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FOREWORD

Shanin Specter & Braden Lepisto, Esquires

Kline & Specter, P.C.

A mother delivering her baby, a father having chest pains, a daughter undergoing surgery. When we are at our most vulnerable, we place our complete faith in doctors, nurses, and other health care providers for the care we need. If these patients receive poor care and are injured, they put their trust in us to right the wrong and deftly guide them through the civil litigation process. Representing individuals harmed by medical malpractice is one of the ways we carry out PAJ's mission: ensuring that any person injured by the negligence of another can obtain justice in Pennsylvania courtrooms. While our clients, the wrongs, the medicine, the law, and the community have evolved over our years of practice, a commitment to the fundamentals of litigating a medical malpractice action allows the plaintiff's lawyer to skillfully litigate these claims in an ever-changing environment. This Booklet provides the fundamentals of those skills to young and seasoned lawyers alike.

As a plaintiff's lawyer, our role changes from the initial client meeting, to discovery, to trial, to the appeal. We are counselors, investigators, students of medicine, advocates, and most importantly, trial lawyers.

Regardless of the role and stage of litigation (initial client interview, retaining experts, filing motions *in limine*, etc.), every decision must be made with a primary focus: how does this question, this request, this objection, or this argument affect the trial?

Medical malpractice litigation should only be undertaken by attorneys with specific competency in the field. Statutes and rules unique to medical malpractice litigation — Certificate of Merit requirement, need for expert testimony, including a specific degree of certainty, venue, damages calculations, and the like — present significant challenges for the unaccustomed.

Because of the typical necessity for multiple experts on liability and damages, medical malpractice cases are very expensive to litigate. Due to the cost, time, and energy inputs, medical malpractice cases should only be undertaken where there are important compensatory and deterrence purposes to be served by the litigation.

While some cases are resolved favorably by settlement, the track record in the courtroom for plaintiffs in medical malpractice cases is daunting. Across the Commonwealth, roughly 85% of medical malpractice trials

end in defense verdicts. In Philadelphia County, argued by defense interests to be "plaintiff friendly," doctors and hospitals consistently prevail in the majority of trials. All of these factors combined suggests that the decision to undertake representation in medical malpractice cases should be made carefully. The principles in this Booklet, as well other scholarly publications, must be well-understood.

Representing victims of medical malpractice and litigating medical malpractice cases is especially important considering the strong public interest in stemming medical malpractice and providing a remedy for those who are badly injured.

A Johns Hopkins University study found that medical error is the third leading cause of death in the United States, behind heart disease and cancer. Despite the epidemic of medical malpractice, very few injuries caused by malpractice result in suit, with only about 1500 medical malpractice lawsuits being filed each year in Pennsylvania, fewer than one for every 9000 of our state's nearly 13 million residents. Our role is to advance not only the private interests of our clients, but also the public interest. Lawyers must be attuned to opportunities to make substantive suggestions for improved care to doctors and hospitals. When resolving cases, you should consider making policy changes or in-servicing of staff a condition of settlement, so incidences of medical malpractice diminish.

THE INITIAL CLIENT INTERVIEW: QUESTIONS YOU MUST ASK

Tim Riley, Esquire

Conner Riley Friedman & Weichler

I. Preparing for The Interview

You've read the intake information provided by the client to your staff or the lawyer who referred you the case. You know the basic details of the claim. There are questions that may not be answered by the intake memo and should be before you proceed further:

A. Who Is the Client?

- 1. The caller is often someone other than the client, such as a spouse, child, partner, or friend of the actual client.
- 2. If the client is deceased, is there a will naming an executor/executrix? If not, an administrator/administratrix will need to be appointed.
- 3. If the client is legally incapacitated, must a guardian be appointed, or does someone have a power of attorney enabling them to act?
- 4. If the client is a minor, who is the guardian selected by the minor under Pa.R.Civ.P 2031, or does a guardian need to be appointed?

B. Who Is the Defendant?

- 1. What is his/her specialty (e.g., family medicine, OB/GYN, CRNA, RN, etc.)?
- 2. Individual defendants must be alive at the time suit is filed, and if a defendant is deceased, an estate must be raised and a personal representative appointed.
- 3. Check the Corporation Bureau website to make sure you know both the current name of a business entity that will be a defendant and its name as of the date of the medical negligence at issue.

C. Conflicts of Interest?

- 1. Has a member of your firm represented the prospective defendant?
- 2. Is the defendant a treating physician of an existing client of your firm whose cooperation you

- need in representing the client? Is he a treating physician of a family member or a member of your staff?
- 3. Do you or anyone else in your firm have a personal or social relationship with the defendant that makes you or them uncomfortable about pursuing a claim against the defendant?

D. Statute of Limitations?

1. Are the claims at issue clearly barred by the applicable statute of limitations based upon the information provided? If so, consider calling, emailing or writing to the client to explain that to her.

E. Prior Reviews by Other Counsel?

1. If you aren't the first lawyer to be asked to review the claim, find out who else has reviewed and presumably declined the matter, and consider contacting that lawyer before starting your own investigation.

F. Venue?

1. Is the court in which the suit would need to be filed one in which you're willing to litigate the case? If not, consider referring the client to a lawyer who regularly practices there.

G. Type of Claim?

1. Are you confident litigating the type of claim that appears to be involved (e.g., a claim including highly technical medical issues that you aren't comfortable handling, or one that may involve both medical negligence and drug or medical device issues)? If not, consider referring the client to a lawyer with experience in handling such claims.

H. Death Claim?

1. If the patient died as the result of the alleged medical negligence, was an autopsy performed? If so, obtain it and the death certificate to understand what they say about the cause of death.

I. Are the Damages That Might Be Recoverable Clearly Inadequate to Support the Cost of Pursuing the Claim?

1. If not, explain the math to the client and respectfully decline.

J. Medical Records?

- 1. Where possible, obtain and review the client's medical records that are pertinent to the claim before the first meeting with the client. Send the client HITECH Act letters she can sign and mail to her healthcare providers requesting that a copy of her electronic medical records be mailed to her on a CD or thumb drive, and ask the client to deliver them to you for review prior to meeting with her. For healthcare providers who don't maintain electronic records, send the client authorizations for the release of healthcare information to sign and return to you so that you can obtain paper copies of those records.
- 2. If you're able to review the medical records before meeting with the client, you'll have a much better understanding of the claim and how it will likely be defended. That will lead to a much more productive meeting with the client and you'll have a myriad of additional questions to ask. Reviewing the records before meeting also enables you to know how the client's version of events squares with what the records reflect, and to be in a position to show the client pertinent entries in the records when you meet.

K. Ask the Clients to Bring the Following Information to the Interview:

- 1. A chronology of the events they feel are important to their claim;
- 2. A list of the names and addresses of all healthcare providers and institutions who the client has been treated for the injuries at issue in their claim;
- Originals of all claim-related documents or information they have, including papers given to them by physicians or hospitals, EOB forms from any entity that paid medical expenses, or disability insurance benefits, photographs, correspondence (especially Patient Safety letters from hospitals, etc.)

II. The Interview: Topics to Be Covered and Questions to Ask.

A. Housekeeping Details/Background Information (If Not Included in the Intake Memo):

- 1. Client's name/address/DOB/SSN/phone/cell/email address
- 2. Spouse's/partner's name/address/date of birth/SSN/phone/cell and email address

- 3. Children's names/addresses/dates of birth/SSN/phone/cell and email addresses
- 4. All marriages/divorces/deaths of spouses and children
- 5. Educational background of client: high school/post-high school, college, graduate school, degrees or certificates earned.
- 6. Activities/interests outside of employment, including recreational activities, sports, travel, involvement in church, community, social or professional club activities, hobbies, and other interests
- 7. Work around the home: domestic chores regularly performed, including home maintenance, vehicle maintenance, lawn care, grocery shopping, cooking, laundry, child care, caring for relatives, neighbors or friends, etc.

B. Liability:

- 1. Who negligently rendered medical care that caused you injury, and what professional designation or license does he hold?
- 2. Where did it happen?
- 3. When did it happen?
- 4. What happened, and what injury did you sustain as a result?
- 5. Why do you believe it happened? Has anyone advised you that it happened because of the negligence of one or more healthcare providers?
- 6. If the case involves an issue of informed consent, what risks and options were reviewed with you prior to the procedure being performed, and was this information conveyed to you <u>by a physician</u>? If not, consent wasn't obtained.
- 7. Did anyone with a close family connection to you or the decedent witness the medical negligence at issue? Consider whether that person has a viable claim for negligent infliction of emotional distress

C. Causation:

1. Which healthcare providers treated you for the injuries you sustained due to the medical

- negligence at issue?
- 2. Other healthcare providers who rendered medical treatment to you of any type in the past ten or more years?
- 3. Past medical history: in general, and in particular with respect to any body part or system injured due to the medical negligence at issue?
- 4. Medications being taken at the time of the medical negligence at issue, by whom were they prescribed, and where were they filled?
- 5. Pre-existing conditions, chronic health issues, comorbidities, etc.
- 6. Prior accidents, injuries, illnesses, hospitalizations, surgeries, procedures?
- 7. Family history (if pertinent)?
- 8. Prior claims (workers' comp, disability, social security disability or SSI) or lawsuits?
- 9. Did you comply with all treatment recommendations of the defendant or other health care providers? If not, what advice didn't you follow?

D. Damages:

- 1. Medical Bills: Who paid for the medical treatment required by the medical negligence at issue?
 - Health Insurance/Medicare/Medicaid? Obtain a copy of all cards, front and back, and explain about probable claims for reimbursement of paid medical expenses.
 - If health insurance was provided under an ERISA medical benefit plan that may be able to subrogate against any recovery, ask the client to request a summary plan description and a plan document from her employer.
 - Have you been told there is a likelihood you will need future medical care, prescription services, physical therapy, drugs, nursing home care, etc.? If so, by whom, and what were you told?
 - If you expect to retain a life care planner (LCP), explain to the client what the LCP will do
- 2. Lost Income: Has the client sustained lost wages, benefits or other income as a result of the medical negligence at issue?

- Employer/self-employed? How long? Job duties? Compensation?
- Request income tax returns from client, her accountant or IRS.
- For what period of time were you unable to work as the result of the injuries you sustained due to the medical negligence at issue? What is the approximate amount of your lost earnings during that period?
- Will the injuries sustained as the result of the medical negligence at issue prevent or impair your ability to work in the future?
- If you expect to retain an economist or a vocational rehabilitation specialist, explain to the client what they will do.
- Past employment/work experience?
- Past military service?
- If your spouse or partner cared for you as you recovered from the injuries at issue, was he employed as of the date you were injured, did he lose income because he needed to care for you, and if so, what is the approximate amount of his lost earnings?
- Ask for the name/address/phone number and email address of a person in the human relations department of the client's employer who can assist with requests for information from her employer.
- If the case involves a wrongful death claim, were any retirement or Social Security benefits lost? See Pa.SSJI (Civ.) 7.220 and Subcommittee Notes following it for a description of the damages recoverable.

3. Non-Economic Losses:

- Past and future pain and suffering? What medication have you taken for your pain, or what treatment have you had to treat it?
- Embarrassment and humiliation?
- Loss of enjoyment of life? What activities did you enjoy doing before you were injured that you aren't able to do now or can only do now with difficulty?

- Disfigurement?
- Spouse's loss of consortium?
 - ("Past, present and future loss of the injured party's services and companionship of, including "the company, society, cooperation, affection and aid of the other" and "a loss of support, comfort and assistance, the loss of association and companionship and the loss of ability to engage in sexual relations." Pa.SSJI (Civ.) 7.140.)
- Other than immediate family members (e.g., friends, neighbors, co-workers, clergy, etc.), who has a close relationship with you who might be willing to talk to me about what you've been through and how the injuries you sustained have affected you?
- If the case involves a wrongful death claim, what services were lost that would have been performed by the decedent, including society and comfort lost due to the death of a parent or child and guidance and tutelage to children? See Pa.SSJI (Civ.) 7.220

4. Miscellaneous:

- Does any family member or close friend have any information they would prefer to discuss with you privately?
- Sometimes prospective clients don't understand what happened to them, and just need someone to explain it to them. Sometimes they feel compelled to investigate the circumstances involving the death of a loved one. Sometimes they are upset because they feel that they were disrespected, ignored or rudely or impolitely treated by a healthcare provider. Try to flush out what it is that motivated them to contact you, and ask them what it is that they would most like you to accomplish for them if you could do so. Are those reasons sufficient to justify the effort and expense involved in investigating and prosecuting a medical negligence case? Are the client's expectations reasonable and potentially achievable?
- If you decide to take a case in which the client is aged or infirm, explain why you need to promptly take their video deposition so that you can preserve their testimony and ensure

- they'll be with you at trial.
- If you need to decline the case because you simply can't make the math work, explain how the costs involved in retaining experts, reimbursing paid medical expenses, and paying counsel fees can so deplete the potential recovery that the risk of pursuing the claim is not justified in your opinion
- If you've developed such a level of discomfort or unease regarding the client or the claim as the result of the interview that you've decided to decline the case, advise the client of your decision at the conclusion of the interview rather than waiting to convey that news in a decline letter.

