He testified that had he been informed that Carol could have lost existing function as a result of the implantation procedure, he would have advised her not to go ahead with the surgery. Thus, it was held on appeal that the jury could properly infer from this testimony that the undisclosed information would have been a substantial factor for Thomas and would also have been a substantial factor for Carol. The Court held that it was error for the trial court to hold that the substantial factor element could not be established by the testimony of Thomas, and held that the substantial factor in an informed consent claim can be established by circumstantial evidence.

With respect to the trial court's holding that expert testimony was required, this holding was affirmed, but the Supreme Court remanded the case to the Superior Court because the Superior Court did not consider whether the exclusion of expert testimony by the Trial Court on the informed consent issue was proper.

Nurse May Serve As Expert On Standard Of Care and Causation Notwithstanding Nursing Statute That Prohibits Nurse From Making Medical Diagnosis

In Freed v. Geisinger Medical Center, 971 A.2d 1202 (Pa. 2009), the Pennsylvania Supreme Court addressed whether a nurse is allowed to testify regarding the relevant nursing standard of care and causation. The Plaintiff, Roger A. Freed, filed a Complaint against Geisinger Medical Center and Health South Corporation alleging that the nursing staff of both institutions failed to meet the nursing standard of care with regard to the treatment and prevention of pressure sore wounds on an immobilized patient. During the trial, Freed presented as an expert witness Linda D. Pershall, a registered nurse, to testify regarding the relevant nursing standard of care, as well as causation. During direct examination, when Freed's counsel asked Pershall her opinion as to the cause of Freed's bedsore, Geisinger objected and the trial court sustained the objection on the basis that Pershall was not a medical doctor and therefore not qualified to give a medical diagnosis. Subsequently, the trial court granted a nonsuit because Freed failed to present a *prima facie* case of negligence by not offering competent evidence of a causal connection between the alleged breach of the nursing standard of care and the development or worsening of Freed's pressure wounds.

In its Opinion written pursuant to Pa. R.A.P. 1925(A), the trial court held that Pershall was not qualified to offer an opinion as to the cause of Freed's pressure wounds because an opinion regarding the specific cause and identity of an individual's medical condition constitutes a medical diagnosis which a nurse is prohibited from making under the Professional Nursing Law, 63 P.S. § 211 *et seq.* The statute states that the practice of nursing "...shall not be deemed to include acts of medical diagnosis..." The Supreme Court rejected this analysis holding that Pershall was competent to provide expert testimony on both the standard of nursing care and the issue of causation. The thrust of the argument to preclude Pershall's testimony was the decision by the Supreme Court in Flanagan v. Labe, 690 A.2d 183 (Pa. 1997) which precluded a nurse from testifying not because she did not possess specialized knowledge regarding the cause of the Plaintiff's condition, but rather because the "normal test of competency is constrained by a statutory provision limiting the deemed competency of nurses." *Id.* 185. The Supreme Court held that the decision in Flanagan, to the extent it prohibits an otherwise competent and properly qualified nurse from giving expert opinion testimony in a Court of law regarding medical causation is flawed and must be overturned.

The Flanagan decision was based on 63 P.S. § 212 of the Professional Nursing Law which permits nurses to diagnose human responses to health problems but expressly prohibits them from providing a "medical diagnosis." In overruling Flanagan, the Supreme Court noted that "... it is in the context of the practice of nursing in which a nurse is precluded from making a medical diagnosis. Expert testimony offered in a Court of law does not implicate a nursing regimen; there is no patient under treatment, no actual or potential health problem, no diagnosis or treatment, and no care is affected. Rather, the expert is merely offering to opine on past events or hypotheticals with respect to a case before the Court." Moreover, the Court noted there is no language in the Professional Nursing Law to suggest that the principles governing the actual practice of nursing are applicable to the distinct legal arena of malpractice, which is governed by the Rules of Evidence or the Rules of Civil Procedure. Further, the Court noted there is nothing in the MCARE statute, which made substantial changes in the requirements for a

qualified expert witness in medical professional liability actions, that expressly prohibits a nurse acting as an expert on standard of care and causation issues.

Provider Doctor Not Entitled To § 605 Coverage When Doctor Left Pennsylvania In June 1989 And Failed To Purchase Tail Coverage To Cover A Claim Which Arose During The Policy Period But Not Made Or Reported Until After The Policy Period Terminated

In Gingerlowski v. Commonwealth of Pennsylvania, Insurance Department, 961 A.2d 237 (Pa. Comm. Ct. 2008), the Court addressed whether the MCARE Fund was required by Section 605 of the former Healthcare Service Malpractice Act to defend and indemnify a Provider in a pending medical malpractice action against Provider in Lackawanna County. While this case was decided under the Malpractice Act found at 40 P.S. § 1301.605, which was repealed and replaced by 40 P.S. § 1303.101-1303.901, the new statute, known as the MCARE Act, has replaced the old § 605 with similar language as set forth in 40 P.S. § 1303.715.

