MEDICAL MALPRACTICE

CASE UPDATE

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SUMMARY OF CASES

Plaintiff's Petition to Open, Following the Failure to File a Timely Certificate of Merit, Passes Three Step Test for Relief According to Pa.R.C.P. 3051

In Aranda v. Amrick, 987 A.2d 727 (Pa. Super. 2009), the Superior Court of Pennsylvania addressed the appeal by Susan Yacovelli, administratrix of the estate of Christopher Aranda, of the order filed by the Court of Common Pleas denying her motion to open a judgment of non pros in the wrongful death case against Dr. Ponnathpur.

The plaintiff brought a professional liability suit against Dr. Ponnathpur. The plaintiff was required to submit a certificate of merit for Dr. Ponnathpur within 60 days of the complaint. A certificate of merit was not submitted within the 60 days. Dr. Ponnathpur filed a praecipe for entry of judgment of non pros and judgment was entered. The plaintiff then filed a Petition to Open/Strike Judgment of Non Pros and to permit the filing of a certificate of merit for Dr. Ponnathpur. The trial court denied the petition to open.

The plaintiff appealed the trial court's denial of the petition to open, contending that the petition should have been granted because the three step test for relief from a judgment of non pros was satisfied based on Pa.R.C.P. 3051. The three step test for the petition to open the judgment includes that: (1) the petition is timely filed, (2) there is a reasonable explanation or legitimate excuse for the inactivity or delay, and (3) there is a meritorious cause of action.

There was no dispute over the first step, which was satisfied. Dr. Ponnathpur argued that the second step was not satisfied because the plaintiff did not provide a reasonable excuse for the delay in filing the certificate of merit. Dr. Ponnathpur also contended that the plaintiff did not meet the third step, establishing a meritorious cause of action, because the plaintiff failed to produce "an export report or further testimony."

The Superior Court found that the excuse for the delay in filing the certificate of merit was reasonable because it was an oversight by the plaintiff's counsel, of which the plaintiff was not aware. The Court cited an analogous case, Sabo v. Worrall, 959 A.2d 347 (Pa. Super. 2008), in which the Court held that a mistake by a plaintiff's counsel, when a paralegal failed to submit a timely certificate, was a reasonable excuse for the delay.

In regards to the third step in the Rule 3051 test, the Superior Court found that there was a meritorious cause of action. The Court denied the contention that the plaintiff must submit export reports or testimony. The Court stated that at this stage in the process, according to Rule 1042.3, the plaintiff is only required to submit "a certificate of merit, stating that a plaintiff has obtained a written statement from a licensed professional." The plaintiff had attached this certificate in the petition to open.

The plaintiff satisfied the three step test of Pa.R.C.P. 3051 and the order was vacated and the matter remanded.

Commonwealth Court Grants Two Hospitals Direct Access to Reinsurance When Hospitals Meet "Totality of Circumstances" Test

In Ario v. Reliance Insurance Company, 981 A.2d 950 (Pa. Commw. Ct. 2009), the Court addressed motions for summary judgment by two hospitals arguing they were entitled to have their medical malpractice claims paid by American Healthcare Indemnity Company (AHIC), who reinsured the policies issued to them by an affiliate of Reliance Insurance Company (in Liquidation). The case came to the Commonwealth Court after being remanded by the Supreme Court for discovery relating to the issue of whether the hospitals are entitled to direct access to the reinsurer, AHIC, to pay the hospitals' claims.

Palm Springs General Hospital and Baptist Health South Florida, Inc. ("Hospitals") claimed that they were entitled to direct access to the reinsurance of AHIC as an exception to the rule that reinsurance proceeds are assets of the estate of the insolvent insurer. The Hospitals argue that AHIC, the reinsurer, effectively acted as the Hospitals' insurer under their fronting agreement and they should fall under the exception to the general rule, citing the principles established in Koken v. Legion Insurance Company, 831 A.2d 1196 (Pa. Commw.. 2003).

The Liquidator of Reliance Insurance Company contended that the Hospitals were barred from direct access to the reinsurer by Section 534 of Article V, 40 P.S. § 221.34. The Liquidator contended the Hospitals could not establish that they fit within the exception established in Legion because they could not satisfy each and every principle established in Legion. The Legion principles provide that a policyholder must pass the "totality of circumstances" test to be granted direct access. The test involves analyzing: (1) whether the ceding insurer acted solely as a fronting company; (2) whether the ceding insurer entered into the transaction to generate fees as opposed to premium revenue; (3) whether the reinsurer functioned as the direct insurer by funding and processing the claims; (4) whether the ceding insurer, or the policyholder, selected the reinsurer; and (5) whether the equities favor direct access.