THE INFORMED CONSENT CASE - WHAT ARE THE ELEMENTS AND WHAT ARE THE COMMON DEFENSES?

Kathryn Kisak & Eric Purchase, Esquires

Purchase, George, & Murphey, P.C.

I. What is Informed Consent?

A doctor must have the express assent of his or her patient before administering certain types of treatment. This is called consent. Furthermore, a doctor must give a patient sufficient information to make an informed decision about whether to undergo the treatment. This is called informed consent.

"[A] claim involving a surgical procedure performed without consent sounds in battery." *Cooper v. Lankenau Hospital*, 51 A. 3d 183, 187 (Pa. 2012). "...[I]n the absence of an emergency, the consent of the patient is a prerequisite to a surgical operation...and an operation without the patient's consent is a technical assault..." *McSorley v. Deger*, 905 A.2d 524, 528 (Pa. Super. 2006). "The tort of battery has been described as an unconsented touching that is either harmful or offensive." *Id.* at 191. It is well settled that "a plaintiff in a medical battery/lack-of-consent case need not prove that the defendant surgeon performed the unauthorized operation with the intent to harm the patient." *Id.* Rather, "...by proving that the surgery or 'touching' was intentional and not consented to, a patient establishes that it was 'offensive,' sufficient to render the unauthorized surgery a battery." *Id.*

For a successful consent claim, no physical injury is required, only unconsented contact. *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742 (Pa. 2002). In *Montgomery v. Bazaz-Sehgal*, our Pennsylvania Supreme Court held that "[a] lack of informed consent or a lack of consent claim is actionable even if the subject surgery was properly performed and the overall result is beneficial." *Montgomery*, 798 A.2d 742, 748-749 (Pa. 2002).

Negligence is also irrelevant. *Cooper*, at 192. The Pennsylvania Superior Court held in *McSorley v*.

Deger "[i]n order for a plaintiff to state a cause of action under this theory he or she need not establish that the unauthorized surgery was done negligently. Indeed, said surgery could have been done perfectly, and could even have had a beneficial effect on the patient, yet a cause of action could still exist; for it is the very conduct

of the unauthorized procedure which constitutes the tort.905 A.2d at 528."

In some circumstances, "Pennsylvania law permits a patient to specifically limit his or her consent to an invasive [medical] procedure to a particular surgeon." *Taylor v. Albert Einstein Medical Center*, 723 A.2d 1027, 1034 (Pa. Super. 1998); See also *Grabowski v. Quigley*, 684 A.2d 610, 617 (Pa. Super. 1996)(if the patient is not informed as to the identity of the operating surgeon, the situation is a "ghost surgery").

II. When Must Consent Be Obtained?

The law of informed consent is governed both by Pennsylvania caselaw and by statute. The Medical Care Availability and Reduction of Error Act (MCARE), at 40 P.S. §1303.504, outlines the statutory duty of a physician to obtain his/her patient's informed consent. Informed consent must be obtained for the following procedures: (1) performing surgery, including the related administration of anesthesia; (2) administering radiation or chemotherapy; (3) administering a blood transfusion; (4) inserting a surgical devise or appliance; and (5) administering an experimental medication, using an experimental device or using an approved medication or device in an experimental manner. 40 P.S. §1303.504 (a). Informed consent is not required in a medical emergency in which immediate action is needed to preserve the patient's life or health. *Id.*; See also Pa. SSJI (Civ) 14.90.

III. Who Must Obtain A Patient's Consent?

The physician conducting the procedure must personally obtain the patient's consent and discuss with the patient all the information necessary to render the patient's decision "informed." This duty is non-delegable and the physician must personally satisfy this obligation through direct communication with the patient. *Shinal v. Toms*, 162 A.3d 429 (Pa. 2017); See also Pa. SSJI (Civ) 14.90. A physician cannot rely upon a subordinate to disclose the information required to obtain informed consent. "Without direct dialogue and a two-way exchange between the physician and patient, the physician cannot be confident that the patient comprehends the risks, benefits, likelihood of success, and alternatives." *Id.* at 453. "It is incumbent upon the physician to cultivate a relationship with the patient and to familiarize himself or herself with the patient's understanding and expectations." *Id.* at 453-454.

A doctor who performs only the pre-surgery physical examination or a nurse or a physician's assistant

cannot satisfy the operating physician's duty. *Id.* Furthermore, in most cases, a medical facility such as a hospital cannot be held vicariously liable for the physician's failure to perform this non-delegable duty. *Valles v. Albert Einstein Med. Ctr.*, 805 A.2d 1232 (Pa. 2002).

IV. What Information Must A Patient Be Given?

"...[F]or a consent to be effective it must be informed and knowledgeable." *McSorley* at 528. "Lack of informed consent is the legal equivalent to no consent..." *Montgomery* at 748. In order for consent to be informed, it must be shown that the patient was advised of those material facts, risks, complications, and alternatives to surgery that a reasonable person would consider significant in deciding whether to have the operation. *Taylor*, at 1034-1035. Furthermore, a physician may not knowingly misrepresent his or her professional credentials, training or experience. 40 P.S. §1303.504 (d)(2).

A doctor must disclose information that a reasonable person would have considered material to a decision of whether or not to undergo treatment. (Pa. SSJI (Civ) 14.90, *comments*; citing *Festa v. Greenberg*, 511 A. 2d 1371 (Pa. super. 1986)). "The validity of a surgical patient's informed consent depends upon the pretreatment information relayed to the patient..." *Shinal v. Toms*, 162 A.3d 429, 453, (Pa. 2017). A patient must be informed of "all the material facts from which he can make an intelligent choice as to his course of treatment." *Id*.

Interestingly, the MCARE statute does not make reference to the "material facts" standard, but rather compartmentalizes the information that must be disclosed into three distinct categories: (1) a description of the procedure, (2) risks of the procedure and (3) alternatives to the procedure. 40 P.S. §1303.504(b). "Consent is informed if the patient has been given a description of the procedure... and the risks and alternatives that a reasonably prudent patient would require to make an informed decision as to that procedure." *Id.* MCARE seems to be satisfied with the disclosure of the items in its given checklist.

In contrast, the Pennsylvania judiciary in *Shinal, Taylor, Festa* and other decisions suggest that informed consent is more nuanced and that a doctor is required to impart *any* information that *a reasonable person would* consider material to a decision of whether or not to undergo treatment. The Superior Court has held that it is up to the jury, not the court, to determine what information a reasonable patient would find "material" in order to

make an intelligent choice as to her course of treatment. *Cooper v. Roberts*, 286 A.2d 647 651 (Pa. Super. 1971); *Festa v. Greenberg*, 511 A.2d 1371, 1377 (Pa. Super. 1986). This tension between MCARE and decisional law has yet to be resolved.

The signing of a surgical consent form does not *ipso facto* bar an informed consent claim. A patient may still show that the physician failed to explain certain risks or alternatives related to the procedure. *Doe v.*Raezer, 664 A.2d 102 (Pa. Super. 1995) (Pa. SSJI (Civ.) 14.90, comments). Furthermore, collateral evidence has routinely been admitted in order to demonstrate the extent and nature of the communication between the parties and their understanding of the material terms of their contractual agreement regarding the conditions and parameters the anticipated surgery. *Moure v. Raeuchle*, 604 A.2d 1003 (Pa. 1992); *McSorley v. Deger*, 905 A.2d 524, 528 (Pa. Super. 2006).

V. When Is Expert Testimony Required?

A battery claim does not require expert medical testimony to prove the fact of an unconsented touching. (*Taylor, at 1035*). An action in battery needs no physical injury, but only some contact. Further, "the law is well established that expert testimony is not necessary where the cause of an injury is clear and where the subject matter is within the experience and comprehension of lay jurors." *Montgomery v. Bazaz-Sehgal*, 568 Pa. 574, 589 – 590 (2002). Expert testimony was not required to prove that patient's emotional injuries, including embarrassment, feelings of being machine-like, and effect on patient's marital relations, resulted from unconsented-to and unwanted implantation of penile prosthesis. *Montgomery v. Bazaz-Sehgal*, 568 Pa. 574, 589 – 590 (2002). However, expert testimony is required to prove a causal relationship between the unconsented touching and any item of damage that is not clear and within the experience and comprehension of lay jurors.

Expert testimony *is* required to determine whether the procedure constituted the type of invasive procedure that requires informed consent under 40 P.S. §1303.504 (a). See 40 P.S. §1303.504(c). Moreover, if the case involves a question of whether risks were appropriately disclosed, expert testimony is also required to identify the risks of a procedure and the alternatives to the procedure and the risks of the alternatives. 40 P.S. §1303.504(c).

VI. What Are the Damages?

A physician who proceeds with a procedure or treatment without the patient's informed consent is liable for all injuries caused by that procedure or treatment, regardless of whether the procedure is performed, or the treatment is administered with the proper skill and care. Pa. SSJI (Civ) 14.110. Damages are recoverable for the unauthorized "touching," regardless of whether an actual injury occurs. *Id.* Where it is proven that an unauthorized invasion of a person's personal integrity has occurred, even if harmless, the person is entitled to damages. *Id.* Citing Prosser and Keeton, *Law of Torts* §9 at p. 40 (5th ed. 1984).

THE NEGLIGENCE CASE: WHAT ARE THE ELEMENTS

AND COMMON DEFENSES?

Jason Matzus, Esquire

Matzus Law, LLC

I. Medical Negligence

Generally, negligence is a common legal theory in any civil tort case where an assessment of fault is made by a jury. In medical negligence cases, the patient must establish that the medical provider owed a duty of care to the patient, the duty of care was breached, the breach in the duty of care caused the patient harm or increased the risk of harm to the patient, and the patient suffered damages. These four elements (duty, breach, causation, and damages) are similar to all other negligence cases. The scope of this chapter will focus on the second and third elements (breach and causation) as all medical providers owe a duty of care to their patients. Thus, the first element is subsumed within the physician–patient or medical provider–patient relationship and the fourth element (damages) is beyond the scope of this section.

Medical negligence is often referred to as and used synonymously with the term "medical malpractice." Medical negligence is defined as follows: an act of commission or omission by a medical professional that deviates from the accepted medical standard of care regarding the particular medical care at issue. Generally speaking, an act of "commission" is an *affirmative act or active negligent conduct* committed by the physician. An example of an act of "commission" is when a surgeon severs or cuts the wrong body part during surgery. Conversely, an act of "omission" is *passive negligent conduct* and results from a physician's failure to act. An example of an act of "omission" would be if a physician fails to order required diagnostic testing to evaluate for the presence of cancer in a patient and the patient's underlying cancer goes undetected resulting in premature death. At trial, you should avoid framing an "act of omission" (i.e., the doctor's failure to act) as passive negligence. Rather, you should frame all "acts of omission" as affirmative negligent acts. For example, instead of saying, "the doctor failed to order the recommended testing", you should say, "the doctor chose not to order the recommended testing". In short, frame all "failures to act" as affirmative voluntary choices not to provide the

recommended standard of care.

Doctors, nurses, and other medical professionals owe a duty of care to their patients. This duty requires the medical professional to provide medical care that is consistent with accepted medical standards of care. Medical negligence consists of the negligent, careless, or unskilled performance of a professional act by a medical provider regarding the duties imposed upon them by their professional relationship with the patient. (Pa. SSJI (Civ) §14.00). This is the typical definition given by the trial judge to the jury to define the term "malpractice."

Additionally, a physician must keep informed of contemporaneous developments in the medical profession or his or her specialty and must use current skills and knowledge regarding the medical care and treatment provided to patients. In other words, a physician must have "up to date" medical skills and knowledge, and if the physician fails to keep current on contemporaneous developments in their specialty or fails to use current knowledge regarding the medical care provided to their patient, the physician is negligent. (Pa. SSJI (Civ) §14.10).

II. Increased Risk of Harm

If a physician negligently delays the provision of required medical care, the physician may be liable for the injury caused to the patient if the patient presents expert testimony that the delay or failure to act by the physician increased the risk of harm to the patient. (See Pa. SSJI (Civ) §14.20). In an increased risk of harm case, the patient must present medical expert testimony that the medical provider's act or failure to act increased the risk of harm to the patient and the increased risk was, in turn, the factual cause of the patient's harm, even though the medical expert is unable to say with absolute certainty that the negligence caused the resulting harm. The principal of increased risk of harm recognizes that in certain circumstances direct, conclusive evidence of medical causation is impossible to prove.

