IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

RAYMOND HELFRICK, by and through his son, MICHAEL HELFRICK, P.O.A.,

Plaintiff

vs.

UPMC SHADYSIDE HOSPITAL; UPMC REHABILITATION HOSPITAL; HEARTLAND HEALTHCARE CENTER; HEALTHCARE AND RETIREMENT CORPORATION; DOUGLAS SKURA; MICHAEL P. CASEY, M.D.; DAVID WEBER, M.D.; FARHAD ISMAIL-BREIGI, M.D.; JON A LEVY, M.D.; LEONARD E. EVANS, M.D.; DAVID G. HALL, M.D.; GREGORY C. MIECKOWSKI, M.D.; DAVID J. LEVENSON, M.D.; DR. LEE ENSON, M.D.; DR. GORDON CHU,

Defendants

CIVIL DIVISION

NO. GD03-010082

CODE _____

OPINION AND ORDER OF COURT DATED OCTOBER 7, 2003

NO. GD03-010082

Counsel for Plaintiff:

Richard T. Haft, Esquire
Edward Wehrenberg, Esquire
226 Sheryl Lane
Pittsburgh, PA 15221

Patrick J. Loughren, Esquire
310 Grant Street
Suite 3204 Grant Building
Pittsburgh, PA 15219

Counsel for Defendants UPMC Shadyside Hospital, UPMC Rehabilitation Hospital, Heartland Health Care Center, Health Care and Retirement Corporation, Farhad Ismail-Breigi, M.D., and Dr. Gordon Chu:

Eugene A. Giotto, Esquire
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402

Counsel for Defendants Douglas Shura, M.D., and Gregory C. Mieckowski, M.D.:

Jeanne Welch Sopher, Esquire
707 Grant Street
35th Floor Gulf Tower
Pittsburgh, PA 15219-1913

Counsel for Defendants David Weber, M.D., Michael P. Casey, M.D., and Jon I. Levy, M.D.:

Giles J. Gaca, Esquire
Alan S. Baum, Esquire
Four PPG Place, Suite 300
Pittsburgh, PA 15222

NO. GD03-010082

Counsel for Defendant David G. Hall, M.D.:

Lynn E. Bell, Esquire
420 Fort Duquesne Boulevard
10th Floor One Gateway Center
Pittsburgh, PA 15222-1416

Counsel for Defendant David J. Lefenson, M.D.:

Robert J. Pfaff, Esquire
Suzanne Oppman, Esquire
112 Washington Place
Suite 1010 Two Chatham Center
Pittsburgh, PA 15219

NO. GD03-010082

OPINION AND ORDER OF COURT DATED OCTOBER 7, 2003

WETTICK, J.

This Opinion and Order of Court addresses two issues: (1) whether a court may open a judgment of non pros for failure to file a certificate of merit entered on the sixty-second day following the filing of the complaint only if the plaintiff can meet the three-prong test of Pa.R.C.P. No. 3051; and (2) does the entry of a judgment of non pros for failure to file a certificate of merit preclude the plaintiff from bringing a second lawsuit on the same causes of action if the statute of limitations has not run.

I.

Pa.R.C.P. No. 1042.3(a) provides that in an action based on allegations that a licensed professional deviated from the acceptable professional standard, the attorney for the plaintiff shall file with the complaint or within sixty days after the filing of the complaint a certificate of merit signed by the attorney. Pa.R.C.P. No. 1042.6(a) provides that the Prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit

within the required time provided there is no pending timely filed motion seeking to extend the time to file the certificate.

Plaintiff's complaint was filed on May 29, 2003, raising professional negligence claims against fifteen healthcare providers. The sixtieth day from the filing of the complaint was July 28, 2003. Judgments of non pros were entered on behalf of most defendants, pursuant to praecipes filed by defendants' counsel, on July 30 and July 31, 2003.[1]

Relief from a judgment of non pros is governed by Rule 3051 which provides that if the relief sought from a judgment of non pros includes the opening of the judgment, the petition shall allege facts showing (1) the petition is timely filed, (2) there is a reasonable explanation or a legitimate excuse for the inactivity or delay, and (3) there is a meritorious cause of action. The Explanatory Comment--1991 to this rule states that this rule "will apply in all cases in which relief from a judgment of non pros is sought, whether the judgment has been entered by praecipe as of right or by the court following a hearing." The Comment further states that this rule "provides for uniformity in the requirements of the petition to open such a judgment."