The Court found in favor of the Hospitals and granted the motions for summary judgment. The Court concluded that the Hospitals should be treated as third party beneficiaries of the Reinsurance Agreements because "(1) Reliance acted only as a fronting company in which capacity it did not accept an underwriting risk; (2) Reliance entered the transaction to generate fee income not premium revenues; (3) AHIC functioned as the direct insurer by funding and processing claims through its affiliate, SCPIE Management; (4) Hospitals chose the Sullivan Kelly program because of AHIC's participation not because of Reliance's minimal participation as a fronting company; and (5) the equities favor Hospitals' claim for direct access." The Court found that the parties always understood AHIC would fund the claims of the Hospitals, not Reliance, and for the Liquidator to claim compensation for claim liability, when Reliance never could or did, goes against the designed arrangement.

A Medicaid Beneficiary Has a Cause of Action Against His or Her Tortfeasor to Recover and Reimburse DPW for Medicaid Benefits Received During the Beneficiary's Minority, Pursuant to the Fraud and Abuse Control Act.

In E.D.B. v. Clair and Centre Community Hospital, 987 A.2d 681 (Pa. 2009), the Supreme Court of Pennsylvania addressed whether the Department of Public Welfare (DPW) was entitled to a portion of settlement proceeds for reimbursement for Medicaid expenditures made on behalf of a disabled minor when a claim therefore by the minor's parents is barred by the statute of limitations.

E.D.B. ("Emily") was born suffering severe mental and physical disabilities. Her parents, "the Bowmasters," filed a suit against the hospital where Emily was born and the attending physician. The parties reached a negotiated settlement and the settlement was approved by the Court of Common Pleas and a special needs trust was set up for Emily. DPW, being notified by "the Bowmasters" of the suit had put a lien on any award or settlement resolving the litigation in the amount that DPW had expended for Emily's medical care. After the settlement, the Court ordered the trustee of Emily's special needs trust to reimburse DPW for the full amount of her medical expenses.

"The Bowmasters" appealed to the Superior Court, holding that DPW could only be reimbursed for medical expenses paid on Emily's behalf after she reached the age of majority. The Superior Court concluded that medical expenses incurred by a minor because of personal injury rests with the minor's parents, not with the minor herself, citing Hathi v. Krewstown Park Apartments, 385 Pa. Super. 613, 561 A.2d 1261, 1262 (1989). Because "the Bowmasters" were barred from seeking reimbursement for medical expenses incurred during Emily's minority because the statute of limitations had expired, and Emily could only pursue a claim for expenses after she reached the age of majority, the Court concluded that the litigation could not have resulted in a award or settlement that included medical expenses Emily had incurred as a minor. The Court ruled that DPW could not satisfy its lien.

DPW then appealed to the Supreme Court of Pennsylvania. The Supreme Court faced three issues in this case. The first was whether a child can sue the tortfeasor for reimbursement of medical expenses when that child's estate may be legally liable to pay medical expenses for an injury. The second was whether the Pennsylvania Legislature intended to permit a minor receiving medical assistance to sue a tortfeasor for medical expenses when it enacted the Fraud and Abuse Control Act 62 P.S. 1409(b). And lastly, the Court faced the issue of whether a minor child is a "beneficiary" of medical assistance according to 62 P.S. § 1409(b)(13).

The Supreme Court concluded that Emily was a "beneficiary" according to subsection 1409(b)(13) of the Fraud and Abuse Control Act because no reading of the statutory definition of "beneficiary" can exclude Emily. The Court interpreted the definition of "beneficiary" as "any person who has or will receive benefits."

The Court then determined that the intent of the General Assembly in the Fraud and Abuse Control Act is clear in the fact that when any beneficiary, adult or minor, enters into a settlement with the tortfeasor, DPW has the right to recover by asserting a lien on the settlement for the reasonable value of Medicaid benefits provided to the beneficiary. The Court found nothing in the statute that distinguishes a minor beneficiary from one who has reached the age of majority. The Court could not conclude that the General Assembly intended 1409(b)(11) to be constrained by the common law in such a manner as to bar a beneficiary from recovering from the tortfeasor the monetary value that assistance provided during his or her minority.