III. Medical Causation

Under Pennsylvania law, in order for the patient to recover, the patient must prove that the medical provider's negligent conduct was a "factual cause" in causing the injury or harm. Conduct is considered to be a "factual cause" of harm when the harm would not have occurred absent the conduct and the conduct was an actual factor in causing the harm, even if the harm is unusual or unexpected. (Pa. SSJI (Civ) §14.20).

Importantly, the medical provider's conduct does not need to be the *only* factual cause. The medical provider is not relieved of liability if other causes concur with the medical provider's negligence and cause injury to the patient *provided* that the medical provider's negligence is a *factual cause* of the patient's injury.

Oftentimes, in medical malpractice cases, proving medical causation is the more complex and difficult "hurdle" to overcome. It is recommended that you meticulously and comprehensively evaluate the medical causation element of a medical malpractice case before filing a lawsuit. Analyzing medical causation very carefully as part of your overall case selection and screening process will ultimately pay dividends to your client and you. The worst outcome for any plaintiff medical malpractice trial lawyer is to obtain a favorable verdict on medical negligence (i.e., the jury votes "yes" on negligence) but an unfavorable verdict on medical causation (i.e., the jury votes "no" on medical causation).

THE ROLE (AND NECESSITY) OF EXPERT WITNESSES IN MEDMAL CASES

Malcolm MacGregor, Esquire

McDonald & MacGregor, LLC

I. Minimum Expert Qualifications: 40 P.S. Insurance § 1303.512 – Expert Qualifications:

Section 1303.512 – Expert Qualifications of the MCARE Act generally states that an expert physician must possess sufficient education, training, knowledge and experience to provide credible, competent testimony. Section 1303.512(a), General Rule. The expert must possess an unrestricted physician's license to practice medicine in any state and be engaged and/or retired within the previous five years from active clinical practice or teaching. These requirements may be waived if the court finds that an expert is otherwise competent to testify by virtue of education, training or experience. Section 1303.512(b), Medical Testimony, (1) and (2). Subsection (c), Standard of Care (1), (2), and (3) sets forth additional qualifications for a physician expert testifying as to the standard of care including:

- A. Be substantially familiar with the applicable standard of care for the specific care at issue as to the time of the breach;
- B. Practice in the same subspecialty as the defendant physician or in a subsection which has a substantially similar standard of care for the specific are at issue; and,
- C. Where a defendant physician is certified by an approved board, the expert must be board certified by the same or a similar approved board. Section 1303.512 (c)(1), (2) and (3)
- D. A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis and treatment of a condition if the court determines that:
 - 1. The expert is trained in the diagnosis or treatment of the condition; and,
 - 2. The defendant physician provided care for that condition and such care was not within the physician's specialty or competence. Section 1303.512 (d), Care Outside Specialty, (1) and (2).

There is also a "catch all" subsection at (e), Otherwise Adequate Training, Experience and Knowledge, which provides that a court may waive the same specialty and board certification requirements for a standard of care expert if the court determines that the expert possesses sufficient training, experience and knowledge to

provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period. Section 1303.512(e).

While your legal research will provide you with many cases detailing the various requirements for expert qualifications in medical malpractice cases, the MCARE Act expert qualification section represents a minimum requirement your medical malpractice expert must possess in order to offer testimony at trial on behalf of your client. Remember you **must** have an expert who complies with these minimum requirements in order to advance a medical malpractice claim. Only in the rarest of instances such as a res ipsa loquitur case, do you not need to have an expert.

II. The Role of the Expert in Med Mal Cases

A. Case Screener/Reviewer/Certificate of Merit Affiant:

One of the most important roles of an expert in a medical malpractice case is to help you determine whether there are sufficient grounds to prosecute a claim. These are some of the most complicated cases and they require a high level of knowledge from a qualified medical expert to determine whether the defendant healthcare provider breached the standard of care and whether that breach caused your client's injuries, such that a claim can be successfully prosecuted. You will need to provide your reviewing medical expert with all of the relevant medical records, films, and related test results involved in your client's care, in addition to sharing any important factual information from the client's perspective regarding the treatment or what was told to them by the healthcare provider. After your expert has had an opportunity to review the materials, you should set up a Zoom session, or a FaceTime or phone conference, to discuss their review of the case. Pennsylvania Rule of Civil Procedure 1042.3, Certificate of Merit, requires that an expert reviewing physician must provide an affidavit confirming the merit of the case against the defendant healthcare provider. Once that written statement in the form of an affidavit is provided, then the attorney prosecuting the medical malpractice claim must file a Certificate of Merit of record with the court against each licensed professional against whom a claim is asserted. Careful attention should be paid to the specifics of Rule 1042.3 requirements on filing the Certificate of Merit in a timely fashion and against whom they must be

filed.

B. Discovery Consultants:

Your medical expert is also an invaluable resource in the discovery process. In addition to providing you with medical research on the condition at issue and the standards of care involved, they can also help you craft specific Requests for Admissions, Interrogatories or Requests for Production of Documents. The expert can also be extremely effective in helping you prepare for a deposition, including outlining questions on the medicine and standards of care to cross examine the defendant healthcare provider that will be essential to the prosecution of your medical malpractice claim.

C. Trial Expert:

The work that you put in with your medical expert in a malpractice case in the initial screening and review, as well as medical research and discovery process, goes a long way towards helping you and your medical expert in a medical malpractice be effective advocates for your client at trial. The expert will be required to author an expert report as part of the discovery process and must testify within the "four corners of that report" at trial, meaning that he or she cannot surprise the defense by raising issues which are not set forth in their expert report. Working closely with an expert to ensure that they understand the legal requirements of an expert report as to the issues of negligence, breach of the standard of care, causation related to the injuries and the resulting harm or damages endured by your client, is critical to the success of your case. In addition to their original expert report upon which they will testify at trial, experts in medical malpractice cases will often be asked to author rebuttal reports in response to those proffered by the defense to ensure that they can testify at trial with regard to not only their opinions, but their critique as to the opinions offered by the defenses' medical experts. There is absolutely no substitute for preparation when working with an expert on their expert report or trial testimony. It is highly recommended that you meet with the expert in person to go over not only their reports, but the medical records and testimony upon which their report is based, as well as the opinions of the opposing experts. If that is not possible, then a virtual or phone conference should be set up to carefully review the opinions that will be offered at trial, as well as anticipated

cross-examination. You should work closely with your expert on developing their direct testimony, the specific opinions required on negligence, causation, and damages, as well as opinions to refute the defenses in your case.

II. Experts, Resources and Reminders:

The best resources for identifying highly qualified experts for complicated medical malpractice litigation include your own office with partners who have dealt with similar experts, the PAJ Med Mal listsery, as well as recommendations from experienced med mal trial lawyers and scholarly articles authored by physicians who are willing to act as experts. Each are also excellent tools to find highly qualified experts. You can also resort to reaching out to PAJ business partner and/or an experienced service that provides highly qualified experts. However, you should be careful to ensure that you have an opportunity to review the expert's qualifications, speak to the expert, and understand what you are getting for the expert service fee before agreeing to proceed in that fashion. Above all else, never forget that you must select an expert who will unquestionably appear at trial to testify to advance and defend their opinions. It does you no good to retain a highly qualified expert who will ultimately tell you that they will not appear at trial, are too busy to appear at trial, but will give you a deposition. Your expert must be live at trial in a medical malpractice case and they should be selected with that requirement in mind.

Generally, in terms of the type of expert required, as mandated by the MCARE Act qualifications sections referenced above, you will generally find that you will require experts in the same field of medicine as those who treated your client. These will most commonly include surgical, radiology, neuroradiology, neurology, orthopedic, internal medicine, physiatry and/or physical therapy, as well as physician-hospital executives familiar with the standards of care for hospitals and the delivery of healthcare and nursing home administrators familiar with the standards of care applicable to those entities.

Finally, never forget that prosecuting medical malpractice cases is extremely expensive. You must work with the expert to obtain all of the services you need, while at the same time remembering that every dollar you spend is coming out of your client's pocket as a reimbursed expense or an expense that you may NOT get reimbursed for if you are not successful in the case. Managing the financial demands of highly qualified

medical experts is complicated and requires a clear understanding as to hourly rates, the amount of time to be spent on the case and trial appearance fees including non-refundable deposits when cases are continued or settled. You must be mindful of this for the benefit of your client as well as your law firm.

Should you ever have any questions regarding the retention of an expert in medical malpractice cases, please do not hesitate to contact me at mlm@mmmmlaw.com or participate in our PAJ listserv.

CERTIFICATE OF MERIT REQUIREMENTS

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Pennsylvania's Certificate of Merit requirement is contained in Rule 1042.3 and requires the attorney for the plaintiff to sign and file a certificate of merit within sixty days after the filing of the complaint in any action based upon an allegation that a licensed professional deviated from an acceptable professional standard. Pa. R. Civ. Proc. 1042.3(a). The Certificate must attest that:

- (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
- (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or
- (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim. *Id*.

This requirement also applies to actions alleging a lack of informed consent, and requires that the "appropriate licensed professional" who supplies the underlying written statement be an expert "with sufficient education, training, knowledge and experience" to testify at trial, although the expert need not be the same person who ultimately testifies at trial. *Id.* In medical malpractice cases, the expert who provides the statement in support of a certificate of merit should meet the qualifications set forth in Section 512 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P. S. § 1303.512, which provides that, in addition to possessing an unrestricted physician's license, the expert must meet the following

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¹ Rule 1042.1 expressly identifies licensed professionals for whom this Rule applies, and in addition to healthcare providers as defined by § 503 of the MCARE Act, 40 P.S. § 1303.503, such professionals include accountants, architects, chiropractors, dentists, engineers, land surveyors, nurses, optometrists, pharmacists, physical therapists, psychologists, attorneys and veterinarians.

qualifications:

- (1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.
- (2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).
- (3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e). 40 P. S. § 1303.512(c).

A separate certificate of merit must be filed for each licensed professional against whom a claim is asserted. Pa. R. Civ. Proc. 1042.3(b)(1). A defendant need not file a responsive pleading until the time prescribed under Rule 1026 requires it, or within twenty days after service of the certificate of merit, whichever is later. Pa. R. Civ. Proc. 1042.4. The Certificate of Merit form itself can be found at Pa. R. Civ. Proc. 1042.10.

In the event no Certificate of Merit is filed within sixty days of the filing of the Complaint, and there is no pending motion to extend the time or to determine that no certificate is required, then the prothonotary, upon Praecipe by the defendant, shall enter a judgment of non pros against the plaintiff. Pa. R. Civ. Proc. 1042.7.²

Before filing the praecipe, a defendant seeking to enter such a judgment of non pros must file a written notice of intention to file the praecipe and serve it on the party's attorney of record no sooner than the thirty-first day after the filing of the complaint. Pa. R. Civ. Proc. 1042.6. While the plaintiff may file a motion to extend the time for filing a certificate of merit, that motion must be filed by the thirtieth day after the filing of a notice of intention to enter judgment of non pros. Pa. R. Civ. Proc.1042.3(d). The filing of such a motion to extend tolls the time period within which a certificate of merit must be filed unless the court rules upon the motion.³ *Id*.

² Note that the filing of Preliminary Objections does not impact a plaintiff's duty to timely comply with Rule 1042.3. *Yee v. Roberts*, 878 A.2d 906 (Pa. Super. 2005).

³ Additionally, the party filing the motion must move with "reasonable diligence" under the local rules to see that the motion is promptly presented to the court for determination. Pa. R. Civ. Proc. 1042.3(d).

"The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days." *Id.*⁴

The certificate of merit requirement has been held to apply to hospitals and other entities where theories of corporate liability are alleged, and a separate certificate is required for such claims, confirming that an appropriate expert has "supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm" whenever corporate liability allegations are asserted. See *Rostock v. Anzalone*, 904 A.2d 943 (Pa. Super. 2006); *Stroud v. Abington Mem'l Hosp.*, 546 F. Supp. 2d 238 (E.D. of Pa. 2008); *Goodfellow v. Camp Netimus, Inc.*, 2017 WL 1738398 (M.D. of Pa. 2017); *Harris v. Balanced Care of Altoona, Inc.*, 82 Pa D&C 4th 172 (C.P. Blair 2006)(applied to corporate liability theory against nursing home). As evidenced by the foregoing citations, Pennsylvania's certificate of merit requirement also applies in federal cases where Pennsylvania law is applied. *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258 (3d Cir. 2011).