The Provider failed to purchase a reporting endorsement, commonly known as “tail” coverage, or its substantial equivalent, following his cancellation of his primary professional liability “claims made” policy in July 1989. Further, Provider did not pay to the CAT Fund, or its successor MCARE Fund, a surcharge since July 1989. Thus, the Fund claimed that it was not obligated under Section 605 of the Malpractice Act to provide indemnification and defense for a claim reported after Provider’s cancellation of his claims made primary coverage.

The underlying claim arose out of the birth of the Patient on December 20, 1986 at Community Medical Center in Scranton. While hospitalized at CMC, Patient came under Provider’s care until December 22, 1986. Following her birth, Provider performed routine tests on Patient’s hips and performed a number of examinations on patient’s hips. In June 1999 Patient came under the care of a new pediatrician who diagnosed a congenital hip dislocation requiring several surgeries and extensive physical therapy. Patient claimed a delay in the diagnosis increased the risk of harm and initiated a medical malpractice claim in April 1994. Provider notified the Fund of the claim pursuant to Section 605.

The Fund argued that the Provider was not eligible for Section 605 coverage because he did not purchase the required tail coverage on the cancellation of his claims made policy in July 1989, and because Provider did not pay a Fund surcharge since 1989.

The Court noted that a claims made policy covers claims made or reported during the policy period and excludes coverage for claims reported subsequent to the termination of the policy even when such claims resulted from occurrences during the policy period. The policy purchased by Provider did state that, upon termination, Provider could purchase, upon payment of an additional premium, an endorsement providing coverage for claims which occurred during the policy period, but not reported until after the policy period.

Section 605 allows a primary insurer to request the Fund to provide first dollar indemnity and cost to defense where: the claim arose more than four years after the tort or breach of contract; and the claim was filed within the applicable statute of limitations. See Former 40 P.S. § 1301.605. However, Provider needs to maintain basic insurance coverage in order for the Fund to provide coverage under Section 605. To maintain basic insurance coverage on cancellation of the claims made policy, Fund regulations require the purchase of tail coverage or its substantial equivalent. 31 Pa. Code § 242.2, et seq. Provider argued that, because the Fund failed to give

Provider sufficient notice that he needed to purchase tail coverage, there were issues of fact and thus, the Fund was not entitled to summary judgment. However, the very terms of the insurance policy purchased by Provider made specific reference to the need to purchase tail coverage upon termination or cancellation of the policy, and thus, the Court found that notice was provided, and summary judgment in favor of the Fund was granted.

Supreme Court Formally Adopts “General-Verdict Rule.”

In Halper v. Jewish Family & Children’s Service of Greater Philadelphia, 963 A.2d 1282 (Pa. 2009), the adoptive parents of son diagnosed with schizophrenia filed an action against an adoption agency, alleging two theories of negligence. First, the parents alleged “wrongful adoption,” i.e., the adoption agency failed to notify them of the birth mother’s mental history. Second, the parents asserted that the adoption agency negligently misfiled the birth mother’s medical information, thus prohibiting the parents from discovering it and preventing the son from receiving psychiatric care. The adopted son also filed his own action which mirrored the parents’ second “failure to disclose” theory. The jury returned a general verdict finding the adoption agency negligent. The jury was not asked to differentiate between the “wrongful adoption” and “failure to disclose” theories. The jury awarded the parents \$225,000.00 and the son \$75,000.00. The parents and the defendant appealed.

On appeal, the Superior Court stated that the verdict was “too muddled to be legally supported.” Id. at 1284. The Superior Court found the verdict problematic because the son was only able to recover under the second “failure to disclose” theory and the verdict failed to breakdown the jury’s decision. Accordingly, the Superior Court reversed the judgment and remanded for a new trial concerning the son’s claim, limited to the issue of negligent failure to disclose.

Both the parents and son appealed to the Supreme Court. In its decision, the Supreme Court stated:

Here, the jury awarded the Halpers \$225,000 and David \$75,000. At trial, neither the Agency nor the Halpers requested a special verdict slip or interrogatories to determine on what issues the jury awarded damages. Clearly, there is a discrepancy in the amount of damages awarded; however, because a general verdict was returned and the evidence supported one of the Halpers’ theories, the verdict must stand. Therefore, we adopt and apply the “general-verdict rule” here because we will not shift the burden to the Halpers due to the Agency’s failure to request a special verdict slip, and the evidence was clearly sufficient to support at least one of the Halpers’ two theories of liability.

Id. at 1289.