The Supreme Court discussed Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268, 275, 126 S.Ct. 1752, 164 l.Ed.2d 459 (2006), in which the Supreme Court of the United States held unenforceable an Arkansas statute that required satisfaction of a state agency lien for Medicaid expenditures from the entirety of a settlement, regardless of how the settlement was allocated. This case led to a modification of 1409(b)(11) of the Fraud and Abuse Control Act to include, "to the extent that Federal Law limits recovery of medical assistance reimbursement to the medical portion of a beneficiary's judgment, award, or settlement." The Supreme Court of Pennsylvania found that nothing in Ahlborn affects or weakens the Court's interpretation of the General Assembly's intent of allowing beneficiaries to file claims for Medicaid expenditures incurred during minority.

The Supreme Court of Pennsylvania vacated the Superior Court's order and reinstated the order of the Court of Common Pleas for reimbursement to DPW.

Supreme Court Decides that Commonwealth Court Has Original Jurisdiction over Coverage Disputes Involving MCARE Fund

In Fletcher v. Pennsylvania Property & Casualty Insurance Guaranty Association, 985 A.2d 678 (Pa. 2009), the Supreme Court of Pennsylvania addressed whether the Commonwealth Court has original jurisdiction over claims against the Medical Care Availability and Reduction of Error Fund (MCARE Fund) or was claimant required to first exhaust administrative remedies by seeking relief from the Insurance Department.

Johanna Fletcher, a successful plaintiff in a medical malpractice case, brought a declaratory judgment action to resolve coverage issues relating to the MCARE Fund in the original jurisdiction of the Commonwealth Court. The MCARE Fund filed preliminary objections claiming the Commonwealth Court did not have original jurisdiction. The Commonwealth Court found that it had jurisdiction, and the Fund then appealed, claiming Fletcher must first exhaust the administrative remedies by seeking relief from the Insurance Department.

Fletcher relied primarily on Ohio Casualty Group of Ins. Companies v. Argonaut Ins. Co., 514 Pa. 430, 525 A.2d 1195 (1987), in which an insurer brought an action against the CAT Fund in the Commonwealth Court's original jurisdiction. The Court concluded in Ohio Casualty that the available administrative remedies were not adequate to resolve the coverage dispute, and thus, the Commonwealth Court had original jurisdiction.

The MCARE Fund argued that with the passage of the MCARE Act, which transferred the rights and responsibilities of the CAT Fund to the MCARE Fund, the Insurance Commissioner had exclusive jurisdiction over all of the Fund's written determinations. The Fund argued that Fletcher failed to bring her claim to the Insurance Department, thus she failed to exhaust her administrative remedies.

Fletcher responded by claiming that the Commonwealth Court had original jurisdiction over disputes involving the MCARE Fund, just as it had for the CAT Fund. Flethcer argued that the MCARE Act does not contain anything pertaining to administrative appeals involving coverage determinations. She argued that the failure to include an express administrative appeal provision for coverage disputes implied that none was intended, under the principle of statutory construction *expression unius est exclusion alterius,* leaving intact the original jurisdiction of the Commonwealth Court.

The Supreme Court ruled in favor of Fletcher and remanded the matter for further proceedings, upholding original jurisdiction of the Commonwealth Court for coverage disputes involving the MCARE Fund. The Court first concluded that the MCARE Fund could not point to any specific statutory procedure within the MCARE Act, where health care providers (or individuals with the health care provider's assignment of rights) can be afforded a remedy, which was the same situation in Ohio Casualty concerning the CAT Fund. Second, the Court stated that the legislature is presumed to have acted with knowledge of the Ohio Casualty decision, and the silence on the resolution of coverage disputes within the Act leads the Court to court to "conclude that the legislature did not intend a change in jurisdiction." The Court found that by addressing assessment appeals in the Act, but not coverage appeals, the legislature implicitly left the original jurisdiction that came out of the Ohio Casualty decision intact. The Court also found that the similar responsibilities between the CAT Fund and the MCARE Fund supported the conclusion that the legislature did not intend to change jurisdiction for coverage appeals.

Superior Court Extends Corporate Liability To Medical Professional Corporations When the Corporation Is (a) Responsible for the Coordination and Management of the Patients and (b) Fails to Deliver the Care It Was Contractually Obligated to Provide.