While there are cases that will overlook procedural defects that result in non-compliance with Rule 1042.3, provided there is no prejudice to the opposing party and a plaintiff demonstrates substantial efforts to comply, e.g. *Womer v. Hilliker*, 908 A.2d 269 (Pa. 2006), the goal is to avoid such an issue in the first place. In that regard, certain practical steps offer considerable assistance:

(1) Develop a simple and generic form, which tracks each requirement of Rule 1042.3 and, where applicable, 40 P. S. § 1303.512, and send the blank form to each expert whom you retain to review the matter. Assuming you receive a positive review, upon receipt of the form signed by your expert, you will have met the requirements that enable you to sign and file the Certificate of Merit in the form prescribed by Rule 1042.10.

⁴ The rule further expressly provides that, "[i]n ruling upon a motion to extend time, the court shall give appropriate consideration to the practicalities of securing expert review. There is a basis for granting an extension of time within which to file the certificate of merit if counsel for the plaintiff was first contacted shortly before the statute of limitations was about to expire, or if, despite diligent efforts by counsel, records necessary to review the validity of the claim are not available." *Id*.

- (2) File your Certificates of Merit with your Complaint, as doing so simultaneously avoids the risk that you will overlook the 60-day deadline for filing the Certificates and also eliminates any additional time that the defendants might receive to respond to your Complaint as a consequence of any delay in filing the Certificates of Merit.
- (3) Count the number of Defendants in your Complaint. Count the number of Certificates of Merit you have filed. Those numbers must match.
- (4) Calendar a date 21 days after your complaint is filed by which you doublecheck your Certificates of Merit. Should you encounter any issues, you can either correct them promptly and/or you still have another 9 days within which to file for an extension of time pursuant to Rule 1042.3(d).
- (5) If you are unsure whether a Certificate of Merit is required, file one anyway assuming you are able. There is no penalty for filing an unnecessary Certificate of Merit and it eliminates the debate.

VENUE IN MEDMAL CASES

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"[T]he Pennsylvania Constitution grants the judiciary and the judiciary alone power over rule-making." *In re 42 Pa.C.S. § 1703*, 394 A.2d 444, 451 (Pa. 1978); *see* Pa. Const. Article V, Section 10(c). Noting that venue provisions delineate the forum, manner, and mode of enforcing litigant's rights rather than creating or defining the rights themselves, the Pennsylvania Supreme Court concludes that venue provisions are procedural rules subject to its exclusive authority. *McGinley v. Scott*, 164 A.2d 424, 428 (Pa. 1960).

I. The Venue Rule

In non-medical malpractice actions, Pennsylvania Rule of Civil Procedure 1006 generally permits that plaintiffs can find proper venue in multiple counties such as where the defendant can be served (i.e., residence, headquarters), the county where the transaction or occurrence happened, or where the defendant regularly conducts business. In the wake of the comprehensive medical malpractice tort reform implemented in the early 2000s, the Supreme Court created Pennsylvania Rule of Civil Procedure 1006(a.1) which provides:

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

Further strengthening these special venue restrictions unique medical malpractice claims, Pennsylvania Rule of Civil Procedure 1006(c)(2) provides:

If the action to enforce joint or joint and several liability against two or more defendants includes one or more medical professional liability claims, the action shall be brought in any county in which the venue may be laid against any defendant under subdivision (a.1).

This provision does not apply to a cause of action that arises outside the Commonwealth.

In essence, health care providers in Pennsylvania are treated differently than all other defendants in that venue is restricted to only those counties where the actual harm occurred⁵.

Since enactment of this special Rule, medical malpractice victims have tried unsuccessfully to test the limits of this Rule⁶. For example, the Superior Court held that venue is only proper in the county where a medication was negligently prescribed, not the county where it was ingested and caused death. *Peters v. Sidorov*, 855 A.2d 894 (Pa. Super. 2004). Generally, courts throughout the Commonwealth apply the special medical malpractice venue rule rigidly, unwilling to expand the interpretation of where the "cause of action arose." Yet, with the rapid emergence of tele-medicine and the consolidation of decision-making regarding staffing and budgeting at large health network headquarters, if the Pennsylvania Supreme Court does not finally rescind the special venue Rule, a new round of venue litigation is sure to follow.

II. Form Non Conveniens

At times, patients receive care from the same health care provider at different counties (i.e., a surgeon's office and the hospital) or multiple health care providers at different locations (i.e., two different hospitals). Under these circumstances, if the negligent care occurred in both counties, the plaintiff has the choice of venues. While the plaintiff's choice of forum carries great weight, it is no absolute. Pennsylvania Rule of Civil Procedure 1006(d)(1) provides, in pertinent part:

For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought.

⁵ Notwithstanding the questionable constitutionality of this special Rule, as of this publication date the Pennsylvania Supreme Court is reconsidering the viability of this special Rule.

⁶ For a comprehensive review of cases throughout the Commonwealth analyzing a wide array of factual circumstances, please see Clifford R. Rieders, *Pennsylvania Medical Malpractice Law & Forms*, Chapter 1 (2017)

Consideration of a defense motion to transfer venue for convenience requires that the movant demonstrate, "with detailed information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant." *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997). The public and private factors to be considered are:

The relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive... The court will weigh relative advantages and obstacles to a fair trial.

Factors of public interest also have [a] place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden [*11] that ought not to be imposed upon the people of a community which has no relation to the litigation. There is appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Engstrom v. Bayer Corp., 855 A.2d 52. 56 (Pa. Super. 2004)(quoting Petty v Suburban Gen. Hosp., 525 A.2d 1230, 1232 (Pa. Super. 1987)). This analysis is circumscribed by the fundamental principle that the plaintiff's choice of forum must be respected unless the balance of factors strongly favors transfer. Scola v. AC&S, Inc., 657 A.2d 1234, 1241 (Pa. 1995), quoting Okkerse v. Howe, 556 A.2d 827, 831-32 (Pa. 1989).

As the Pennsylvania Supreme Court considers rescinding its special venue rule, stay tuned!

LIENS IN MEDICAL MALPRACTICE CASES

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Generally, Pennsylvania law is that a plaintiff can recover for expenses even those paid by a third party, such as an insurer. See, Moorehead v. Crozer Chester Medical Center, 564 Pa. 156, 765 A.2d 786 (2001). This was until the MCARE Act came along. The MCARE Act essentially prohibits recovery for past medical expenses paid by a private or public entity in a medical professional liability action. The General Assembly declared the purpose of the MCARE Act was to ensure fair legal process and reasonable compensation for persons injured due to medical negligence in the Commonwealth. See, Medical Professional Liability - General Amendments, 2002 Pa. Legis. Serv. Act 2002 – 13 (H.B.1802).

The Medical Care and Availability Act modified Pennsylvania's Collateral Source Rule regarding medical bills, in 40 Pa. C.S.A. §1303.508 (a) as follows:

- (a) **General Rule:** Except as set forth in subsection (d), a claimant in a medical professional liability action is precluded from recovering damages for past medical expenses or past lost earnings incurred to the time of trial to the extent that the loss is covered by a private or public benefit or gratuity that the claimant has received prior to trial.
- (b) **Option:** The claimant has the option to introduce into evidence at trial the amount of medical expenses actually incurred, but the claimant shall not be permitted to recover for such expenses as part of any verdict except to the extent that the claimant remains legally responsible for such a payment.
- (c) **No Subrogation:** Except as set forth in subsection (d), there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to a public or private benefit covered in subsection (a).
- (d) Exceptions: The collateral source provisions set forth in subsection (a) shall not apply to the following;

 (1) Life insurance, pension or profit-sharing plans or other deferred compensation plans, including agreements pertaining to the purchase or sale of a business; (2) Social Security benefits; (3) Cash or medical assistance benefits which are subject to repayment to the Department of Public Welfare; (4) Public

benefits paid or payable under a program which under federal statute provides for right of reimbursement which supersedes state law for the amount of benefits paid from a verdict or settlement.

So long as a case is governed by Pennsylvania law, the MCARE Act determines what expenses can and cannot be introduced at trial and/or recovered. Public benefits generally include Medicare and Pennsylvania Department of Human Services and are recoverable. They must also be paid back. Both Medical and DHS have formulas for reduction of liens that take into account attorney fees and costs of litigations.

But what about medical bills paid by a private health insurer? First, determine if they are an exception to MCARE. Otherwise, they cannot assert a lien. One of the biggest issues encountered by practitioners when it comes to private insurers are ERISA plans. ERISA plans have a lien against recovery and is governed by a large liberal body of federal law tending to be very insurer friendly. You should first get the Plan and Form 5500 and verify the validity of the lien as ERISA and become familiar with the specific language of the plan regarding subrogation.

Another problematic area for Pennsylvania practitioners is out-of-state private payors, not ERISA. These out-of-state plans will often allege they are not governed by Pennsylvania law and have a contract in a different state with their Insured (your client). They often threaten clients that if they are not paid back, they will sue them in the court in the state which they are located, a different state than the plaintiff's medical malpractice claim and that fear is often times enough to strike compromise by both parties. Alternatively, a choice of laws analysis would be performed and most likely dealt with at the summary judgment level. The issue becomes whether a county court decision is binding on a different court in another state.

Whether dealing with ERISA or an out-of-state plan, I have found early communication with the plan to be best. This is even true of public benefits, like Medicare and DHS. Liens of all types should be considered at the outset of the case. I suggest contacting each lienholder and attempting to get an agreed to reduction at the outset and in writing so that at the end of your case, liens do not prevent you from settling your case. Finally, there are a couple other liens that may impact your case. Workers' Compensation benefits should always be accounted for as these carriers have the right to subrogation. Carriers are required to reduce by fees and costs and are governed by the Pennsylvania Workers' Compensation Act. PA Workers' Compensation Act, 77

P.S. §671, et. seq. And, in addition to medical bills paid through the Pennsylvania Department of Human Services referenced above, they may have another kind of lien through Pennsylvania's Estate Recovery Act. The Act allows the Pennsylvania Estate Recovery Program to recover for Medical Assistance from the estate of an individual who was 55 years or older when he or she started receiving nursing facility services or home and community-based services. 62 P.S. §1412.

THE INTERPLAY BETWEEN THE MEDMAL AND MEDICAL PRODUCT CASE

Kila Baldwin, Esquire

Kline & Specter, PC

If an injured party files a products liability action against a medical device manufacturer, alleging that a medical device used on them and/or implanted in them was defective and/or malfunctioned, causing harm, it is nearly guaranteed that the defendant manufacturer will file cross claims or raise as a defense that the medical care provider who used the device in question and/or implanted the device in question was somehow negligent, causing the plaintiff's injuries.

By way of example, I have represented numerous plaintiffs in transvaginal mesh cases. The injured women in these cases have plastic mesh inserted through their vagina to help relieve their symptoms of pelvic organ prolapse and/or stress urinary incontinence. Without fail, the defendants in these cases have served expert reports and argued at trial the mesh products were implanted incorrectly, causing the harm.

It is imperative when you file a products liability action involving a medical device you carefully review the medical records and understand fully any medical procedures or surgeries your client underwent, and what the physicians did or did not do. As you prepare to file suit, consider if the conduct of the physician or othercare provider could have contributed in any way your client's injuries, and be prepared to discuss that possibility with your experts before you file suit.

As the case develops, prepare your client for this possibility being raised in their deposition, and what questions they may face about it. For instance, a defense attorney may ask a plaintiff if they believe the defendant doctor was negligent in any way, opening the door for supposition and guessing by your client if you haven't prepared them that is a potential defense in the case.

When your experts write their reports, make sure they rule out other possible causes of the harm, including any potential medical negligence. A generic statement by the expert that they have ruled out other causes of harm is not adequate. Have your expert explain the procedure, what was done by the physician, and that the physician followed the standard of care. In products liability actions, that often means you will have to hire an additional expert simply to testify as to the standard of care.

Similarly, when you file medical malpractice cases where a medical device was involved, the defense attorneys will undoubtedly attempt to blame the device manufacturer, alleging the device was defective. For example, I handled a case where a man underwent laser ablation of a brain tumor. During the surgery, the laser being used broke, releasing pressurized carbon dioxide directly into his brain. However, the surgeon involved failed to appreciate numerous warnings the system's software gave him to stop using the device when it fractured, causing injury. The defense in the case was that the device was defective; a thinly veiled attempt to shift blame away from the doctor and to the device. In cases like this, you may need to file suit against both the physician as well as the manufacturer. When doing so, you must have separate reports for all experts on liability in the event you settle with either party before trial. If you don't do this, you run the risk of having an expert being cross examined with his own report about why both parties are culpable. If you elect not to sue both parties, ensure that you have reports ruling out the other's party's actions as a cause of the injuries.