**Medical Expenses Paid By An ERISA Plan Are Recoverable In
Personal Injury Action And Expert Evidence Was Required
To Prove The Plaintiff's Future Wage Loss Claims
Under § 510 Of The MCARE Statute**

In Hartenstine v. Daneshdoost, 4 Pa. D. & C.5th 282 (Lehigh Cty. 2008), the plaintiff filed a medical malpractice action against the physician who performed three spinal surgeries on the plaintiff. In her complaint, the plaintiff alleged claims based on negligence and lack of informed consent. The defendant moved for partial summary judgment on the grounds that, inter alia, the claims for medical expenses and future loss of income should be dismissed because they were precluded by law.

The Court held that medical expenses already paid by a private or public benefit or gratuity are not recoverable under MCARE. See 40 P.S. § 1303.508(a). The Court, however, noted there was an exception to this rule for public benefits paid or payable under a program that provides for a right of subrogation. See 40 P.S. § 1303.508(d)(4). Because Medicare, which paid some of plaintiff's bills, is such a federal program, the Court found that plaintiff was not precluded from recovering such benefits under MCARE and, therefore, denied the defendant's motion for summary judgment on this ground.

Similarly, the Court also stated that payments made under an ERISA plan also are governed by federal law that superseded MCARE. In this case, the plaintiff argued that she was covered by a medical plan maintained by Northampton County for its employees, which was called by its administrator an ERISA plan, which, therefore, entitled her to recovery. However, the Court reserved judgment on the issue of whether a government plan, for which the county government was ultimately responsible, was governed by ERISA until the time of trial.

The Court also granted summary judgment in favor of the defendant on the plaintiff's claims for future wage loss because the plaintiff did not provide any expert evidence that the plaintiff was unable to perform her employment duties in the future. The Court further stated that summary judgment was proper because the plaintiff failed to provide any evidence to allow the jury to reduce a claim for future wage loss to present value as required by section 510 of the MCARE Act. See 40 P.S. § 1303.510.

Court Addresses Multiple Issues Including Exclusion Of Settling Defendants From Verdict Slip, Admission of Expert Testimony Re: Standard of Care, Jury Instruction On “Irrelevant Considerations,” Use Of Learned Treatise, Statements Made During Closing Argument, Remittur Of Jury Verdict, And Jury Charge Of Corporate Negligence

In Hycza v. West Penn Allegheny Health System, Nos. 135 WDA 2008, 136 WDA 2008, 2009 WL 1877500 (Pa. Super. July 1, 2009), the Superior Court addresses the following issues on appeal: (1) the exclusion of the settling defendants from the courtroom and refusing to place their names on the verdict slip; (2) the qualifications for an expert under MCARE; (3) a jury charge on irrelevant considerations; (4) the use of a learned treatise on direct examination; (5) statements made during closing argument; (6) remittur of a jury verdict; and (7) a jury charge on corporate negligence.

The plaintiff’s estate brought a medical malpractice action against numerous defendants, including Drs. Yvette C. Ross Hebron, Hillary A. Stroud, Bruce E. Conway, Jonathan E. Artz, and Hassan Hassori, and their respective practice groups, for the alleged failure to diagnose and treat massive gastrointestinal bleeding after the plaintiff died following successful hip surgery.

Prior to trial, the plaintiff settled with one of the hospitals, Drs. Stroud, Conway, and Artz, as well as their practice groups. The plaintiff proceeded to trial against Dr. Hebron and her practice group, ChoiceCare Physicians, P.C. A jury awarded the plaintiff’s estate \$5.4 million on the wrongful death claim and \$1.8 million on the survival claim. Both Dr. Hebron and ChoiceCare filed post-trial motions, which were denied, and then filed a Notice of Appeal.

On appeal, the Superior Court rejected all of the Defendants’ arguments and affirmed the lower court’s ruling. The Court first concluded that the lower’s court decision to exclude the settling defendants was proper because the evidence failed to show that any of the settling defendants failed to take appropriate and/or corrective action.

The Court next concluded that the trial court was within its discretion to allow the testimony of the plaintiff’s expert, a professor at the University of Colorado who teaches neurology, because the expert demonstrated he was adequately trained and familiar with the applicable standard of care to render an opinion even though the treatment or diagnosis of a multiple sclerosis patient undergoing rehabilitation was outside his specialty. Additionally, the Superior Court found any error on this issue to be harmless.

The Court also addressed whether the trial court’s issuance of the “irrelevant considerations” charge constituted reversible error. At trial, the lower court issued a charge virtually verbatim to the following:

A medical malpractice case is a civil action for damages and nothing more. The sole issue is whether the plaintiff has suffered injuries as the result of the defendant’s negligence, and is thus entitled to monetary compensation for those injuries. The case does not involve punishment of the defendant, or even criticism of his professional abilities, beyond the facts of this matter. The

claim does not involve the defendant's reputation, his medical practice or his rights as a licensed physician. Therefore, no thought should be given to irrelevant considerations in reaching a verdict in the case.

Id. at *9 (citing Levine v. Rosen, 616 A.2d 623 (Pa. 1992)).