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[1]In a separate opinion entered in these proceedings on September 29, 2003, I struck a judgment of non pros dismissing plaintiff's complaint as to Dr. Levenson. This judgment was entered after plaintiff filed beyond the sixtieth day a certificate of merit as to Dr. Levenson. I ruled that a judgment of non pros may not be entered if the certificate of merit is filed prior to the filing of the praecipe for the entry of a judgment of non pros.

Plaintiff's petition does not set forth a reasonable explanation or legitimate excuse for the inactivity (the inactivity being the failure of plaintiff's counsel to file within the sixty day period a certificate of merit or a motion to extend the time for filing the certificate). This will be so in almost every case in which a judgment of non pros is entered for failure to file a certificate of merit. The plaintiff who has a reasonable explanation or legitimate excuse for not being able to timely file a certificate of merit may, instead, file a motion to extend the time for filing the certificate on or before the filing date that the plaintiff seeks to extend. The filing of the motion to extend tolls the time period within which a certificate of merit must be filed until the court rules on the motion. Consequently, an explanation for the inactivity requires an explanation as to why the plaintiff did not within the sixty day period file a motion to extend the time for filing the certificate of merit.

Plaintiff contends that the judgments should be opened because the attorneys for defendants "ran to court" to enter judgments two days after the sixty day time limit expired. The attorneys for defendants never contacted plaintiff's counsel to ascertain whether plaintiff had an expert before obtaining their judgments.

This contention is without merit because there is no requirement in the Rules of Civil Procedure for a defendant to give notice to the plaintiff's counsel before filing a praecipe for the entry of a judgment of non pros for failure to file a certificate

of merit. The provisions of Pa.R.C.P. No. 237.1, which require a defendant to give notice of its intention to file a praecipe for the entry of a judgment of non pros, do not apply. Rule 237.1(a)(1) provides that, as used in this Rule, judgment of non pros "means a judgment entered by praecipe pursuant to Rules 1037(a) and 1659." Thus, Rule 237.1 does not apply to a judgment of non pros entered pursuant to Rule 1042.6 for failure to file a certificate of merit. Furthermore, a Note to Rule 1042.6 states that "Rule 237.1 does not apply to a judgment of non pros entered under this rule."

Plaintiff also relies on Pa.R.C.P. No. 126 which provides that the court at any stage of any action may disregard any error or defective procedure which does not affect the substantial rights of the parties. However, Rule 126 cannot be used to rewrite Rules of Civil Procedure.

If a court were to apply Rule 126 to a petition to open a judgment of non pros for failure to file a certificate of merit unless the defendant can show prejudice, the petition would almost always be granted. Defendants are not going to be able to show that they were prejudiced by the late filing of a certificate of merit regardless of whether the delay involves ten days, thirty days, or ninety days. Consequently, the use of a prejudice standard would eliminate the Rule's deadlines for filing certificates of merits. If, on the other hand, the court were to apply Rule 126, using a cause shown standard, the plaintiff would

be no better off than if the court looked only to Rule 3051 which allows relief where there is a reasonable explanation or legitimate excuse for the inactivity.

If trial judges wish to provide relief where there has been a judgment entered shortly after the sixtieth day and the petition to open is promptly filed, each judge will be creating a new deadline based on that judge's view of what is fair. One judge may decide to open the judgment whenever the petition, along with a certificate of merit, is filed within seven days of the entry of the judgment of non pros; another may use a ten day standard. These deadlines would have nothing to do with the language within Rules 1042.6 and 3051. Trial judges would be creating a second safety net (the first being the timely filed motion to extend the time for filing the certificate provided for in Rule 1042.3(d)) where the rules do not do so. This is not a proper application of Rule 126.

Plaintiff also argues that since his petition to open was filed within ten days of the entry of the judgment of non pros and since he attached certificates of merit to the petition, his petition to open is governed by Pa.R.C.P. No. 237.3. This rule provides for a court to open a judgment of non pros where the petition is filed within ten days after entry of the judgment if the petitioner has attached a verified copy of a complaint that states a cause of action. This argument is without merit because Rule 237.3 states that it applies to a petition for relief from a

judgment entered pursuant to Rule 237.1 and, as I have previously discussed, Rule 237.1 only applies to judgments of non pros entered pursuant to Rules 1037(a) and 1659.