In Hyrcza v. West Penn Allegheny Health System, 978 A.2d 961 (Pa. Super. 2009), the Superior Court of Pennsylvania addressed an appeal from a judgment of approximately $8.6 million on a jury verdict in a medical malpractice case.

The plaintiff, Carol Hyrcza, the Executrix of the estate of Margaret Mahunik, was successful in her medical malpractice action against Yvette C. Ross Hebron, M.D. and ChoiceCare Physicians. Mahunik died on July 10th, 2001 after showing signs of gastrointestinal bleeding that went unnoticed by Dr. Hebron on July 4th, 2001. Dr. Hebron ended her employment at ChoiceCare on July 6th, 2001 and ChoiceCare failed to provide Mahunik with another physician. The plaintiff was awarded $8.6 million on a jury verdict in the Court of Common Pleas.

The defendants, Dr. Hebron and ChoiceCare Physicians, appealed the verdict by arguing the trial court abused its discretion in six instances during the trial. The defendants first claim that the trial court erred by refusing to place the settling defendants names on the verdict slip. Second, the court erred by overruling the defense objections to Hyrcza's expert witness on the grounds that he was unqualified to render a standard of care opinion. Third, the court erred by overruling the defense objections to the jury charge on irrelevant considerations. Fourth, the trial court erred by permitting the improper use of learned treatise during the direct examination of Hyrcza's expert witness. Fifth, the court erred by denying the defense's request for cautionary instructions because comments by Hyrcza's counsel were inflammatory, scurrilous, and prejudicial during closing arguments. And finally, the defendants claim the court erred by failing to grant Dr. Hebron's request for remitter because the verdict was excessive.

ChoiceCare, alone, also appealed on the grounds that the trial court erred by charging the jury on its alleged corporate negligence. ChoiceCare claimed that corporate liability does not extend to medical professional corporations and that it was covered by a standard agency charge.

Regarding the defendants' first issue, that the trial court erred by excluding the "settling defendants" from the verdict slip, although there was clear evidence of their negligence, the Superior Court held that the trial court's decision was supported and upheld the decision. The Superior Court concluded that there is no absolute right to have settling co-defendants put on the verdict slip and the trial court must determine whether there is any evidence of a settling co-defendant's liability before putting them on the jury slip, citing Herbert v. Parkview Hosp., 854 A.2 1285 (Pa. Super. 2004). The Superior Court agreed with the trial court that there was not sufficient evidence for a *prima facie* case against the settling defendants, thus it was the correct decision to exclude them from the verdict slip.

The Superior Court also upheld the decision of the trial court regarding the defendants' second issue, that the trial court erred by admitting the expert testimony of Dr. Corboy. The defendants argued the witness was unqualified to render a standard of care opinion under Section 1303.512 of the Medical Care Availability and Reduction of Error Act. The Superior Court refused to overturn the trial court's decision to accept Dr. Corboy's testimony that he was familiar with the standard of care at issue because a significant portion of his practice was devoted to such care, citing Smith v. Paoli Memorial Hospital, 885 A.2d 1012, 1016 (Pa. Super. 2005).

Regarding the issue of jury instructions taken from the Pennsylvania Suggested Standard Civil Jury Instructions on "irrelevant considerations", the Superior Court found no error by the trial court, citing Levine v. Rosen, 532 Pa. 512, 616 A.2d 623 (1992) and Sedlitsky v. Pareso 425 Pa. Super. 327, 625 A.2d 71 (1993).

Regarding the issue of the use of learned treatise, in which the defendants claimed that the trial court erred by allowing the plaintiff's counsel to elicit hearsay testimony from Dr. Corboy from a learned treatise, the Superior Court upheld the trial court's decision to allow the testimony because of the limited purpose for which the learned treatise was used and the undisputed nature of the medical principle discussed.

The Superior Court upheld the decision of the trial court to refuse to give cautionary instructions following statements made by Hyrcza's counsel during closing argument, which were that "doctors help each other out when they're in a jam." This statement was in reference to the credibility of one of the defense's expert witnesses, Dr. Narla, who was not accepting payment for his testimony. The Superior Court found that, in this context, the statements were permissible argument.

The Court also upheld the determination of the trial court to not grant remitter because of an excessive verdict, stating that "the jury could have reasonably awarded the amount in question."