In sum, it is important in any case involving a medical device, either a malpractice or products liability action, that you consider all of the different potential causes of harm, and have experts ruling those in (or out) so you can effectively try the case.

MOTIONS IN LIMINE IN MEDICAL MALPRACTICE CASES

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Motions in limine can be a very effective weapon in medical malpractice cases either as a sword or as a shield. The types of issues you want to include in motions in limine are those types of improper things that you anticipate the defense lawyer of witnesses may say in front of the jury that once the jury hears it will be impossible to put the rabbit back in the hat; Therefore as you start to prepare how you are going to present your case to the jury, it is very important to think about all the various pieces of improper evidence are arguments that counsel may make that you don't want to have the jury hear before you have a chance to make an objection in open court. A pretrial Motion in Limine give you the ability to have the court make a ruling on the anticipated improper evidence and/or arguments without a jury ever hearing it and being tainted by it.

Each county will have different rules for when Motions in Limine need to be presented. In my view, the later you can present the Motion in Limine the better. The majority of cases that I handle are in Allegheny County. In Allegheny County, the local practice is to present the Motions in Limine to the trial judge after the jury is selected. In many other counties they need to be filed with the court in advance so be sure to check the local rules to see if there is a particular filing deadline.

In my experience, there are generally two types of Motion in Limine. Case specific evidence that you want to exclude and more general Motions in Limine that I file in all cases. I will share examples of each one.

I. Case Specific

A case specific MIL may well be some evidence that was established in your case that is totally irrelevant to the case being tried. One situation that commonly occurs during wrongful death cases is that the surviving spouse who is claiming loss consortium for the loss of the spouse is now dating or even remarried.

Under the law in PA, the evidence of marriage and even dating is inadmissible. In that setting I will always want to file a MIL to preclude evidence or reference to the marriage or dating.

Another situation that can commonly occur in a medical malpractice cases is evidence or an argument or inference that the condition that caused the plaintiff to arrive in the ER was caused by something the plaintiff or

someone else not a party to the lawsuit caused. I had a case where a woman who was on Coumadin and was hyper-coagulated when showed up at the ER after a fall. The ER doctors failed to reverse her hyper-coagulation and then the radiologist missed the brain bleed. The defendant hospital wanted to get into the background of why she had the hyper-coagulated state. Of course, the "why" in that case was totally irrelevant and could be prejudicial to the case. We filed a MIL and the judge precluded any evidence or discussion of the why my client was hyper-coagulated.

Finally, a classic example is that the defense has multiple experts who have reports that contain the same opinions. In that situation you want to file a MIL to limit the defense to one expert per witness and thus having to make them choice which expert is going to talk about which issue.

II. General

As you try these medical malpractice cases you will find that the defense is always trying to inject improper considerations into the case to try to get the sympathy of the jury most commonly in openings and closings. They will do things such as say "how proud or honored they are to represent Dr. X." Defense counsel will say how sorry the lawyer and his client is that Mrs. Y was seriously injured or died. They may try to argue that Dr> Z used his/her best judgment, or did not intend to hurt the plaintiff. In every case I fill MIL to preclude those types of arguments. These MIL are not always granted but I feel that it makes counsel soften those type of statements to the jury even if the judge allows it.

III. Conclusion

As previously stated, you should be thinking about case specific MIL as discovery closes and expert reports exchanges. Be sure to check the local rules on the county specific filing deadlines. MIL can be very helpful to try to level the playing field that is usually stacked against us by the judges and juries.

ALTERNATE DISPUTE RESOLUTION IN MEDMAL CASES

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Trial is a formal process guided by the rules of evidence. Although mediation is less formal than a court proceeding, that does not mean there is no process and no rules. The process is as follows:

- I. The mediator will typically make an opening statement. That statement is somewhat mediator specific but usually the participants are introduced. The fact that the proceedings are confidential and voluntary is explained. The challenges of trial are emphasized, which generally are that trial is uncertain, stressful costly and public with a high degree of risk to each side.
- II. Each party has an opportunity to give a presentation or make some kind of statement regarding the dispute.
 The litigants are also given the opportunity to speak.
- **III.** The mediator then gives the parties the opportunity to ask questions.
- IV. Private caucuses then occur in separate rooms. During this time the mediator will meet privately with each side. After those meetings the mediator will then go between the two rooms and discuss the strengths and weaknesses of each position. The majority of the time spent in mediation is in the private caucus.
- V. If the case has resolved or the discussions are going to continue after the mediation, the mediator sometimes will bring the parties back together. This often does not happen.
- VI. If the case has settled, the mediator will likely document the main provisions and have each party sign a simplified version of the settlement terms.

The rules of mediation are not found in a handbook. Different lawyers and mediators have various approaches and unwritten rules. The following are the rules that I try to follow before a mediation. First of all, talk to the defense lawyers before the mediation. I have found it enlightening to simply ask, "What are your thoughts about the mediation?" Frequently you will learn something about the defendant's positions that you did not know. It's an invitation for the defense lawyer to point fingers at other defendants as being primarily responsible. You may also learn that the doctor they represent will not consent to settle. Assuming that the doctor actually has the right to withhold consent to settle, it makes no sense to have that doctor and lawyer

participate in a mediation.

Although the costs of mediation are often evenly split between the parties, I ask the defendants to pay for the mediation. One of the reasons that I want them to pay is it tells me if they are serious about a resolution. Another reason I ask them to pay is that I have found when they are paying for the mediation, the proceedings are handled more efficiently. In other words, the defense does not want to waste their time and money. The majority of the time they agree to pay.

In my opinion, mediation is about control and certainty. The defense often believes they have total control because they have what the plaintiff wants - money. On the other hand, the plaintiff is in control because a case will never settle until the plaintiff says yes to an offer. I don't say that from the perspective of arrogance. For that matter a pompous arrogant stance in mediation is probably the worst mistake you can make. I say a case does not settle until the plaintiff says yes because that is the law. You have this powerful fact on your side so remember it.

You also control your intentions, expectations, and goals. Perhaps you want to mediate because you believe the defense attorney is not communicating what you believe is important to the person who decides what the case is worth. A mediation will give you the opportunity to present your case. If you present your case, I strongly believe that your presentation should be about the defendant. Focus on the defendants conduct and choices. I love to show a short video clip of the defendant's testimony during a deposition.

I rarely focus my presentation at a mediation on my client's damages. If I have a video that documents the client's damages, I send it before the mediation. Avideo with short interview clips from the witnesses you plan to call at trial can be very powerful. Although I typically claim lost wages and medical expenses in the complaint, I rarely introduce them into evidence at trial. However, I typically provide an economic report to the defense before the mediation. I remember more than one mediation where the mediator said that the defense thought our economic claim was over reaching. As time went on It became evident that this was the only thing the defense had to talk about. With that in mind and a trial date around the corner, I told the mediator to tell the defense we were not going to call our economist at trial because the economic damages trivialized the true value of the losses our client had suffered. The mediation resulted in a very favorable settlement. My point is, listen to

what the mediator tells you about the defense's position and use it to your advantage.

At times the mediation is requested by the defense so that the decision makers can meet the client.

Rarely will they tell you that is the purpose. I suggest you ask the defense lawyer if that is why they want a mediation. I rarely consider meeting the clients a good reason for a mediation. There are legitimate reasons to protect our clients from the uncomfortable stares and judging eyes of total strangers. There is no rule that your client must attend. If and when the defense insists that your clients attend, it only makes sense that you likewise, if you believe it will help move the case forward, insist the defendant doctors and hospital representatives attend.

Mediation can result in certainty for the defense that does not benefit the plaintiff. If you have negotiated to a number that the defense perceives as low, they may believe that you will settle for less on the eve of trial. Be prepared and willing to leave the mediation without a resolution. There is rarely a legitimate reason for there to be long periods of time between offers. Under most circumstance I would strongly suggest that you do not set yourself up by believing the case must settle at mediation.

Most importantly, prepare your clients for the process of mediation. Be cognizant of the fact that your clients may perceive a friendly attitude toward the defense attorneys and mediator as a sign that you are not advocating for their position. Make sure they know that you are always on their side.

TOP TEN PENNSYLVANIA DECISIONS IN MEDICAL MALPRACTICE IN THE PAST 10 YEARS

Clifford A. Rieders and Pamela Shipman, Esquires

Rieders, Travis, Humphrey, Waters & Dohrmann

- I. Expert Witnesses Under the MCARE Act. Vicari v. Spiegel, 605 Pa. 381, 989 A. 2d 1277 (2010) is key to understanding Section 512 of MCARE Act, 40 P.S. §1303.512, which governs who is qualified to testify regarding the standard of care The Supreme Court explained that it is a "misconception that the MCARE Act mandates that.... the testifying expert must be board-certified by the same board" in every instance. Id., at 1283. The Act allows trial courts to waive the same subspecialty and same board-certification requirements if an expert witness has sufficient training, experience and knowledge regarding the applicable standard of care as a result of active involvement in the defendant physician's subspecialty or a related field of medicine. The Supreme Court expressly held that a determination that an expert practices in a field of medicine that is sufficiently related to the defendant physician's field can only be considered as to "the specific care at issue." Id. Thus, a medical oncologist would not be qualified to testify regarding a board-certified otolaryngologist's performance of surgery, but was qualified to opine regarding his failure to recommend chemotherapy.
- II. Emotional Distress Damages. *Toney v. Chester County Hospital*, 614 Pa. 98, 36 A. 3d 83 (2011) (evenly divided court). The opinion in support of affirmance concluded that liability for negligent infliction of emotional distress, absent physical injury, may be extended beyond the impact, zone of danger and bystander theories to "a subset of cases involving preexisting relationships" specifically, "...we would hold that some relationships, *including some doctor-patient relationships*, will involve an implied duty to care for the plaintiff's emotional well-being that, if breached, has the potential to cause emotional distress resulting in physical harm." *Id.*, at 94-95 (emphasis added). The opinion indicated that liability on that basis is to be determined on a case by case basis. *Id.*, at 95.
- III. Nursing Home Liability Corporate Responsibility. Scampone v. Highland Park Care Ctr., LLC, 618

Pa. 363, 57 A.3d 582 (2012) held that a nursing home can be held liable on a "corporate negligence" theory, adopted first in *Thompson v. Nason Hosp.*, 527 Pa. 330, 591 A.2d 703 (Pa. 1991). *Thompson* held that a hospital can be liable for non-delegable duties of care owed directly to patients: duties to (1) use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) select and retain competent physicians; (3) oversee all persons who practice medicine within the hospital's walls; and (4) formulate, adopt, and enforce adequate rules and policies to ensure quality patient care. *Id.*, at 707. The *Scampone* court determined that the *Thompson* principles may be applicable to a variety of institutions other than hospitals in the medical liability context.

- IV. "Error in Judgment" Jury Instruction. Passarello v. Grumbine, 624 Pa. 564, 87 A.3d 285 (2014) disposed of the question, hopefully permanently, as to whether a trial court should give an "error in judgment" jury instruction. An instruction that physicians are not liable for their "errors in judgment" when making medical decisions is erroneous. The physician's subjective state of mind is not relevant to whether he or she violated the standard of care, an objective determination.
- V. <u>Pleading Vicarious Liability</u>. Estate of Denmark v. Williams, 117 A.3d 300 (Pa. Super. 2015), and Sokolsky v. Eidelman, 93 A. 3d 858 (Pa. Super. 2014) stand for the proposition that when pleading vicarious liability "[s]imply because employees are unnamed within a complaint or referred to as a unit, i.e., the staff, does not preclude a claim against their employer under vicarious liability if the employees acted negligently during the course and within the scope of their employment." Sokolsky, 93 A. 3d at 866.
- VI. Defendants Shutting Down Deposition Testimony from Their Doctors. In *Karim v. Reedy*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, 2016 WL 111324 (Lacka. Co. Jan. 11, 2016), Judge Nealon analyzed whether malpractice plaintiffs may discover the past and present opinions of a defendant physician concerning the healthcare treatment at issue, including opinions on the standard of care. He held that no statute, rule, or appellate authority grants a malpractice defendant the right to withhold relevant opinions, nor does it provide him or her with the ability to prevent the discovery of those opinions by agreeing not to testify as an expert at trial. Judge Nealon's opinion is in contrast to that of Judge Wettick of Allegheny County who has ruled that a defendant physician who will not be offering expert opinion testimony at trial

Cannot be forced to opine in discovery on the quality of treatment and medical care, although Judge Wettick has noted that nothing in his analysis "suggests that a party may object to the testimony of a treating physician or any other witness who testifies that a review of a slide, chart, report, x-ray, and the like may be helpful in refreshing the witness's memory." See *Lattaker v. Magee Women's Hospital of UPMC*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1144 (Alleg. Co. July 5, 2016).