Plaintiff contends that Rule 237.3 applies because a Note to Rule 1042.6 states only that "Rule 237.1 does not apply to a judgment of non pros entered under this rule." According to plaintiff, it is significant that the Note does not also say that Rule 237.3 does not apply. This contention is without merit for several reasons.

First, Rule 237.3 states that it applies only to a judgment of non pros entered pursuant to Rule 237.1. Thus, a Note to Rule 1042.6 which says that Rule 237.1 does not apply to judgments entered pursuant to Rule 1042.6 includes other rules that refer to Rule 237.1.

Second, while Rule 1042.6 refers to the entry of a judgment of non pros, none of the rules governing certificates of merit (i.e., Rules 1042.1-1042.8) refer to the opening of a judgment of non pros entered pursuant to Rule 1042.6 There would be no reason for rules that do not refer to the opening of a judgment of non pros to include a Note referring to a rule governing the opening of a judgment of non pros that, on its face, does not apply to judgments entered pursuant to Rule 1042.6.

Third, it is clear from the language of Rule 237.1 et seq. that the entire rule applies only to judgments of non pros entered pursuant to Rules 1037(a) and 1659. This is reinforced by a Note

to Rule 1042.6, the purpose of which is to make it clear that the defendant does not need to provide a notice of intention to file a praecipe for the entry of judgment of non pros. If the Supreme Court had intended for Rule 237.3 to apply to judgments of non pros that do not come within the definition of judgments of non pros covered by Rule 237.1 et seq., it would not have expressed its intention solely by including a Note to Rule 1042.6 which never mentioned Rule 237.3.

Plaintiff's final argument relates only to defendants who had not been served at the time counsel for these defendants filed praecipes for the entry of judgments of non pros for failure to file a certificate of merit. Plaintiff's counsel contends that a judgment of non pros may not be entered against a party that has not been served.

I disagree. The rules make no reference to service. Rule 1042.3 requires a certificate of merit to be filed within sixty days after the filing of the complaint.

For these reasons, I am denying plaintiff's petition to open judgments of non pros entered prior to the untimely filing of certificates of merit.

II.

In his petition to open, plaintiff alleges that the statute of limitations has not run. The petition seeks a court order permitting the refiling of the complaint in a second lawsuit

instituted prior to the expiration of the statute of limitations. While this is not relief that may be provided in response to a petition to open a judgment of non pros, all parties requested that I address this issue at this time.[2]

The dismissal of plaintiff's complaint for failure to file a certificate of merit within the required time is not a ruling on the merits. This requirement of filing a certificate of merit with the complaint or within sixty days thereafter is similar to the requirement of filing a complaint in an action commenced through the filing of a praecipe for a writ of summons. This is a step that the plaintiff must take before the merits of the plaintiff's claims will be addressed. See, e.g., Pa.R.C.P. No. 1042.4 which provides that where the certificate is not attached to the complaint, the defendant is not required to file a responsive pleading until service of the certificate of merit.

Case law provides that a non pros entered against a plaintiff for failure to file a complaint pursuant to Pa.R.C.P. No. 1037 does not bar a second action. See 3 Goodrich Amram 2d §1037(a):7 (footnotes omitted):

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[2]A second complaint has been filed. Defendants will be filing a request to dismiss the new lawsuit based on my denial of plaintiff's petition to open the judgments of non pros entered in this lawsuit. I will assume responsibility for the new lawsuit, at least until the lawsuit is ready to be tried. Obviously, my ruling in the new lawsuit will follow the ruling that I am making in these proceedings. The ruling in the new lawsuit will create an order that can at some time be challenged in the appellate courts.

§1037(a):7 Effect of non pros upon right to bring second action

A non pros against a plaintiff is not res judicata, and thus does not bar the plaintiff from commencing another action upon the same cause of action, provided the statute of limitations has not expired, and that the costs of the non prossed action have been paid.

In Bucci v. Detroit Fire & Marine Insurance Co., 167 A. 425 (Pa. Super. 1933), a fire which destroyed the plaintiffs' property occurred on April 16, 1930; the plaintiffs instituted this lawsuit through a writ of summons filed on October 28, 1931; no statement of claim was filed within sixty days as required by a rule of court; a judgment of non pros was not entered until January 12, 1932 for the plaintiffs' failure to file a statement of claim. The plaintiffs had paid the costs and instituted a second lawsuit on December 28, 1931.