Regarding the issue of ChoiceCare's appeal, that the trial court erred by charging the jury on its alleged corporate negligence, the Superior Court upheld the decision of the trial court, agreeing that a standard negligence charge would have been inadequate under the circumstances. The Superior Court reached this decision because ChoiceCare was responsible for the coordination and management of all patients in the rehabilitation unit in which Mahunik was located and ChoiceCare failed to deliver the comprehensive care it was contractually obligated to provide Mahunik. The Court cited Thompson v. Nason Hospital, 527 Pa. 330, 591 A.2d 703 (1991), in which the doctrine of corporate negligence as a basis for hospital liability was established. The Court decided that the case at hand was closer to that of the Thompson case, rather than of Sutherland v. Monongahela Valley Hosp. 856 A.2d 55 (Pa. Super. 2004), in which the court refused to extend the corporate liability doctrine to a physician's office. The Superior Court concluded that ChoiceCare had (a) total responsibility for the coordination of care within the hospital's rehabilitation unit, and (b) had failed to uphold its duties, thus a corporate negligence charge was warranted.

Supreme Court Holds that Parties to a Settlement Should Be Afforded Latitude to Effectuate Their Express Intentions when Plaintiff's Surrendered Vicarious Liability Only and Expressly Reserve the Rights Against the Agent

In Maloney v. Valley Medical Facilities, 984 A.2d 478 (Pa. 2009), the Supreme Court of Pennsylvania addressed whether a plaintiff's release of principals that had potential vicarious liability also releases the agent from the plaintiff's claims, even when there is an express reservation of rights.

The plaintiff, Max Maloney brought a medical malpractice action against the defendant Dr. Prendergast, M.D., Dr. Brennan, M.D., and a vicarious liability action against the institutional defendants ("Employers") associated with these physicians. The action claimed negligence for the failure to timely diagnose and treat osteosarcoma in his wife, Linda Maloney. Plaintiff later surrendered all claims "in any way connected with all medical professional health care services rendered by the above name Health Care Providers." A paragraph was included in the release to expressly reserve the rights against Dr. Prendergast.

Dr. Prendergast and Employers then filed motions for summary judgment, claiming that the language of the release discharged all direct and derivative claims that came from Dr. Prendergast's conduct based on the common law rule governing releases, Mamalis v. Atlas Van Lines, Inc., 522 Pa. 214, 560 A.2d 1380 (1989) and Pallante v. Harcourt Brace Jovanovich, Inc., 427 Pa. Super. 371, 629 A.2d 146 (1993). The Mamalis case held that the release of an agent operates to release the principal from vicarious liability claims. The Pallante case applied Mamalis to require that the release of an agent follows from the release of a principal. The trial court granted the motions based on the common law rules from Mamalis and Pallante.

On appeal to the Superior Court, the Court found that the release surrendered all claims against the "Employers," but disagreed with the trial court's decision concerning Dr. Prendergast, because the case involved possible multiple negligent acts, rather than a single negligent act as in Pallante. Accordingly, the Superior Court vacated the judgment with regard to Dr. Prendergast.

The defendants filed an appeal to the Supreme Court claiming that the Superior Court disregarded Mamalis in its decision, and that this decision is "irreconcilable with Pallante." The plaintiff countered by arguing that the present case involved multiple separate acts of negligence and multiple tortfeasors rather than the release of a single agent in a single tort case. Plaintiff also claimed that Pallante did not extend the Mamalis decision to "scenarios encompassing allegations of multiple acts of negligence," and that there is no indication that the language of the written release in Pallante included a reservation of rights.

The Supreme Court upheld the decision of the Superior Court. In doing so, the Supreme Court found that Mamalis was directed at a simple fact pattern, which included one principal and one agent, and the Court did not consider the extension of the rule to complex factual scenarios as the one in the present case. The Supreme Court further stated:

> In the scenario entailing a plaintiff's surrender of vicarious liability claims only and express preservation of claims against the agent, we hold that the parties to a settlement should be afforded latitude to effectuate their express intentions. To the extent that the Superior Court's decision in *Pallante* holds to the contrary, see *Pallante*, 427 Pa. Super. At 377, 629, A.2d at 149 ("Given the supreme court's decision that principal and agent are not joint tortfeasors, we conclude that the release of the principal acts as a release of the agent"), it is disapproved.

Superior Court Concludes that "Error of Judgment" Instructions to a Jury Should Not Be Given in Medical Malpractice Actions

In Pringle v. Rapport, 980 A.2d159 (Pa. Super. 2009), the Superior Court of Pennsylvania addressed an appeal contending that the trial court erred in including an "error of judgment" instruction during the charge to the jury at the trial of a medical malpractice action.