The Court rejected the defendant's argument that the charge was inaccurate and misleading, and found that the trial court's charge on "irrelevant considerations" was proper and in accordance with the Supreme Court's holding in Levine.

The Superior Court next addressed the plaintiff's counsel's use of a treatise during direct examination of its expert. The Court held that it was not reversible error for the trial court to allow the use of the treatise because it was used for a limited purpose and the medical principle discussed via the treatise was undisputed by the defendants.

The Court was also asked to decide whether certain statements made during closing argument were prejudicial. At trial, the plaintiff's counsel made statements such as doctors "help each other out when they're in a jam," and the defendant would "let a 60-year old woman die again" were prejudicial. The Court concluded that these statements were not prejudicial because there was evidence in the record to support the statements.

The Court next determined that the jury's award was reasonable and did not "shock the conscience." Accordingly, the Superior Court found no error in the trial court's refusal to reduce the verdict.

And finally, the Court concluded that the trial court was correct in charging the jury on corporate negligence because the evidence showed that ChoiceCare was responsible for the coordination and management of all patients in the rehabilitation unit at the hospital and it failed to deliver the comprehensive care it was contractually obligated to provide the plaintiff.

Summary Judgment Granted To Hospital Based On Lack Of Ostensible Agency

In Kuhn v. Maxwell, 6 Pa. D. & C. 5th 106 (Adams County 2008), the Adams County Court of Common Pleas addressed a Motion for Summary Judgment filed by a hospital challenging allegations of vicarious liability.

The plaintiff appeared in the emergency room at Gettysburg Hospital on May 23, 2004 complaining of chest pain, heartburn and symptoms of epigastric bloating. A number of medical tests were conducted which revealed that the plaintiff suffered from a large central hiatal hernia. Thereafter, the plaintiff was referred to a physician at Gettysburg Surgical Associates, Inc. The hospital's emergency department patient instruction form instructed the plaintiff to return to the emergency department if required and to call a physician at Gettysburg Surgical Associates, Inc. The patient was then released from the hospital emergency department.

The patient was seen by physicians at Gettysburg Surgical Associates, Inc. and on November 30, 2004 the patient was admitted to the hospital under the care of one of the doctors for surgery to address his hiatal hernia. Following the patient's discharge from the hospital on December 2, 2004, she again visited the emergency department at the hospital on February 18, 2005 complaining of chest pain and nausea. X-rays revealed a large hiatal hernia and a subsequent surgery was performed at the hospital on February 24, 2005. Several days later, the patient appeared at the offices of Gettysburg Surgical Associates, Inc. and she was readmitted to the hospital to rule out a surgical leak. The patient then returned to his physician's office complaining of difficulty swallowing and was thereafter readmitted to the hospital for dysphasia, abdominal pain and weight loss. The patient alleged malpractice against two physicians of Gettysburg Surgical Associates, Inc. and brought suit against the hospital under a claim of vicarious liability.

The Common Pleas Court granted the hospital's motion for summary judgment and found that neither physician of Gettysburg Surgical Associates, Inc. was an employee of the hospital regardless of their staff privileges at the hospital.

Further, the Common Pleas Court stated that the question of whether an ostensible agency relationship exists is examined under an objective standard to determine whether the patient's belief of being treated by the hospital or its employees is reasonable. Thus, the focus is not on the patient's subjective belief, but whether her belief is reasonable under the circumstances presented to her.

In this case, the patient argued that her belief was reasonable based upon the fact that the hospital made the referral to a specific surgeon or association of surgeons and that the two surgical procedures she complained about were conducted by surgeons at the hospital pursuant to their staff privileges. The court found that the patient was unable to objectively establish her belief that the physicians were agents of the hospital were reasonable. The court stated that MCARE Act clearly states that the holding of staff privileges alone is insufficient to establish ostensible agency and that the survival of a claim against the hospital requires a greater showing on the part of the patient. 40 P.S. § 1303.516(b).

The court concluded that the hospital did nothing more than “competently render emergency service” to the patient and refer her for further treatment to an independent physician.

- (a) Doctor's Negligence Constituted Single Occurrence Pursuant To MCARE Act, And Thus MCARE Liability Is Limited To \$1 Million, Not \$2 Million.**
- (b) Patient, As Assignee, And Not Prevailing Party, Can Seek Indemnity From MCARE Fund For Unpaid Delay Damages And Post Judgment Interest.**

In Linney-Lindstrom, et al. v. MCARE Fund, 970 A.2d 1206 (Pa. Cmwlth. Ct. 2009), patient filed an action in Commonwealth Court seeking a declaration that the MCARE Fund was required to pay a second \$1,000,000 for two occurrences of medical malpractice and unpaid delay damages and post judgment interest on a federal district court verdict award of \$13,150,000.00. The underlying injuries giving rise to this lawsuit involved the doctor's failure to diagnose patient's chorioamnionitis infection prior to the birth of twins. The parent of the twins filed a medical malpractice action against the treating doctor in federal court and the MCARE Fund defended the treating physician.