The lower court dismissed the second lawsuit on the ground that the plaintiffs were seeking to revive an action in direct violation of the purpose and intent of the rule of court requiring the filing of a statement of claim within sixty days after the institution of the action. The Superior Court reversed.

The Superior Court stated "the legal effect of the non pros could not prevent the entry of a suit for the same cause of action within the statute of limitations." Id. at 427-28. The Court disagreed with the trial court's ruling that to hold otherwise would annul and render useless the rule of court requiring the

filing of a statement of claim within sixty days. "The penalty suffered by the plaintiffs is the delay in the trial of their cause and the payment of costs incurred, yet if the statute of limitations has not expired the non pros. of the first action cannot prevent the institution of the second suit." Id. at 428.

In reaching this decision, the Court relied on the following language in the case of Murphy v. Taylor, 63 Pa. Super. 85 (1916):

> "Where after a nonsuit [non pros.] has been entered the plaintiff brings a second action against the same defendant for the same cause, within a reasonable time, the court will stay the proceedings until the costs of the first suit are paid; but the proceedings will not be quashed." Bucci, 167 A. at 427.

In Gordon-Stuart Ltd. v. Allen Shops, Inc., 361 A.2d 770 (Pa. Super. 1976), the plaintiffs filed a complaint naming Frantz as one of several defendants. Frantz filed preliminary objections seeking a more specific complaint. The lower court sustained the preliminary objections on March 25, 1974, and ordered the plaintiff to file a more specific complaint within twenty days. The plaintiff failed to do so. On October 4, 1974, Franz caused a judgment of non pros to be entered against the plaintiffs.

The plaintiffs did not take any action to have the non pros removed. However, on December 24, 1974, they commenced a second action identical to the original action. Frantz filed preliminary objections which included a motion to strike the complaint based on the previous judgment of non pros. The trial court granted the

motion. The Superior Court reversed.

The Superior Court ruled that a judgment of non pros was simply a dismissal for want of diligent prosecution and not a judgment on the merits. Thus, the judgment did not preclude the plaintiffs from commencing a second action on the same cause, provided that the statute of limitations had not expired and the plaintiffs had made payment of costs of the former suit:

> Our opinion in Bucci was predicated on the fact that a judgment of non pros is simply a dismissal for want of diligence prosecution and is not a judgment on the merits. In either instance, that is, where the plaintiff is non-prossed for neglecting to file a seasonable complaint, or failing to file an amended pleading, the judgment for the defendant is not on the merits and does not preclude the plaintiff from commencing another suit on the same cause of action, provided that the statute of limitations has not expired and the plaintiff has made payment for the costs of the former suit. 361 A.2d at 772 (footnote omitted).

In Bon Homme Richard Restaurants, Inc. v. Three Rivers Bank and Trust Co., 444 A.2d 1272 (Pa Super. 1982), the first lawsuit was dismissed pursuant to a local rule providing for termination of cases in which there has been inactivity for a period of at least two years. This local rule was adopted to implement Pa.R.J.A. No. 1901 which directed each common pleas court to adopt local rules dismissing stale claims. The plaintiff did not petition to

reinstate the case.[3]

Thereafter, the plaintiff filed a second lawsuit raising the claims raised in the prior lawsuit. The defendant filed preliminary objections seeking dismissal by virtue of the court order granting the motion to strike entered in the previous proceedings.

The Superior Court affirmed the ruling of the trial court dismissing this second action. The Court stated that to allow a second action would make a mockery of the judicial policy that Judicial Administration Rule 1901 was designed to serve.

In Haefner v. Sprague, 494 A.2d 1115 (Pa. Super. 1985), the plaintiff commenced a legal malpractice action by summons. He was thereafter served with a rule to file a complaint within twenty days. He failed to do so. The defendants filed a praecipe to enter a judgment of non pros. The plaintiff filed a petition to open which was subsequently denied.

The plaintiff commenced a second action. The defendants filed preliminary objections seeking dismissal based on the entry of the judgment of non pros in the initial action; they relied on Bon Homme Richard Restaurants, Inc.