The Pringles, parents of Austin Pringle, filed a medical malpractice complaint against Dr. Rapport, the defendant, after nerves in the infant's neck were torn during delivery. The jury verdict was in favor of the defendant. The Pringles then appealed contending that the trial court erred in including an "error of judgment" instruction to the jury.

The Pringles appeal included two challenges to the trial court's charge to the jury. First, did the trial court err when it instructed the jury, "to decide the issue of negligence by considering the physician's subjective judgment?" And secondly, was the trial court's instruction to the jury, "Physicians do not guarantee a cure and negligence should not be presumed from the occurrence of an unfortunate result," in inextricable conflict with the Pringle's accepted "*Res Ipsa Loquitur*" charge? The Pringles contend that the "error of judgment" instruction "improperly advises the jury on the well-established applicable standards for medical malpractice and is also likely to mislead and confuse the jury in its deliberations."

The Court discussed the fact that there were conflicting decisions by panels of the Court that left the state of law regarding "error of judgment" instructions "in flux." The Court noted the strong disapproval of the instruction in D'Orazio v. Parlee & Tatem Radiological Associates, Ltd., 850 A.2d 726 9 (Pa. Super. 2004). The Court noted that the same panel that decided D'Orazio came to the opposite conclusion in Schaaf v. Kaufman, 850 A.2d 655, 666 (Pa. Super. 2004), in which the use of the instruction by the court was affirmed. The Court stated that these conflicting decisions provide little guidance and necessitate clarification.

The Superior Court reversed and remanded for a new trial. The Court ruled that the "error of judgment" instructions should not be given in medical malpractice actions in the Commonwealth because they are inherently confusing. The Court came to this decision for two major reasons. First, the "error of judgment" charge "wrongly suggests to the jury that a physician is not culpable for one type of negligence, namely the negligent exercise of his or her judgment." The second reason was that "the "error of judgment" charge wrongly injects a subjective element into the jury's deliberations. The standard of care for physicians in Pennsylvania is objective in nature, as it centers on the knowledge, skill, and care normally possessed and exercised in the medical profession." The Court also noted that the "error of judgment" charge improperly focuses the jury's attention to the physician's state of mind, although the state of mind of the physician is irrelevant.

Defendant Hospital's Preliminary Objection to Complaint Sustained and Plaintiffs Ordered to Identify, by Name, Agents of Hospital Who Allegedly Were Negligent

In Rex v. Wellspan Health, 8 Pa. D. & C. 5th 573 (Adams County2009), the Adams County Court of Common Pleas addressed the preliminary objections of the several defendants of Gettysburg Hospital to an amended complaint by the plaintiff, Kathy Rex.

The preliminary objections challenged the plaintiff's amended complaint that alleged the hospital had respondeat superior liability for the negligence of its agents and identified the cause of action against Gettysburg Hospital as one of vicarious liability for the actions and inactions of William Schrantz M.D. and other "agents, servants and employees." The preliminary objections challenged the specificity of the complaint as it related to the agency allegations. The defendants claimed that Pennsylvania Rule of Civil Procedure 1019 (a) required that a pleading include material facts necessary to support a claim. The defendants argued the phrase "agents, servants and employees," inhibited the defendants' ability to defend the action because they were not fully apprised of the acts underlying the claim.

The plaintiff countered the preliminary objections by arguing the complaint was specific in regard to the negligent conduct of the defendants and that the defendants were familiar with the personnel who treated the plaintiff and therefore had adequate notice of the underlying factual background.

The Court granted the preliminary objections, but gave the plaintiff 20 days to file a second amended complaint specifically identifying the agents by specific name or appropriate description. The Court stated the purpose of pleadings is to place the defendants on notice of the claims they will have to defend, citing McClellan v. HMO, 413 Pa. Super. 128, 13, 604 A.2d 1053, 1059 (1992). The Court went on to cite Rachlin v. Edminson, 813, A.2d 862, 870 (Pa. Super. 2002), stating the following:

> Although it is unnecessary to plead all the various details of an alleged
> agency relationship, a complaint must allege, as a minimum, facts which:
> (1) identify the agent by name or appropriate description; and (2) set forth
> the agent's authority and how the tortious acts of the agent either fall within the scope of authority,
> or if unauthorized, were ratified by the principal.