- VII. Nursing Home Liability- Enforceability of Arbitration Clauses. In Taylor v. Extendicare Health Facilities, 147 A.3d 490 (Pa. 2016), Justice Wecht expressed his disapproval of the proliferation of arbitration clauses, particularly in the context of nursing home litigation, which strip individuals of their rights to a jury trial. Nevertheless, writing for the majority, he found the U.S. Supreme Court decisions which hold that the Federal Arbitration Act (FAA) preempts state legislative and judicial attempts to limit the enforceability of arbitration agreements, see Marmet Health Care Ctr., Inc. v. Brown, 132 S.Ct. 1201 (2012); Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), meant that Survival Act claims must be severed and arbitrated despite Rule 213(e) which dictates the consolidation of wrongful death and survival actions for trial.
- VIII. Informed Consent Must Be Given by Physician/Prejudicial Jurors. Shinal v. Toms, 640 Pa. 295, 162

 A.3d 429 (Pa. 2017) concerned two different issues: 1) a physician may not delegate to others the obligation to provide sufficient information in order to obtain a patient's informed consent. Informed consent requires direct communication between physician and patient, and contemplates a face-to-face exchange. 2) Whether to presume prejudice on the part of a prospective juror is a question of law; where there is a direct employment relationship between a juror and a party or participant, such as a hospital, prejudice is presumed and the juror must be stricken for cause. Where an indirect familial, financial, or situational relationship is presented, prejudice is not presumed. The determination whether to strike a juror depends upon the answers and demeanor of the potential juror in voir dire, as observed by the trial judge. The standard is abuse of discretion. Reversal is appropriate only in the case of palpable error.
- IX. <u>Pennsylvania Peer Review Protection Act Narrowed</u>. In *Reginelli v. Boggs*, 645 Pa. 470, 181 A.3d 293 (2018), the Supreme Court significantly narrowed the evidentiary privilege under the Pennsylvania Peer

Review Protection Act, 63 P.S. § 425.1 *et seq*. The Court held that the privilege for "proceedings and documents of a [peer] review committee" only applies to an entity that qualifies as a "professional healthcare provider" as strictly defined by the PRPA. Specifically, the privilege did not apply to an entity under contract to provide review services for a hospital, because the entity was not "licensed or otherwise regulated ... operate in the healthcare field" under Pennsylvania law. Additionally, the Court held that hospital credentialing review activities are not privileged.

X. Risks and Complications of a Procedure May Come into Evidence. Mitchell v Shikora, 209 A. 3d 307 (Pa. 2019), built upon Brady v. Urbas, 631 Pa. 329, 111 A.3d 1155 (Pa. 2015). In Brady, the Supreme Court ruled that evidence of informed consent is not relevant in a case based solely on negligence, but distinguished evidence of risks and complications of a procedure, which may be relevant and admissible. In Mitchell, the Court affirmed the distinction drawn in Brady, and held that under the circumstances the trial court properly excluded informed consent evidence but permitted the admission of risks and complications testimony because it provided a fuller picture of the applicable standard of care.

APPENDIX A

PLAINTIFFS' MOTION IN LIMINE

AND NOW, come Plaintiffs, Kirk and Erik Rettger, by and through their attorneys, Berger & Lagnese, LLC, and file the following Motion in Limine, and in support thereof, state the following:

I. TO STRIKE CERTAIN PORTIONS OF THE REPORTS OF JOHN BUEHLER

- 1. The courts of Pennsylvania have long held that the proper measure of damages in a survival action is future net earnings and <u>not</u> future net savings or net accumulations. <u>See McClinton v. White</u>, 444 A.2d 85, 87 (Pa. 1982) (<u>citing</u> and <u>quoting Pezzulli v. D'Ambrosia</u>, 26 A.2d 659, 662 (Pa. 1942). Net accumulations the difference between the decedent's gross future earning power and his or her total personal expenditures "understates the proper measure of lost earnings under the law of this Commonwealth." <u>Id</u>.
- The loss of future net earnings under Pennsylvania law is equal to the decedent's total
 estimated future earning power minus the decedent's estimated cost of personal maintenance
 over the course of the decedent's work life expectancy. <u>Incollingo v. Ewing</u>, 282 A.2d 206, 229
 (Pa. 1971).
- 3. Because the proper measure of damages is net earnings and not net accumulations or savings many expenditures typically made during one's lifetime, such as gifts, gambling, alcohol, extensive travel, expensive cars, etc., are not to be included in the personal maintenance calculation. Pa. SSJI (Civ) 6.19 (Subcommittee Note) (2005).
- 4. In McClinton v. White, 427 A.2d 218 (Pa. Super. 1981), the Pennsylvania Superior Court adopted the view that when calculating the decedent's personal maintenance deduction, the decedent is to be viewed as an economic unit, capable of producing earnings but subject to the costs of production. McClinton, 427 A.2d at 227. Accordingly, the Superior Court held that the personal maintenance expenses that should be deducted from the decedent's loss of earning capacity are those expenses that "relate to the production of earnings." Id. "This includes expenses personal to the decedent which would have been reasonably necessary for him to

- incur in order to keep himself in such a condition of health and well-being that he would maintain his earning power, as well as any other reasonably necessary 'production cost' item of expense." Id.
- 5. On appeal, the Supreme Court in McClinton accepted the Superior Court's "economic unit" approach to the calculation of net future earnings, and accepted the definition of personal maintenance costs as being those "necessary and economical [costs] which a decedent would be expected to spend based on his station in life for food, clothing, shelter, medical attention and some recreation." McClinton v. White, 444 A.2d at 88.
- 6. In his calculation of the personal maintenance deduction, defense expert John Buehler uses a personal maintenance deduction percentage rate that comes from an article entitled "Patton-Nelson Personal Consumption Tables 2000-2001: Updated and Revised," published in the Journal of Forensic Economics. Mr. Buehler's October 31, 2007 Report is attached hereto as Exhibit "A".
- 7. Both the "Patton-Nelson" article relied on by Mr. Buehler and an earlier article by the same authors entitled "Estimating Personal Consumption Costs in Wrongful Death Cases" are based on a "Consumer Expenditure Survey" conducted by the U.S. Department of Labor Bureau of Labor Statistics. Both of the "Patten-Nelson" articles are attached hereto as Exhibit "B".
- 8. The Patton-Nelson personal maintenance percentage rates are based on national statistics showing the amount of personal earnings that are typically devoted to "the purchase of goods and services exclusively for the benefit of the deceased person[,] . . . includ[ing] such things as food, clothing, transportation, medical care, personal items, hobbies, entertainment and other items that would not benefit the survivors or give rise to asset accumulation in the estate."

 Journal of Forensic Economics 4(2), 1991, at pp. 233 (emphasis supplied). They also include deductions for the purchase of such items as alcohol, tobacco, life insurance, and other similar items. Journal of Forensic Economics, 15(3), 2002, at pp. at 295.
- 9. By deducting all personal expenses from projected earnings, the Patton-Nelson method results

- in a calculation of "net savings" or "net accumulations" rather than net <u>earnings</u>, in violation of Pennsylvania law. <u>See McClinton v. White</u>, 444 A.2d at 87 (reaffirming the Pennsylvania Supreme Court's longstanding refusal to limit Survival Act damages to net savings or net accumulations).
- 10. Because Mr. Buehler's personal maintenance deductions violate Pennsylvania law, these deductions must be stricken and Mr. Buehler must be precluded from offering any testimony regarding personal maintenance.
- 11. Furthermore, the last three paragraphs of Mr. Buehler's October 31, 2007 Report must also be stricken because these paragraphs are based on Mr. Buehler's clearly erroneous assumption that Pennsylvania law is concerned in the least with net savings or net accumulations when calculating economic loss under the Survival Act. It is not; and Mr. Buehler must therefore be precluded from offering any testimony consistent with these paragraphs.
- 12. In addition, Items #2 and #5 of Mr. Buehler's October 10, 2007 Critique of David Hopkins' Report, attached hereto as Exhibit "C", must also be stricken because these paragraphs also improperly inject the concept of net savings or net accumulations into the evaluation of the economic loss occasioned by the untimely death of Michael Rettger. Mr. Buehler must be precluded from offering any testimony consistent with these lines of analysis/criticism.
- 13. Should the Court permit Mr. Buehler to offer testimony concerning the personal maintenance deduction, Mr. Buehler must be precluded from deducting any personal maintenance amounts beyond the Michael Rettger's <u>work life</u> expectancy.
- 14. Under Pennsylvania law, lost net earnings are equal to the total amount of the decedent's loss of earning capacity minus the decedent's "personal maintenance expenses from the time of death through decedent's <u>estimated working life span</u>." <u>Incollingo v. Ewing</u>, 282 A.2d 206, 229 (Pa. 1971) (emphasis supplied). <u>See also Kiser v. Schulte</u>, 648 A.2d 1, 4 (Pa. 1994) (following <u>Incollingo</u>); <u>Mecca v. Lukasik</u>, 530 A.2d 1334, 1339 (Pa. Super. 1987) (same); Slavin v. Gardner, 418 A.2d 361, 364 (Pa. Super. 1979) (same); Pa. SSJI (Civ) 6.19(B)(3)

- (2005) ("Your award to the estate for total lost future net earnings represents the total net earnings over the decedent's work life expectancy.") (emphasis supplied).
- 15. Mr. Buehler states that at the time of his death, Michael Rettger had a work life expectancy of 37.5 years and a life expectancy of 51.4 years. Ignoring <u>Incollingo</u>, Mr. Buehler improperly deducts a personal maintenance expense for each of Michael Rettger's retirement years, i.e., the years between the end of Michael's work life expectancy and the end his life expectancy.

 These retirement personal maintenance deductions must be stricken as they are in violation of Pennsylvania law, and Mr. Buehler must be precluded from offering any similar testimony.
- 16. Under Pennsylvania law, income taxes are not to be deducted from the lost net earnings of the decedent, and no mention of income taxes is to be made during the trial of a survival action.

 Gradel v. Inouye, 421 A.2d 674, 680 (Pa. 1980). Item #4 of Mr. Buehler's October 10, 2007

 Critique of David Hopkins' Report must therefore be stricken insofar as it notes that Mr.

 Hopkins does not subtract income taxes from Michael's calculated earnings. Similarly, the penultimate paragraph of Mr. Buehler's October 31, 2007 report must be stricken because the analysis there provided impermissibly raises the issue of income taxation. Mr. Buehler must be precluded from offering any testimony in any way concerning income taxation.

II. TO PRECLUDE THE DEFENSE FROM OFFERING ANY EVIDENCE OF KIRSTEN STALDER'S COMPETENCE AS A NURSE

- 17. One of Plaintiffs' primary claims against UPMC is that its overnight nurse, Kirsten Stalder, failed to take appropriate action after discovering that Michael Rettger's right pupil had become fixed and dilated at about 1:00 AM the night before surgery. A fixed and dilated pupil in a patient with a known brain mass such as Michael is a sign of impending catastrophic brain injury.
- 18. During discovery, Plaintiffs asked UPMC to produce Nurse Stalder's personnel file.
- 19. In response to this request, UPMC objected to producing "any documents pertaining to evaluations and/or reviews in which Nurse Stalder participated in the course of her nursing

- practice" on the grounds of peer review.
- 20. Plaintiffs then took the deposition of Kathleen Baker, R.N., Nurse Stalder's supervisor at UPMC. During the deposition, UPMC's lawyer asked Nurse Baker the following question: "Could you tell everyone what your impressions of [Kirsten Stalder] were as a nurse?" Nurse Baker answered as follows: "She was an excellent nurse. She had excellent assessment skills. She had an excellent knowledge base. She gave good patient care. The patients liked her. She could sense things about the patient. She was a true patient advocate, and I would want her to care for me or my family, which is the highest praise any nurse can give a fellow nurse."
- 21. Following this deposition, Plaintiffs moved to compel the production of Kirsten Stalder's nursing reviews and evaluations.
- 22. On January 4, 2008, The Honorable R. Stanton Wettick, Jr., ordered UPMC to produce all reviews and evaluations of Nurse Stalder or, in the alternative, stipulate that it would not introduce any evidence at trial that Kirsten Stalder was a competent nurse, as, for example, Nurse Baker testified in her deposition. A copy of Judge Wettick's January 4, 2008 Order is attached as Exhibit "D".
- 23. On February 7, 2008, UPMC stipulated in lieu of producing Nurse Stalder's reviews and evaluations that it would introduce at trial no evidence that Kirsten Stalder was a competent nurse, as, for example, Nurse Baker had testified during her deposition. A copy of UPMC's stipulation is attached as Exhibit "E".