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[3]Under Pennsylvania case law (International Telephone and Telegraph Corporation v. Philadelphia Electric Co., 378 A.2d 986 (Pa. Super. 1977)), a case dismissed for inactivity of record may not be reinstated unless the petition to reinstate is timely filed, there is a reasonable explanation or legitimate excuse for the default, and facts constituting a meritorious cause of action are alleged.

In Haefner, the Superior Court stated that Bon Homme did not apply because "local rules enacted pursuant to Rule 1901 are intended to reach cases inactive for an unreasonable length of time, and may only be dismissed after reasonable notice." 494 A.2d at 1117. The Court ruled that the impact of a judgment of non pros entered for failure to file a complaint is governed by the line of cases which follow the reasoning of Bucci v. Detroit Fire & Marine Insurance Co., Inc., cited in Gordon-Stuart:

> The legal effect of the entry of a judgment of non pros is not such as to preclude a plaintiff who suffers such a judgment from instituting another suit on the same cause of action provided, however, that the second suit is brought within the period of the statute of limitations. 494 A.2d at 1118 (citations omitted).

In Hatchigian v. Koch, 553 A.2d 1018 (Pa. Super. 1989), the defendants filed an appeal from a district justice judgment and ruled the plaintiff to file a complaint within twenty days pursuant to Pa.R.C.P.D.J. No. 1004(B). Upon failure to do so, the defendants obtained a judgment of non pros. Thereafter, the trial court denied the plaintiff's motion to set aside the judgment.

Plaintiff instituted a second action raising the same claim. The trial court granted the defendants' motion for summary judgment based on the ground that a second action could not be instituted. The Superior Court reversed:

> It is settled law that where plaintiff has suffered a judgment of non pros, he may later commence a new action between the selfsame

> parties and alleging the selfsame cause of action so long as the second action is commenced within the applicable statute of limitations. Since a non pros is not a judgment on the merits, it cannot have res judicata effect.
>
> Application of this principle to the instant matter compels us to hold that Hatchigian's present common pleas court action is not barred by the principle of res judicata. We are further persuaded that our resolution is correct because if we were to hold that Hatchigian did not maintain the right to commence his new action throughout the remaining period of the statute of limitations, we would effectively abbreviate his limitations period. The entry of the non pros would place the plaintiff in the same position as if the statute of limitations had run. In contrast a plaintiff who had originally filed a suit in common pleas and been non prossed could still file an identical new action until the limitations period had expired. Id. at 1020 (citations omitted).

Defendants contend that the case law no longer differentiates between a judgment of non pros entered for failure to comply with pleading requirements and a judgment of non pros entered because the claim is stale. According to defendants, the case law now provides that an unopened judgment of non pros bars a second lawsuit even if the statute of limitations has not run. Defendants rely on two cases: Gates v. Servicemaster Commercial Service, 631 A.2d 677 (Pa. Super. 1993), and Schuylkill Navy v. Langbord, 728 A.2d 964 (Pa. Super. 1999).

In Gates, a non pros was entered following two years of inactivity pursuant to Penn Piping Inc. v. Insurance Company of

North America, 603 A.2d 1006 (Pa. 1992). The Court's ruling that the plaintiff would not be permitted to bring a second action even if the statute of limitations had not run is consistent with the case law governing a dismissal of stale claims pursuant to a local rule implementing Judicial Administration Rule 1901. Since a dismissal under Penn Piping required a finding of prejudice (which was presumed where there was inactivity for at least two years),[4] case law would not allow a second lawsuit against a party who obtained dismissal of the first action by establishing prejudice.

However, the Gates opinion contains the following dicta:

> The statute of limitations comes into play only in the sense that if it has not run on the particular cause of action, the plaintiff may seek a reinstatement of the suit with the payment of costs *and* satisfaction of the tripartite test for opening judgment of non pros. *Mazer v. Sargent Electric Co.*, 407 Pa. 169, 180 A.2d 63 (1962); *Bon Homme Richard Restaurants, Inc.*, supra; *Smith v. Southeastern Pennsylvania Transportation Authority*, 297 Pa.Super. 267, 443 A.2d 829 (1982); *Commonwealth v. Bailey*, 278 Pa.Super. 51, 419 A.2d 1351, 1352 (1980); *Corcoran v. Fiorentino*, 277 Pa.Super. 256, 419 A.2d 759 (1980); *Public Welfare v. Flowers*, 46 Pa.Cmwlth. 326, 407 A.2d 896, 897 n.2 (1979); *Thompson v. Cortese*, 41 Pa.Cmwlth. 174, 398 A.2d 1079, 1082 (1979); *cf. Brigham v. Eglin's of Philadelphia, Inc.*, 406 Pa. 99, 176 A.2d 404 (1962) (*Personal injury accident occurred May, 1958;* suit instituted by writ of summons July, 1958; defendant ruled plaintiff to file a complaint August, 1958; plaintiff never

[4]The presumption of prejudice following two years of inactivity is no longer the law in Pennsylvania. Jacobs v. Halloran, 710 A.2d 1098 (Pa. 1998).