Supreme Court Restates and Applies to the Record the Standards and Conditions Appropriate for Summary Judgment

In Stimmler v. Chestnut Hill Hospital 981 A.2d 145 (Pa. 2009), the Supreme Court of Pennsylvania addressed whether a summary judgment was appropriate in a medical malpractice case.

The plaintiff, Ann Stimmler, underwent an echocardiogram in 1999, which showed an echogenic abnormality. This abnormality was a catheter coiled in the right atrium of the plaintiff's heart. The plaintiff filed a medical malpractice claim against Chestnut Hospital and several doctors claiming the catheter in her heart was one used in an antecubital cutdown procedure she underwent at the Hospital in 1965.

One of the defendants, Dr. Padula, filed a request for admissions in which he asked the plaintiff to admit she had intravenous "catheter devices" inserted during sixteen different times after 1965. The plaintiff failed to produce a timely response, but did produce an untimely response that denied that the catheter came from any

procedure except the May 1965 cutdowns. Motions for summary judgment were then filed by the defendants and the trial court granted all of the summary judgment motions. The trial court concluded that the experts' reports failed to establish, to a degree of medical certainty that the catheter was from the May 1965 procedure. The trial court also noted that the experts' reports were based on speculative facts. The expert witnesses, Dr. Reiffel and Dr. Depace both claimed that the catheter must have come from the 1965 procedure due to the length and condition of the catheter.

The plaintiff appealed to the Superior Court, which upheld Dr. Padula's request for admissions because the response was untimely, applying rule 4014 (b) and upheld the summary judgments reasoning that if the plaintiff had catheterizations on 16 other occasions then the factual premise was impermissibly speculative.

The plaintiff appealed to the Supreme Court of Pennsylvania, which concluded that the trial and Superior Court misapplied the appropriate standards and inappropriately determined the case on "deemed admissions." The Court reversed and remanded the decisions.

The Supreme Court found that even if Dr. Padula's request for admissions is deemed true, the admissions do not challenge the common conclusion of Dr. Reiffel and Dr. Depace and do not render the opinions of the expert witnesses as speculative. The Court found that the substance of expert witness testimony must be examined to determine whether the expert has met the requisite standard, citing Welsh v. Bulger, 698 A.2d 581, 585 (pa. 1997). The Court also stated that "in establishing *prima facie* cases, the plaintiff (in a medical malpractice case) need not exclude every possible explanation for the accident; it is enough that reasonable minds are able to conclude that the preponderance of the evidence shows the defendants conduct to have been substantial cause of the harm to the plaintiff."

Supreme Court Addresses Qualifications of Expert and Concludes the "Relatedness" of One Field to Another, under Subsection 512 (e) of MCARE Act, Can Only Be Assessed with Regard to the Specific Care at Issue

In Vicari v. Spiegel, 981 A.2d 145 (Pa. 2010), the Supreme Court of Pennsylvania addressed the qualifications an expert witness must possess in order to testify regarding the standard of care in a medical professional liability case, pursuant to the Medical Care Availability and Reduction of Error Act ("MCARE").

The plaintiff, Joseph Vicari, brought a medical profession liability claim for his deceased wife against the defendants, Joseph Spiegel, M.D. and Pramila Anne, M.D. The plaintiff's wife had a tumor removed from her tongue by Dr. Spiegel and was then given radiation treatment by Dr. Anne. The plaintiff's wife died from the metastatic tongue cancer on April 1, 2002. The plaintiff claimed the defendants were liable because they did not refer his wife to a medical oncologist for possible chemotherapy.

The trial court struck down the expert witness testimony of Ronald H. Blum, M.D., a medical oncologist, because Dr. Blum was not board certified in the same field as either of the defendant physicians. The plaintiff appealed to the Superior Court, arguing the trial court had abused its discretion by striking the expert witness testimony. The Superior Court reversed and remanded the decision stating that Dr. Blum was qualified to testify under the MCARE Act. The defendants then appealed to the Supreme Court of Pennsylvania challenging the decision of the Superior Court.

The question faced by the Supreme Court was whether Dr. Blum, a medical oncologist, was qualified to render standard care opinions against an otolaryngologist and radiation oncologist under Section 512 of the MCARE Act. Section 512 requires that an expert witness in a professional medical liability case must possess sufficient education, training, knowledge and experience to provide credible competent testimony. Section 512 also requires the expert witness to be in the same specialty as the defendant physician and be certified by the same board. Section 512 (e) allows for exceptions to the same specialty and board certification requirements if the court determines the expert possess sufficient training , experience and knowledge 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 years.