Patient filed a motion to mold the verdict to include delay damages and the physician filed post-trial motions. Thereafter, the parties entered into a settlement agreement, assignment of certain rights and a provisional full and final release. Further, the treating physician assigned to the patient his right to litigate whether the MCARE Fund was required to pay a second \$1,000,000.00 for two occurrences of medical malpractice in addition to unpaid delay damages

Subsequent to the federal court's approval of the agreement, the MCARE Fund made the single \$1,000,000.00 payment, plus delay damages and post judgment interest on that amount, and the patient thereupon filed a petition seeking a declaratory judgment against the MCARE Fund.

On the first question, the MCARE Fund's motion for summary judgment was granted. The Court found that the doctor's failure to promptly perform an amniocentesis, or to consult a specialist to determine whether a chorioamnionitis infection was present in a patient carrying twins, constituted a single occurrence under Section 715(b) of the MCARE Act.

MCARE argued that, because it already paid delay damages and post-judgment interest to the plaintiff on its \$1 million coverage, it had no obligation to make any remaining payments to the plaintiff. However, following the underlying trial, the defendant physician had assigned his right to seek indemnity from MCARE for the unpaid delay damages and post-judgment interest imposed on him by the Court to the parent. The Court held that, because the parent came to the court as an assignee of the defendant physician rather than as the prevailing plaintiff, the parent was not barred by section 714(h) and could seek indemnity from MCARE under common law.

Appellant Provided A Reasonable Excuse For Failing To Timely File A Certificate Of Merit

In Sabo, Individually and as Personal Representative of the Estate of Helen P. Altieri, Deceased v. Worrall, III, M.D., et al. 959 A.2d 347 (Pa.Super. 2008), the Superior Court of Pennsylvania reversed the Common Pleas Court's judgment of non pros and held that the Plaintiff's attorney's failure to timely file a Certificate of Merit was due to reasonable, inadvertent mistake or oversight.

On June 16, 2006, Plaintiff filed a complaint seeking damages for the wrongful death of Helen P. Altieri due to the alleged medical malpractice of Defendants. Due to the Plaintiff's failure to file a Certificate of Merit within sixty (60) days after the filing of the complaint pursuant to Pa. R.C.P. 1042.3, the Defendants filed a Praecipe for the Entry of a Judgment of Non Pros on August 17, 2006. The trial court thereafter entered a judgment of non pros.

On September 12, 2006, Plaintiff filed a Petition to Open the Judgment of Non Pros. In the petition, the Plaintiff claimed that their expert had authored a report dated February 27, 2006 stating that the care and treatment by the Defendants fell below the standard of medical care owed to the decedent and caused her harm. In the petition to open judgment, Plaintiff's counsel also filed an affidavit that attested that a Certificate of Merit had been obtained days after filing the complaint and that he believed that the Certificate of Merit had been filed in the prothonotary's office by his paralegal. Notwithstanding these averments, the trial court refused to open the judgment.

The Superior court reversed the trial court's decision and noted that unlike in Womer v. Hilliker, 589 Pa. 256, 908 A.2d 269 (2006), the Plaintiff in this case did in fact prepare a Certificate of Merit and that the failure to file it was an inadvertent mistake by counsel's paralegal. The trial court's reliance on Womack, supra., was found unpersuasive because the plaintiff in Womack, supra. attempted to persuade the court that the submission of an expert report to opposing counsel "substantially complied with Pa. R.C.P. 1042.3." Here, that was not the case since the untimely filing was not impeded by any intent to substitute an alternative document for a Certificate of Merit under the guise of the Rules of Civil Procedure. Thus, the already prepared Certificate of Merit would have been timely submitted but for the paralegal's failure to file it with the Prothonotary.

The Superior Court held that the trial court abused its discretion in finding that the Plaintiff did not provide a reasonable excuse for failing to timely file a Certificate of Merit under Pa. R.C.P. 3051.

DPW Has A Lien On Medical Expenses Paid To Minor, Even Where Statute Of Limitations On Parents' Claims For Such Expenses Has Expired

In Shaffer-Doan v. Commonwealth of Pennsylvania, Department of Public Welfare, 960 A.2d 500 (Pa. Super. 2008), DPW asked the Court to order the payment of DPW's lien in the amount of \$47,392.01 for monies it expended for the care of a minor who recovered funds in connection with a medical malpractice claim. The underlying action was brought by Ayden Shaffer-Doan, a minor, by his parents, against doctors at a medical hospital who were allegedly negligent in the detection and treatment of seizures that the minor was suffering from, resulting in expensive and permanent brain damage.