> filed a complaint; *non pros entered December, 1958*; petition to remove non pros filed December, 1960; and petition to open denied on grounds that plaintiff *did not act with reasonable promptness* and there was an absence of compelling equities). 631 A.2d at 682-83.

None of the cases cited in Gates support the proposition that the plaintiff must obtain reinstatement of the initial suit where the non pros is based on the plaintiff's failure to comply with the pleading requirements.

Mazer v. Sargent Electric Co., supra, 180 A.2d 63, involved a non pros for failure to file a complaint which was entered after the statute of limitations had run. The only issue the Supreme Court addressed was whether the trial court erred in denying the plaintiff's request to open the judgment of non pros.

I have already discussed Bon Homme Richard Restaurants, Inc., supra: a non pros was entered pursuant to a local rule for two years of inactivity of record; the Superior Court ruled in Haefner that Bon Homme did not alter the case law permitting a plaintiff whose initial lawsuit was non prossed for failure to file a complaint to institute a second action if the statute of limitations has not run.

Smith v. Southeastern Pennsylvania Transportation Authority, supra, 443 A.2d 829, involved the plaintiff's appeal from the denial of her petition to reinstate an action that was dismissed by a local rule (implementing Judicial Administration Rule 1901) for inactivity of record for more than two years. Also, the statute of

limitations had run at the time the action was dismissed.

Commonwealth v. Bailey, supra, 419 A.2d 1351, involved a petition to expunge a criminal record which had been dismissed for lack of prosecution. The petitioner filed a new petition identical to the earlier one which the trial court dismissed for failure to appeal from the prior order of court. The Superior Court reversed. It stated the dismissal of the first petition is similar to a judgment of non pros entered in a civil case: "[I]t is well settled that in both of these situations the plaintiff is permitted to commence an identical second action provided the statute of limitations has not expired and the costs of the previous action have been paid." Id. at 1352 (citations omitted).

Corcoran v. Fiorentino, 411 A.2d 759, supra, involved an appeal of a dismissal for inactivity pursuant to a local rule implementing Judicial Administration Rule 1901. Also, the statute of limitations had run.

Department of Public Welfare v. Flowers, supra, 407 A.2d 896, addressed a petition to reactivate a lawsuit dismissed for failure to prosecute for a period in excess of two years pursuant to a local rule adopted to implement Judicial Administration Rule 1901.

Thompson v. Cortese, supra 398 A.2d 1079, was a mandamus action in which the Court ruled that the Prothonotary lacked the authority to accept a Praecipe to Enter Judgments based on dismissal orders entered under a local rule implementing Judicial Administration Rule 1901 when there has been no activity of record

for a period of two years. The opinion, citing Gordon v. Stuart Ltd. and Bucci v. Detroit Fire & Marine Insurance Co., states: "A non pros does not deny relief in that it is not an adjudication on the merits. Thus, if the statute of limitations has not run, a plaintiff previously non prossed can maintain a second suit upon the identical cause of action, provided only that he pay the costs incurred in the prior action." 398 A.2d at 1082.

In Brigham v. Eglin's of Philadelphia, Inc., 176 A.2d 404, supra, the only issue the Court addressed was whether the lower court had abused its discretion in refusing to grant a petition to remove a judgment of non pros filed more than two years after the entry of the judgment.

In summary, the cases cited in Gates that have any bearing on whether a second action may be instituted where the initial action was dismissed, recognize that a second action may be instituted in the situation in which a judgment of non pros was entered for reasons other than staleness or prejudice.

Defendants also rely on Schuylkill Navy v. Langbord, supra, 728 A.2d 964. A judgment of non pros was entered dismissing the plaintiff's initial complaint for failure to appear when the case was called for trial. A second complaint raising the same claims was also dismissed for the same reason.