The Court stated;

> The "relatedness" of one field to another for purposes of subsection 512 (e) cannot be established in a broad and general sense that will henceforth be applicable to all situations and all claims. Rather, the "relatedness" of one field of medicine to another, under subsection 512 (e), can only be assessed with regard to the specific care at issue.

The Court concluded the Dr. Blum did have the sufficient training, experience, and knowledge to testify as to the specific standard care at issue. The Court also concluded that medical oncology, Dr. Blum's field of medicine, was a "related field of medicine" to otolaryngology and radiation oncology with regard to the specific care at issue pursuant to subsection 512 (e).

Superior Court Upholds Verdict in Medical Malpractice Case of 5.2 M Against Challenge that 1) J.N.O.V. Should Have Been Granted, 2) Admission of Expert Testimony Was in Error, and 3) Verdict Was Excessive

In Whitaker v. Frankford Hospital of the City of Philadelphia, 984 A.2d 512 (Pa. Super. 2009), the Superior Court addressed an appeal from a judgment entered on a jury verdict in a medical malpractice action against Diagnostic Imaging, Inc. and its agent Dr. Robert T. Smith.

The jury awarded $5,200,000 in damages, finding that Dr. Smith and Dr. Gauthier, who had previously settled, were equally responsible for the injuries to Caroline Monaghan, who suffered severe brain damage after suffering a sever stroke. The plaintiffs claim that Dr. Smith misread an MRA/MRI on June 21, 2001 which indicated Mrs. Monaghan had 70 percent blockage in two arteries (critical stenosis) but was incorrectly interpreted and that Dr. Gauthier should have admitted and treated, rather than discharged, Mrs. Monaghan on June 23, 2001.

The defendants first claim that they should have been granted summary judgment or a compulsory nonsuit because plaintiffs failed to establish that their conduct caused the injuries based on the fact that there was no evidence Dr. Gauthier relied upon Dr. Smith's incorrect interpretation of the June 21st MRA/MRI. The defendants also claimed that plaintiff's two expert witnesses, one standard care witness and one causation witness, were improperly permitted to testify in the area of expertise of the other. Next, the defendants claimed that their expert witness was improperly restricted during direct examination. And finally, the defendants requested remittitur of the verdict because it was excessive.

Concerning the first issue brought by the defendants, the Court stated the defendants improperly framed their position because once the case proceeded to trial and a defense was presented, the trial Court's refusal to grant them summary judgment became moot. The Court, instead, addressed whether the trial court erred in failing to grant judgment nothwithstanding the verdict. The Court upheld the decision of the trial court and found that it was not surprising the jury determined that Dr. Gauthier must have relied on Dr. Smith's interpretation of the MRI based on the evidence presented. This evidence included the protocol of the Hospital to immediately admit and treat patients with symptomatic critical stenosis, Dr. Gauthier's statement that he would have admitted Mrs. Monoghan if he knew she had critical stenosis, and evidence that Dr. Gauthier believed the MRI indicated the stenosis was non-critical.

Regarding the issue of overlapping testimony of the plaintiff's expert witnesses, the Court found that a new trial was not necessary because the cumulative nature of the testimony was not so harmful that the result at trial would have been different if testimony was restricted. The defendants had also argued that the testimony went beyond the fair scope of the reports issued by the expert witnesses. The Superior Court disagreed and found that the defendants were fully apprised of the deviation from the standard of care testimony as well as the factual premise for causation testimony. The Court stated it will not find error in the admission of testimony that the opposing party had notice of or was not prejudiced by, citing Coffey v. Minwax Company, Inc., 764 A.2d 616, 620-621 (Pa. Super. 2000).

The defendants also argued that the expert witness, Dr. Peyster went beyond his area of expertise during testimony. The Court disagreed with the defendants, stating that the expert witness was unquestionably qualified.

The Superior Court also found that the trial court did not err by restricting the testimony of the defendants' witness, Dr. Dougherty, even though the witness was clearly testifying beyond the fair scope of his report, because the Court found there was no unfair surprise.

Finally, the defendants claim that the damages awarded were excessive, the Court found that the trial court did not abuse its discretion by not awarding remittent of the verdict, finding the verdict was not grossly excessive.