On 1/20/07 DPW asserted a claim of reimbursement for expenses paid pursuant to the Medicaid program. Ten days later, the trial court granted Defendants' Motion for Partial Summary Judgment as to all claims brought on behalf of the parents in their own right based upon the parents' failure to bring their claim within the prescribed two years statute of limitations. Subsequently, a settlement was reached in the amount of \$14.8M. Counsel for Plaintiffs advised counsel for DPW that, because parents did not recover for any medical care, Plaintiffs would not pay the lien to DPW for past medical expenses. Plaintiffs filed a Petition for Declaratory Judgment in the Commonwealth Court seeking a declaration that DPW may not assert a lien in the amount of \$47,392.01. Plaintiffs' position was premised on the principle that only parents can recover for a minor's medical expenses and that, since DPW's lien is for only a minor's medical expenses, DPW is precluded from recovering.

The Court noted that the overarching purpose of the Fraud and Abuse Control Act (FACA), 62 P.S. §§ 1404, 1409, is to authorize DPW to obtain compensation from third parties for benefits DPW paid on behalf of a person injured by third parties. The Social Security Act, 42 U.S.C. §§ 1396-1396U, requires that the states, as a condition for receipt of continued federal funding, must vigorously seek reimbursement from third parties liable for causing injuries to Medicaid recipients. Under FACA, DPW can recover Medicaid payments either by commencing an action against a third party and/or its insurer or by intervening during the pendency of a beneficiary's civil action.

Plaintiffs relied on Bowmaster v. Clair, 933 A.2d 86 (Pa. Super. 2007), petition for allowance of appeal granted, 959 A.2d 900 (Pa. 2008), where the Superior Court reversed an Order granting reimbursement to DPW in satisfaction of DPW's subrogation lien because the parents' claim for medical expenses was time barred in that it was filed more than two years after the expiration of the statute of limitations. The Court in Bowmaster noted that there were two distinct causes of action arising out of a minor's injury; one for the minor's parents and one for the minor. Among the items the parents can recover are medical expenditures made by the parents on the minor's behalf during the child's minority; medical expenses post-majority are recoverable only by the minor.

The Commonwealth Court noted the absence in Bowmaster of any meaningful discussion of FACA, and in particular any effort to give effect to provisions of this statute. The Commonwealth Court, in construing the term "beneficiary," under 62 P.S. § 1409(b)(13), held that the beneficiary of DPW's payment of medical expenses is a child who receives the medical

care while the underlying liability issues with the tortfeasor are sorted out through the legal system. In construing the term "beneficiary" the Court noted that the statute should be construed to favor the public interest over private interest, 1 Pa. C.S. § 1922(5), and the public interest is certainly protected more by requiring tortfeasors, not taxpayers, to pay for the negligent acts of those tortfeasors. Thus, the Court ultimately concluded that a minor is not prevented from seeking medical expenses incurred while he is a minor, so as to enable DPW to recover its lien for monies it has expended, as long as such claim is not duplicated by the parents. Because there were issues with respect to the sufficiency of notice under FACA that Plaintiffs provided to DPW, the Commonwealth Court remanded the case for a hearing and declined to enter summary judgment in favor of DPW.

Hospital May Be Vicariously Liable For Negligence Of Nurses Even When They Are Not Specifically Identified By Name During Trial

In Small v. Temple University Hospital, 8 Pa. D. &C. 5th 61 (Philadelphia County 2008), the court addressed whether a hospital can be vicariously liable for nurses and staff not specifically identified by name in the complaint and not specifically identified by name during trial. Small, while a patient at Temple University Hospital, suffocated because of a mucous plug at the tip of a breathing tube. The testimony revealed that the failure of the nurses and respiratory therapists or other employees of the hospital to perform regular, routine, or repeated suctioning of Small's breathing tube over a period of several hours resulted in mucous build-up. Further, failure of hospital employees and agents to communicate to the physicians about the patient's known breathing difficulties prevented timely medical monitoring, resulting in patient's death. Following a verdict for the Estate of Small, the hospital filed post trial motions raising multiple issues. As to whether post trial relief was appropriate due to the fact that the Plaintiff did not identify by name, those individuals at the hospital who were negligent in not monitoring the patient, the Court held as follows:

Contrary to the assertions made in the defendant's post-trial memorandum, the fact that the family members and trial witnesses knew the name of only one nurse, Tishany Parker, assigned to provide care to Rufus Small, does not relieve Temple Hospital from liability due to negligence of other unnamed staff employees.

Id. at 72.

Plaintiff States A Cognizable Cause Of Action For Medical Malpractice Against General Practitioner With Whom She Engaged In Sexual Relationship

In Thierfelder v. Wolfert, M.D., et al., 2009 WL 1383790 (Pa. Super., 5/19/09), the Superior Court addressed the question of whether a general practitioner rendering psychological care to a patient can be held negligent for engaging in a sexual relationship with a patient where the patient's emotional and psychological symptoms worsen as a result of the relationship. The Court reversed the trial court's grant of Defendant's Preliminary Objections dismissing the claim of medical negligence against doctor.