The Superior Court ruled that a third action could not be instituted. Pa.R.C.P. No. 218 authorizes a court to enter a non pros when a plaintiff, without a satisfactory excuse, fails to

appear at trial. Unless a non pro entered pursuant to Rule 218 is set aside, the plaintiff may not bring a new lawsuit raising the same claims. This ruling is consistent with prior case law holding that a dismissal of the plaintiff s case for failure to appear at trial is not a voluntary nonsuit for purposes of Pa.R.C.P. No. 231. See Farabaugh Chevrolet-Oldsmobile, Inc. v. Covenant Management, Inc., 522 A.2d 100 (Pa. Super. 1987).

The Court in Schuylkill Navy--rather than basing its ruling on the rules governing a party's failure to appear at trial--relied on the Gates dicta that a second lawsuit cannot be brought unless the previously entered judgment of non pros has been opened or stricken.[5] However, the Court's opinion recognized that Rule 218 requires a plaintiff to establish a satisfactory excuse for failure to appear, and that the Note to the rule requires a plaintiff to seek relief from the judgment under Rule 3051. Therefore, this holding, that a dismissal under Rule 218 for failure to attend trial bars a second action, has no impact on the case law allowing the filing of a second action within the statute of limitations where the prior action was dismissed for failure to comply with the pleading requirements of the Rules of Civil Procedure.

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[5]The Court's opinion also refers to Rule 3051. However, Rule 3051 does not address the issue of whether a judgment of non pros bars a second lawsuit. It only addresses the procedure and standards for opening a judgment of non pros.

In summary, the dicta upon which defendants rely is not consistent with established case law which allows a plaintiff whose initial suit was dismissed for failure to file a complaint (a situation analogous to failure to file a certificate of merit) to bring a second action if the statute of limitations has not run.

For these reasons, I enter the following Order of Court:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

RAYMOND HELFRICK, by and through his son, MICHAEL HELFRICK, P.O.A.,

Plaintiff

vs.

UPMC SHADYSIDE HOSPITAL; UPMC REHABILITATION HOSPITAL; HEARTLAND HEALTHCARE CENTER; HEALTHCARE AND RETIREMENT CORPORATION; DOUGLAS SKURA; MICHAEL P. CASEY, M.D.; DAVID WEBER, M.D.; FARHAD ISMAIL-BREIGI, M.D.; JON A LEVY, M.D.; LEONARD E. EVANS, M.D.; DAVID G. HALL, M.D.; GREGORY C. MIECKOWSKI, M.D.; DAVID J. LEVENSON, M.D.; DR. LEE ENSON, M.D.; DR. GORDON CHU,

Defendants

NO. GD03-010082

ORDER OF COURT

On this 29 day of September, 2003, it is hereby ORDERED that plaintiff's petition to strike judgment of non pros as to defendant David J. Levenson, M.D., is granted.

BY THE COURT:

WETTICK, J.

IN THE COURT OF COMMON PLEAS OF A LEGHENY COUNTY, PENNSYLVANIA

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Plaintiff

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Defendants

CIVIL DIVISION

NO. GD03-010082

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OPINION AND ORDER OF COURT DATED SEPTEMBER 29, 2003

HONORABLE R. STANTON WETTICK, JR.

NO. GD03-010082

Counsel for Plaintiff:

Richard T. Haft, Esquire
Edward Wehrenberg, Esquire
226 Sheryl Lane
Pittsburgh, PA 15221

Patrick J. Loughren, Esquire
310 Grant Street
Suite 3204 Grant Building
Pittsburgh, PA 15219

Counsel for Defendants UPMC Shadyside Hospital, UPMC Rehabilitation Hospital, Heartland Health Care Center, Health Care and Retirement Corporation, Farhad Ismail-Breigi, M.D., and Dr. Gordon Chu:

Eugene A. Giotto, Esquire
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Lynn E. Bell, Esquire
420 Fort Duquesne Boulevard
10th Floor One Gateway Center
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Counsel for Defendant David J. Levenson, M.D.:

Robert J. Pfaff, Esquire
Suzanne Oppman, Esquire
112 Washington Place
Suite 1010 Two Chatham Center
Pittsburgh, PA 15219

NO. GD03-010082

OPINION AND ORDER OF COURT DATED SEPTEMBER 29, 2003

WETTICK, J.