III. TO PRECLUDE DEFENSE COUNSEL FROM TELLING THE JURY THEY FEEL PROUD OR HONORED TO REPRESENT THEIR CLIENTS

- 24. Plaintiffs' counsel have observed counsel for UPMC and Dr. Bonaroti, David R. Johnson, Esquire, and Alan S. Baum, Esquire, respectively, deliver several openings in prior cases.
- 25. It is the custom of both Mr. Johnson and Mr. Baum to tell the jury during their openings that they the lawyers feel immensely proud and honored to represent their respective clients.
- 26. Such lawyer statements have no place in a civil jury trial as they represent an attempt to persuade

the jury to favor the lawyer's client, <u>not</u> on the basis of the evidence but rather on the strength of the lawyer's personal vouching. Mr. Johnson and Mr. Baum should be precluded from offering in their openings any personal views about how proud or honored they feel to represent their respective clients.

IV. TO PRECLUDE DEFENSE COUNSEL FROM TELLING THE JURY THEY AND/OR THEIR CLIENTS FEEL SORRY FOR PLAINTIFFS' LOSS

- 27. It has also been the custom of both Mr. Johnson and Mr. Baum to tell the jury during their openings that they and/or their clients feel sorry for the loss suffered by the plaintiff and/or the decedent's family.
- 28. Such lawyer statements have no place in a civil jury trial. They are neither statements of what the evidence will show, nor are they relevant to any matter at issue in a trial such as this. Rather, such statements are an attempt to sway the jury not on the basis of the evidence but on impermissible considerations of personal affinity and sympathy. Mr. Johnson and Mr. Baum should be precluded from telling the jury in their openings that they and/or their clients feel sorry for Plaintiffs' loss.

V. TO PRECLUDE DEFENDANTS FROM OFFERING EVIDENCE OF DR. BONAROTI'S RELATIONSHIP WITH THE FAMILY OF PLAINTIFFS' COUNSEL

29. Dr. Bonaroti has served as the neurosurgeon of certain relatives of Plaintiffs' counsel. In addition, Dr. Bonaroti's wife, also a physician, has worked as a partner with Plaintiffs' counsel's brother, John Lagnese, M.D. These facts are totally irrelevant to any matter at issue in this case, and any mention of them would be highly and unfairly prejudicial to Plaintiffs. Defendants should be barred from introducing this information into the trial of this matter.

VI. TO BAR EVIDENCE OF THE REASONABLENESS OF MICHAEL'S CARE OCCURRING BETWEEN THE DATES OF NOVEMBER 15-18, INCLUSIVE

30. One of Plaintiffs' theories of liability in this matter has been that Drs. Bonaroti, Senter, and Lieberman were negligent for failing to diagnose Michael Rettger's brain lesion as a brain

- abscess sooner than they did.
- 31. There is considerable support for this theory. For example, the medical records from the hospital in West Virginia where Michael was first treated for severe headache contained multiple references to Michael's elevated white blood count and his recent history of bronchitis/respiratory tract infection with associated coughing up blood. It is well recognized that the risk of brain abscess is significantly increased in the setting of systemic infection such as a respiratory tract infection. However, these medical records apparently were never read by Michael's UPMC doctors, as all of these doctors erroneously remarked in Michael's UPMC chart that Michael had no recent history of systemic infection.
- 32. For reasons of trial strategy, Plaintiffs have decided not to pursue any claims arising out of the events of November 15-18, inclusive. Consequently, Plaintiffs' liability claims will be based on the events that occurred following Michael's development of a fixed and dilated right pupil at approximately 1:00 AM on November 19.
- 33. In light of this decision, the issues concerning the reasonableness of Michael's care at UPMC occurring between the dates of November 15 and 18, inclusive, are no longer in dispute.
 Plaintiffs would be willing to admit that all of this care was acceptable and within the standard of care.
- 34. Given that Plaintiffs will be making no claims arising out of Michael's pre-November 19 care and given that Plaintiffs would be willing to admit that Michael's November 15-18 care was reasonable and met the standard of care, there should be no defense expert opinion evidence concerning issues such as any of the following: Whether Michael's care at UPMC between the dates of November 15 and November 18 was managed properly; Whether Michael's history and physical procedures, admitting procedures, and/or surgical planning at UPMC between the dates of November 15 and 18 were carried out properly; Whether it was reasonable under all the circumstances for Michael's UPMC doctors to have believed during the November 15-18 period that Michael's brain mass was most likely a tumor; And whether high grade brain neoplasm is

statistically more or less common than brain abscess in a patient such as Michael Rettger.

35. Under these circumstances – where Plaintiffs will be making no claims of negligence arising out of Michael's pre-November 19 care – any defense expert opinion evidence concerning the reasonableness or propriety of any of this care would be totally irrelevant and would be capable of confusing and misleading the jury. Since Plaintiffs will be making no negligence claims arising out of Michael's pre-November 19 care, Defendants should be precluded from introducing any expert opinion evidence concerning or related to any of that care.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter the Order attached hereto.

	Respectfully submitted,
Ву	
	Paul A. Lagnese, Esquire

APPENDIX B

PLAINTIFF'S OMNIBUS MOTION IN LIMINE

AND NOW, comes Plaintiff, Billi Jo Jorgenson, Executrix of the Estate of Gretchen Altemus, by and through her attorneys, Paul A. Lagnese, Esquire, David M. Paul, Esquire, and Berger & Lagnese, LLC, and files the following Omnibus Motion in Limine.

I. MOTION IN LIMINE TO PRECLUDE DEFENSE COUNSEL FROM TELLING THE JURY THEY FEEL PROUD OR HONORED TO REPRESENT THEIR CLIENTS

- 1. In Plaintiff's counsels' experience, defense lawyers in medical malpractice cases often attempt to tell the jury during their openings that they the lawyers feel immensely proud and honored to represent their respective clients.
- 2. Such lawyer statements have no place in a civil jury trial as they represent an attempt to persuade the jury to favor the lawyer's client, not on the basis of the evidence but rather on the strength of the lawyer's personal vouching. Mr. Anderson and Mr. Hudak should be precluded from offering in their openings any personal views about how proud or honored they feel to represent their respective clients.

II. MOTION IN LIMINE TO PRECLUDE DEFENSE COUNSEL FROM TELLING THE JURY THEY AND/OR THEIR CLIENTS FEEL SORRY FOR PLAINTIFF'S LOSS

- 3. In Plaintiff's counsels' experience defense lawyers in medical malpractice cases often attempt to tell the jury during their openings that they and/or their clients feel sorry for the loss suffered by the plaintiff and/ or the decedent's family.
- 4. Such lawyer statements have no place in a civil jury trial. They are neither statements of what the evidence will show, nor are they relevant to any matter at issue in a trial such as this. Rather, such statements are an attempt to sway the jury not on the basis of the evidence but on impermissible considerations of personal affinity and sympathy. Mr. Anderson and Mr. Hudak should be precluded from telling the jury in their openings that they and/or their clients feel sorry for Plaintiff's loss.

III. MOTION IN LIMINE TO PRECLUDE EVIDENCE OF ALLEGED NON-COMPLIANCE OR CONTRIBUTORY NEGLIGENCE

- 5. This medical negligence case arises out of the alleged failure to properly interpret a head CT performed on Plaintiff's mother, Gretchen Altemus, at Indiana Regional Medical Center on February 4,2010.
- 6. Plaintiff is asserting a medical negligence claim against Aris Teleradiology, against Aris's radiologist Walter Uyesugi, D.O., and against Indiana Regional Medical Center. The claim against Aris and Dr. Uyesugi is that Dr. Uyesugi failed to identify an obvious intra-cranial bleed on the head CT performed at Indiana Regional on February 4, 2010. The claim against Indiana Regional is that it failed to provide Dr. Uyesugi with relevant recent prior head CT exams that would have assisted Dr. Uyesugi in identifying the intra-cranial bleed on the February 4 head CT.
- 7. The relevant facts are that Mrs. Altemus fell and struck her head at her home on the evening of Thursday, February 4, 2010. She went to the ER at Indiana Regional with a severe headache. At the ER she reported that she was on the blood thinning medication Coumadin, and that earlier in the week, her INR was elevated at 9+. A STAT head CT was ordered and performed. This exam was sent to Aris Teleradiology for interpretation. Dr. Uyesugi read the exam and sent a report back to Indiana Regional stating that the exam was negative for intra-cranial hemorrhage. Unfortunately, present and visible on this head CT was a small but obvious intra-cranial bleed.
- 8. Mrs. Altemus was admitted to Indiana Regional for observation. Several hours later she deteriorated neurologically and suffered a respiratory arrest. A repeat head CT was performed which was read as showing a much larger intra-cranial bleed than was present on the first head CT. Mrs. Altemus was given fresh frozen plasma to reverse the effects of Coumadin and was transferred emergently from Indiana Regional to UPMC Presbyterian. She was evaluated at UPMC Presbyterian and the decision was made that surgery would no longer offer adequate

- prospect of any benefit to her. She died on February 6, 2010 due to complications related to irreparable brain injury resulting from the late diagnosed intra-cranial bleed.
- 9. It is anticipated that defendants will attempt to introduce evidence that Mrs. Alternus was informed by her primary care doctor on February 2, 2010, of her INR elevation, and that she was advised at that time to go to the hospital so that her elevated INR could be medically reversed, but that she refused to follow this medical advice. It is also anticipated that defendants will attempt to introduce evidence that Mrs. Alternus was advised by her doctor not to refrain from moving about with an elevated INR, but that she disobeyed this advice and slipped and fell while moving about.
- 10. Mrs. Altemus's antecedent conduct which allegedly contributed to her medical condition that furnished the occasion for the February 4, 2010 medical treatment that is at issue in this case is legally irrelevant to a determination of whether Aris/Dr. Uyesugi and Indiana Regional Hospital were negligent on February 4, 2010 in relation to the head CT performed at Indiana and sent to Aris for interpretation. Additionally, the evidence should be further excluded as legally irrelevant under Pa.R.E. 403, because the probative value of any such evidence is outweighed by its unfair prejudice.
- 11. In a medical negligence case, the general rule is that evidence of a patient's negligent or intentional conduct that occurs prior to the negligent treatment and provides only the occasion for subsequent negligent treatment is irrelevant to the assessment of comparative fault between the patient and the negligent healthcare provider(s). See Richardson v. LaBuz, 91 Pa. Cmwlth. 436, 452, 474 A.2d 1181, 1192 (1984).
- 12. In Pennsylvania, it has long been held that a tortfeasor takes his/her victim as he/she finds him/her. In <u>Lebesco v. SEPTA</u>, 251 Pa. Super. 415, 423, n.2, 380 A.2d 848, 852, n.2 (1977), the Pennsylvania Superior Court observed:

Appellant attempts to buttress its contention by emphasizing appellee's pre-existing vein condition. However, because a tortfeasor must take the victim as he finds him, the

tortfeasor is liable for the full extent of the victim's injuries. Thus, a tortfeasor remains responsible for the victim's injuries, even if the victim's particular sensibility resulted in more harm than the tortfeasor could have foreseen. Accordingly, appellant's focus on appellee's pre-existing condition does not in any way limit appellant's liability for appellee's injury.

13. In <u>Richardson v. LaBuz</u>, 91 Pa. Cmwlth. 436, 452, 474 A.2d 1181, 1192 (1984), the Pennsylvania Commonwealth Court applied this rule in excluding evidence of plaintiff's antecedent allegedly negligent conduct in causing the circumstances that occasioned his medical treatment, concluding that evidence of the plaintiff's antecedent negligence was legally irrelevant in a medical malpractice action against a physician and hospital. 474 A.2d at 1193. Then-Judge (later President Judge) Craig, writing for the Court, reasoned:

The Commonwealth's contention that the Court erred in refusing to allow it to introduce any evidence with regard to the circumstances of the accident is without merit. This action is solely for damages caused by medical malpractice, not the auto accident. The negligence of Richardson in causing the accident is irrelevant, and the injuries he sustained in the accident are relevant only to determine what his physical state would have been but for the negligence of the doctors and the hospital.

14. Under Pennsylvania law, no matter the antecedent conduct engaged in by the patient that occasioned the need for the medical care at issue, such antecedent conduct on the part of the patient is legally irrelevant in a medical negligence case arising out of the subsequent medical care provided. Evangelista v. Similaro, 59 Pa. D. & C.4th 137, 143 (Pa. Com. Pl. Philadelphia Co. 2002) is a good example. That case involved a medical negligence claim arising out of the failure to timely diagnose and treat decedent's lung cancer. As evidence of contributory negligence, the defendant sought to introduce evidence that the decedent had failed to quit smoking cigarettes. The trial court excluded such evidence as legally irrelevant, stating as follows:

The plaintiff's theory in the case was that the defendants were negligent in not diagnosing [decedent's lung] cancer sooner. There is no allegation that they *caused* the cancer. The fact that [decedent] continued to smoke... did not impede the diagnosis of his cancer. Therefore, as a matter of law, there was no contributory negligence on the part of [decedent] that was a substantial factor in causing his injury.