Both Mr. and Mrs. Thierfelder began treating with Dr. Wolfert, a family physician, in 1997. Mrs. Thierfelder presented with and was treated by Dr. Wolfert for depression, anxiety and marital problems. Dr. Wolfert prescribed various anti-depressant medications to Mrs. Thierfelder. According to the Third Amended complaint filed in the case by the husband and wife plaintiffs, Dr. Wolfert and Mrs. Thierfelder began a sexual relationship in the Spring of 2002 that lasted until January 2003. In March 2003, Mrs. Thierfelder confessed to her husband about the relationship, and the couple then filed a lawsuit against Dr. Thierfelder. The Defendants filed Preliminary Objections to the third amended complaint and the trial court granted the Preliminary Objections based upon the holding set forth in Long v. Ostroff, 854 A.2d 524 (Pa.Super. 2004) whereby "a general practitioner's duty of care does not prohibit an extramarital affair with a patient's spouse."

In reversing the trial court, the Superior Court refused to extend the holding in Long, *supra.*, to the facts of this case. While noting that the court in Long, *supra.*, found no cognizable cause of action in a lawsuit brought by husband, who was not the patient, based upon the wife's extramarital affair with the defendant doctor, the Superior Court stated that the foreseeable harm is much greater in cases where the plaintiff is the actual person with whom the doctor had the affair. In this case, the wife was being treated by the doctor for emotional and psychological problems and the allegation was that the sexual relationship between her and the doctor was detrimental to her emotional well being.

The Superior Court held that when a physician is providing a specific treatment for psychological problems, and has a sexual relationship with the patient and the sexual relationship directly causes the patient's psychological/emotional symptoms to worsen, the patient has a cognizable cause of action for malpractice.

a. Agreement Not To Execute Against Doctor’s Assets Does Not Release Doctor’s MCARE Coverage Or Doctor’s Principal

b. Doctor Not Entitled To “Error In Judgment Charge”

Tindall v. Friedman, 970 A.2d 1159 (Pa. Super. 2009) involved a medical malpractice action where a patient and his wife made claims against a family doctor, a radiologist, and a medical imaging provider, claiming that these Defendants were negligent in failing to promptly diagnose a cancerous tumor on patient's knee. The jury returned a verdict in the amount of \$2,500,000.00 in favor of Mr. Tindall, and in the amount of \$1,000,000.00 on the loss of consortium claim of Mrs. Tindall. Post trial motions were filed.

Mr. Tindall went to see his family doctor, Dr. Friedman, in April of 1997 because of problems with his left knee. Dr. Friedman sent Mr. Tindall for an X-ray which reflected a strain, but the radiologist also indicated that the X-ray revealed the existence of an abnormality on the outside of the left knee and that this abnormality could be classified as either a hematoma which is a benign condition or a neoplasm which is an abnormal growth of cells and which can consist of cancerous cells. Subsequently, Dr. Friedman ordered an MRI from Jefferson Imaging and specifically noted that the MRI was to be conducted to determine whether the abnormality was a calcified hematoma or a neoplasm. Dr. Schweitzer, the radiologist, interpreted the MRI in April of 1997, and his report made no reference to cancer. Dr. Schweitzer stated at trial that he did not receive Dr. Friedman's written instructions with respect to the purpose of the MRI, i.e. was the abnormality a calcified hematoma or a neoplasm. In April of 1999, Mr. Tindall reported to Dr. Friedman with more frequent pain in the left knee, as well as continued locking and swelling. In August of 1999, Mr. Tindall was diagnosed with bone cancer. Due to the delay, Mr. Tindall's cancer increased in size and was considered to be a more aggressive high grade cancer as opposed to the cancer which existed as of April, 1997. At the time of trial, Mr. Tindall was cancer free but had a significantly increased risk of reoccurrence, metastasis and death than he would have had if the condition had been diagnosed in 1997. He was rendered sterile due to the chemotherapy. If Mr. Tindall had been diagnosed in April of 1997, he would have been treated with surgery alone, had an excellent prognosis for a cure and had an extremely low chance of reoccurrence of metastasis.

Prior to submission of the case to the jury, in exchange for the \$400,000.00 limit of Dr. Schweitzer's primary medical malpractice insurance, the Tindalls agreed not to execute against Dr. Schweitzer's personal assets. The Release, as stated on the record, provided, inter alia, as follows:

“My clients are not releasing Dr. Schweitzer nor are they agreeing to indemnify or hold him harmless with respect to any claims that may be pursued against him by the other defendants.

My clients are not waiving any right to continue this case against any defendant in this case or to collect any primary policies, excess policies of any defendant in this case.”

Even though Dr. Schweitzer's personal assets were immune, Dr. Schweitzer still had an additional \$800,000.00 in coverage pursuant to MCARE.

The trial court entered judgment n.o.v. in favor of Jefferson Imaging premised on the finding by the trial court that Dr. Schweitzer had been released during the course of the trial. Since Dr. Schweitzer had been released, the trial court held that Jefferson Imaging, as his principal, also was released.

The Superior Court reversed and held that the agreement not to execute against the personal assets of Dr. Schweitzer was a partial release, and the Tindalls thus did not give up or abandon their claim against Dr. Schweitzer or his principal, Jefferson Imaging. The Court further noted that the settlement agreement did not "effectively terminate" the claim against Dr. Schweitzer because MCARE coverage was still available to the Tindalls up to \$800,000.00 if they established Dr. Schweitzer's culpability at trial. Moreover, the agreement recited on the record specifically stated that Dr. Schweitzer was not released and included a reservation of the Tindalls' right to pursue MCARE coverage.

Dr. Friedman, the family doctor, also alleged error concerning jury instructions. He complained about the fact that the trial court refused to give an "error in judgment" charge to instruct the jury that a doctor is not a guarantor of success, and to inform the fact finder that an unsuccessful outcome of a Plaintiff's treatment does not, by itself, establish a lack of due care by the physician was error. In rejecting this contention, the Court noted the proposed Standard Civil Jury Instructions, since at least 1981, have not contained a reference to the error in judgment instruction. The note to 10.03A specifically states that "error in judgment" and its exceptions are not included in the charge because "the principles contained therein are adequately covered by the charge on the professional standard of care." Pa. S.S.J.I. (Civ.) 10.03A, Subcommittee Note (2003). The Court reviewed the trial court's instructions and held they were sufficient to cover the concepts that a doctor is not liable for a mere error in judgment, he is not a guarantor of treatment, and that a poor outcome does not establish malpractice.

Pennsylvania Supreme Court Reaffirms Discovery Rule In Malpractice Case Such That Awareness Of Injury And Its Cause Must Be Present To Commence Running Of The Statute of Limitations

Wilson v. El-Daief, M.D., et al., 964 A.2d 354 (Pa. 2009), involved a medical practice action against a surgeon and a hospital where the patient alleged negligence in connection with surgical procedures performed on her wrist and hand. The Common Pleas Court awarded summary judgment to defendants holding that the patient failed to file suit within the applicable two year limitations period. The Superior Court affirmed the Common Pleas Court's decision and the Supreme Court of Pennsylvania reversed and remanded.

In October 2003, the patient filed a Writ of Summons against the defendants. The ensuing complaint alleged that Dr. El-Daief negligently lacerated the radial nerve in the patient's wrist during surgeries in May and August 2000. The patient admitted that she began experiencing excruciating pain at the incision point of the surgery immediately after the second surgery on August 4, 2000. In addition, the patient testified that she believed "something wasn't right" and that the defendants, as of September 24, 2001, had not taken proper care of her.

The Common Pleas Court concluded that the discovery rule did not apply to toll the running of the statute of limitations because once the patient became aware of the injury, and who occasioned it, she was under a duty to investigate the matter and commence a cause of action. The Superior Court affirmed the Common Pleas Court's decision granting summary judgment to defendants and held that the severe pain, clubbing, and contraction experienced by the patient was sufficient to place her on notice of a surgical injury in addition to her own conclusion that as of September 24, 2001 her physician had not taken proper care of her. The Superior Court found that, given her symptoms, there could be no doubt in her mind that she suffered an injury and that the injury had occurred at the time of the second surgery performed by Dr. El-Daief in August 2000. The majority rejected the argument that a definitive diagnosis is essential to the commencement of the limitations period.

The Supreme Court of Pennsylvania heard the appeal to assess the consistency of the Superior Court's decision with the Fine v. Checcio, 870 A.2d 850 (Pa. 2005), and Caro v. Glah, 867 A.2d 531 (Pa. Super. 2004) decisions. The Supreme Court reversed the Superior Court's decision and reaffirmed the holding in Fine, *supra*.

The Supreme Court acknowledged that the parties at least agreed that under the discovery rule, the applicable limitations period commences when the patient learns that she has an injury and its cause. The dispute between the parties is the degree of knowledge of the cause (actual or constructive) necessary to commence the running of the limitations period.

The Supreme Court stated that the baseline legal standards for the analysis are set forth in Fine, *supra*., which reflects the general rule that a cause of action accrues when an injury is inflicted, and that in certain cases involving latent injury, or where the causal connection between an injury and another's conduct is not apparent, the discovery rule may operate to toll the statute of limitations until the plaintiff discovers, or reasonably should discover, that she has been injured and that her injury has been caused by another's conduct. The Supreme Court concluded plaintiff's notice of injury and cause are questions for the jury.

While the patient concluded (by September 24, 2001) that Dr. El-Daief had not taken proper care of her, the Supreme Court found that the patient's statement did not unambiguously establish notice of injury and cause in light of other testimony. Notably, the patient also testified that she first learned that Dr. El-Daief might have done something wrong in surgery within months of the filing of her complaint.