Evangelista, 59 Pa. D. & C.4th at 143 (emphasis in original); accord Palar v. Wohlwend, No. 123-2014 CD (Pa. Com. Pl. Jefferson Co. 2016) ("Opinion on Post-Trial Motions") (Foradora, P.J.,) (attached as Exhibit 1) (evidence that the plaintiff had smoked was deemed legally irrelevant and excluded where the plaintiff's claim was not that Aris had caused plaintiff's lung cancer, but only that Aris's teleradiologist had negligently failed to recognize and report a radiologically detectable lung lesion).

- 15. Under Pennsylvania law, the defendant physician or hospital in a medical negligence case is "only liable prospectively, and the circumstances leading the patient to see the physician are irrelevant to the adequacy of the care received." S. Gerald Litvin, et al., <u>Torts: Law and Advocacy</u>, 3 PA Practice § 7.24. The well-settled principle of Pennsylvania law that the tortfeasor/defendant physician or hospital takes the patient as they find him/her is delineated in PA SSJI 7.70, which states, in pertinent part, that damages should be awarded for injuries caused by the defendant even if "a preexisting medical condition was aggravated" by the defendant's negligence.
- 16. Pa.R.E. 402 provides that evidence that is not relevant is not admissible. Accordingly, sinceunder Pennsylvania law the circumstances leading the patient to see the physician are considered irrelevant to the adequacy of the care subsequently received, Pennsylvania Rule of Evidence 402 bars the admission of evidence that Mrs. Alternus was advised prior to February 4, 2010 to go to the hospital due to her elevated INR, but refused to follow this medical advice.
- 17. Evidence should be excluded under Pennsylvania law if its probative value is outweighed by its unfair prejudice. Pa.R.E. 403. "Unfair prejudice" means an undue tendency to suggest a decision on an improper basis. Pittsburgh Construction Co. v. Griffith, 834 A.2d 572 (Pa. Super. 2003).

Under the law discussed above, it would clearly be improper to suggest a decision in this case based on Mrs. Alternus's alleged failure to go to the hospital earlier due to her elevated INR. Indeed, under the applicable law, the only conceivable reason to seek to admit such evidence would be to suggest that Mrs. Alternus brought her troubles on herself, and that Plaintiff is therefore unworthy of being compensated for the medical negligence that was subsequently practiced upon her mother.

- 18. The only evidence that the jury should hear with regard to the Mrs. Altemus' INR is that it was 9+ when she arrived at the hospital. How it came to be that high, why it was that high, or that is was anyone's fault it was that high, are issues that are totally irrelevant to this case. The relevant issues in this case are whether or not Dr. Uyesugi was negligent for failing to identify a subdural bleed on the February 4 head CT; whether Indiana Regional was negligent in failing to provide relevant and available prior images to Dr. Uyesugi; and whether the actions of Dr. Uyesugi and Indiana hospital caused or increased the risk that Mrs. Altemus would suffer a severe brain bleed.
- IV. MOTION IN LIMINE TO PRECLUDE ALL TESTIMONY, ARGUMENT OR SUGGESTION

 THAT DEFENDANT UYESUGI EXERCISED HIS BEST JUDGMENT, MADE HIS BEST

 EFFORTS, WAS A "CARING" HEALTHCARE PROVIDER, OR DID NOT INTEND TO INJURE

 MRS. ALTEMUS
 - 19. Defendants may attempt to introduce testimony, and/or argue through counsel, that Dr. Uyesugi exercised his best judgment or made his best efforts in caring for Mrs. Altemus (i.e., "tried his best"), and/orthat he was a "caring" healthcare practitioner, or that he did not intend to injure Mrs. Altemus. Such testimony or argument would be improper and should be precluded from the trial of this case.
 - 20. Whether a defendant exercised his or her best judgment or was "caring" or did not intend any harm to come to the patient is not relevant to whether they committed medical malpractice. In Pringle v. Rapaport, 980 A.2d 159 (Pa.Super. 2009) (*en banc*), appeal denied, 987 A.2d 162 (Pa.

2009), the Superior Court addressed the standard of care applicable to medical malpractice cases. In rejecting the so-called "error of judgment" jury instruction, the <u>Pringle</u> court made it clear that "[t]he 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," and therefore, "the physician's mental state is irrelevant in determining whether he or she deviated from the standard of care." Id., 980 A.2d at 174.

The error of judgment charge improperly refocuses the jury's attention on the physician's state of mind at the time of treatment, even though the physician's mental state is irrelevant in determining whether he or she deviated from the standard of care. Furthermore, by directing the jury's attention to what the physician may have been thinking while treating the patient, the jury may also be led to conclude that only judgments made in bad faith are culpable – even though a doctor's subjective intentions while rendering treatment are likewise irrelevant to the issues placed before a jury in a medical malpractice case.

Id. at 174.

- 21. The <u>Pringle</u> court's reasoning applies here: references to best judgment, best efforts, or lack of bad intent, if permitted, would improperly interject a "subjective element" into the jury's deliberations when the jury's focus should, instead, be on objective considerations of the "knowledge, skill, and care normally possessed and exercised in the medical profession." <u>Pringle</u> at 173-174.
- 22. Not only is any such testimony or argument irrelevant to any trial issue, it would also confuse and/or mislead the jury and therefore should be precluded. The concept of best judgment/intent is fertile ground for jury confusion by directing the jury's attention away from the elements of the action and onto the irrelevant question of whether the Defendant did or did not exercise his *best* judgment and whether the Defendant did or did not *intend* to harm Plaintiff's decedent.

 Injecting this element into the trial would wrongly add moral subjectivity to what Pringle says is

clearly an objective duty of care. Suggestions of best judgment or lack of intent to harm blatantly imply that a lesser duty of care would apply instead of the objective standard of care.

Pennsylvania law is well-established on this point. If, on one hand, a physician's conduct violates the standard of care, then he or she is *negligent* regardless of the nature of the conduct at issue or the defendant's state of mind or intentions. If, on the other hand, a physician's conduct does not violate the standard of care, then he or she has not, by definition, committed malpractice, regardless of judgment or intentions. See, e.g. Carrozza v. Greenbaum, 866 A.2d 369, 378 n. 14 (Pa. Super. 2004), appeal denied in relevant part, 882 A.2d 1005 (Pa. 2005).

- 23. Any attempt by Defendant Aris to insert the idea of best judgment/lack of bad intent into the trial would be nothing more than an improper attempt to bias the jury, a defense version of a "Golden Rule" argument. Similar to a "Golden Rule" argument, the jury would be asked to put itself in the Defendant's position, a stratagem universally recognized as improper because it encourages the jury to depart from its requisite neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. Here Defendant would be attempting to extend the Golden Rule argument by asking the jury to think about the Defendant's good intentions and the exercise of his best judgment rather than the objective standard of care, and to speculate what it, the jury, would do, were it to be placed in the subjective shoes of the Defendant healthcare provider.
- V. MOTION IN LIMINE TO PRECLUDE ANY EVIDENCE, ARGUMENT, OR SUGGESTION THAT

 DR. MOLLY TROSTLE OR ANY OTHER NON-DEFENDANT PHYSICIAN OR HEALTHCARE

 PROVIDER MADE ANY MISTAKES IN THEIR CARE OF MRS. ALTEMUS OR OTHERWISE

 CAUSED ANY HARM TO HER
 - 24. Defendants may attempt to argue or suggest that Dr. Molly Trostle or some other non-defendant physician or healthcare provider made mistakes in their care of Mrs. Altemus, or caused some or all of Mrs. Altemus's harms/injuries. No Defendant has an expert report placing any blame on Dr. Trostle or any of the other non-defendant physicians or healthcare providers involved in Mrs. Altemus's care. No Defendant has an expert report attributing any causal responsibility for Mrs.

Altemus's injuries to the conduct of Dr. Trostle or any of the other non-defendant physicians or healthcare providers. Therefore, Defendants should be precluded from introducing evidence, arguing, or suggesting that Dr. Trostle or any of the other non-defendant physicians or healthcare providers made any mistakes in their care of Mrs. Altemus or that their conduct in any way caused Mrs. Altemus's harms/injuries.

VI. MOTION IN LIMINE TO PRECLUDE ANY MENTION OF THE FACT THAT SEVERAL NAMED DEFENDANTS IN THIS CASE WERE LET OUT OF THE CASE BEFORE TRIAL

25. This case included numerous defendants who are no longer in the case. The fact that these other defendants were once a part of this case and are no longer is completely irrelevant to any issue extant in this case. This information would also be capable of confusing and misleading the jury. Any mention of it should be precluded.

VII. CONCLUSION

26.	For the foregoing reasons, Plaintiff respectfully requests that this Court enter the proposed Order
	attached hereto.

Respectfully submitted,

Paul A. Lagnese, Esquire

APPENDIX C

MOTION IN LIMINE TO EXCLUDE ARIS RADIOLOGIST FROM COMMENTING ON PLAINTIFF'S RADIOLOGY EXPERT'S CREDIBILITY WITH REFERENCES TO ALLEGED INHERENT BIAS

AND NOW, comes Plaintiff, Billi Jo Jorgenson, Executrix of the Estate of Gretchen Altemus, by and through her attorneys, Paul A. Lagnese, Esquire, David M. Paul, Esquire, and Berger & Lagnese, LLC, and files the following Motion in Limine to Exclude Aris Radiologist from Commenting on Plaintiff's Radiology Expert's Credibility with References to Alleged Inherent Bias.

- This is a medical malpractice claim for the failure to identify a subdural bleed in a CT scan of Plaintiff's decedent Gretchen Altemus after Mrs. Altemus fell and hit her head on February 4, 2010.
- 2. Plaintiff has retained Edward Druy, a radiologist, as an expert in this case. Dr. Druy states in his report that Defendant Walter Uyesugi failed to identify the subdural bleed in the CT scan of February 4, 2010 and this failure was a breach of the standard of care.
- 3. Defendant Uyesugi has retained a radiologist, Jeffrey Creasy, as their radiology expert.
- 4. On November 22, 2016, Defendant Uyesugi produced a supplemental report from Dr. Creasy.
- 5. Therein Dr. Creasy states:

The typical method for determining the standard of care in a radiological medical-legal setting is inherently biased. Since the definition of standard of care is that which a reasonable physician would have done given the same information in the same setting, showing an expert a set of images in which a finding was not initially recognized as abnormal, but now retrospectively is known to be abnormal is not a faithful recreation of the same set of information that the initial, original interpreter had at his disposal.....the two experts who stated that Dr. Uyesugi's failure to detect the small falcine acute subdural hemorrhage was a violation of the standard of care, both knew that the images they were asked to view were from a contested read, or the very least were under review after the initial reading and report. That information was not available to Dr. Uyesugi at the time

he interpreted the CT examination.

- 6. In essence, Dr. Creasy is saying that no opinion or review by a radiologist who reviews film for a plaintiff's attorney can ever be reliable and is inherently biased. Essentially Dr. Creasy is attacking the credibility of Dr. Druy's opinion based on this alleged "inherent bias."
- 7. However, Pennsylvania courts have continuously held that expert witnesses are not permitted to testify about whether or not they think a witness is credible. Instead, courts hold this is the jury's job to determine.
- 8. "Credibility is an issue uniquely entrusted to the common understanding of laypersons. The teaching of *Dunkle* is that expert testimony will not be permitted when it attempts in any way to reach the issue of credibility, and thereby usurp the function of the fact finder." *Commonwealth v. Delbridge*, 578 PA. 641, 667, 855 A.2d 27,42 (2003).
- 9. Additionally, Dr. Creasy's opinions on alleged expert bias or inherent bias has nothing to do with the medicine in this case and are irrelevant.
- 10. Even if relevant, Dr. Creasy's opinion that any expert radiology opinion generated where the reviewer knows that the images were "from a contested read...or at the very least under review" is not valid and not credible is novel and not a methodology generally accepted in the scientific community and under Pa. R.E. 702(c) should not be presented to this jury.
- 11. Dr. Creasy in support of his opinion that all subsequent radiologic reviews are not credible due to alleged "inherent bias" cites one article in the medical literature that purports to call for a panel of radiologist to "blindly review" films before a lawsuit would be permitted to be pursued. This is clearly novel and is a methodology not generally accepted in the radiologic community. Not to mention that such a methodology would require action by either the legislature or the Pennsylvania Supreme Court.

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that this Court enter the proposed Order attached hereto.