The subject of this Opinion and Order of Court is plaintiff's petition to strike a judgment of non pros entered for failure of plaintiff to file a certificate of merit within sixty days of the filing of the complaint. The issue raised through this petition is whether a judgment of non pros may be obtained if the plaintiff has filed a certificate of merit beyond the sixty day period set forth in the rules for the filing of a certificate of merit but before the defendant's filing of a praecipe for the entry of a judgment of non pros.[1]

In a complaint filed on May 29, 2003, plaintiff asserted professional liability actions against numerous defendants, including Dr. David J. Levenson. Under Pa.R.C.P. No. 1042.3, the attorney for plaintiff was required to file within sixty days after the filing of the complaint either a certificate of merit or a

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[1]Case law holds that in determining first-in-time, it is the times and dates of the filings as opposed to the times and dates of the entry of the filings on the record. Lansdowne by Lansdowne v. G.C. Murphy, 517 A.2d 1318 (Pa. Super. 1986).

motion to extend the time for the filing of the certificate. Plaintiff failed to do so. At 8:30 A.M. on August 1, 2003 (the 64th day after the complaint was filed), counsel for plaintiff filed a certificate of merit as to Dr. Levenson. At 2:38 P.M. on August 1, 2003, counsel for Dr. Levenson filed a praecipe for the entry of judgment of non pros pursuant to Pa.R.C.P. No. 1042.6 which reads as follows:

> **Rule 1042.6. Entry of Judgment of Non Pros for Failure to File Certification**
>
> (a) The prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time provided that there is no pending timely filed motion seeking to extend the time to file the certificate.
>
> *Note:* The prothonotary may not enter judgment if the certificate of merit has been filed prior to the filing of the praecipe.
>
> Rule 237.1 does not apply to a judgment of non pros entered under this rule.
>
> (b) The praecipe for the entry of a judgment of non pros shall be substantially in the following form: . . . .

In response to the praecipe which defendant filed, the Prothonotary entered a judgment of non pros. Plaintiff has filed a petition to strike the judgment on the ground that the Prothonotary lacked authority to enter a judgment of non pros after the filing of a certificate of merit. I am granting the petition.

The text of Rule 1042.6 does not address the issue of what happens when a plaintiff files a certificate of merit beyond the sixty day period but before the entry of a judgment of non pros. However, the Note to Rule 1042.6 provides the answer: "The prothonotary may not enter judgment if the certificate of merit has been filed prior to the filing of the praecipe."

Defendant contends that I should disregard the Note because it is inconsistent with Rule 1042.6. I disagree. As I will discuss, there is an issue as to whether the Prothonotary is authorized to enter a judgment of non pros if a plaintiff has complied with the requirements of a rule, albeit untimely, prior to the defendant's filing a praecipe for the entry of a judgment of non pros. Consequently, the Note is answering the question that the rule does not address. The answer that the Note furnishes is consistent with case law governing analogous situations.

A note should be used in construing a rule of civil procedure unless it is not possible to give effect to both the note and the rule. See Pa.R.C.P. No. 129(e) ("A note to a rule or an explanatory comment is not a part of the rule but may be used in construing the rule.") and the Explanatory Comment--1990 to Rule 129(e) (citing with approval the statement of the Pennsylvania Supreme Court in Laudenberger v. Port Authority of Allegheny County, 436 A.2d 147, 151 (Pa 1981), that explanatory notes "indicate the spirit and motivation behind the drafting of the rule, and they serve as guidelines for understanding the purpose

for which the rule was drafted").

It is common practice for appellate courts, when construing a rule of civil procedure, to give considerable weight to the notes and explanatory comments that accompany the rule. See Katz v. St. Mary Hospital, 816 A.2d 1125, 1127-28 (Pa. Super. 2003); Rieser v. Glukowsky, 646 A.2d 1221, 1225 Pa. Super. 1994); McGonigle v. Currence, 564 A.2d 508, 510-11 (Pa. Super. 1989); Macioce v. Glinatsis, 522 A.2d 94, 96 (Pa. Super. 1987).

There is no inconsistency between Rule 1042.6 and the Note providing that the Prothonotary may not enter judgment if the certificate has been filed prior to the filing of the praecipe. Rules of civil procedure providing for the Prothonotary to enter a judgment of non pros, upon praecipe of the defendant, for failure of a plaintiff to comply with a rule of court, are not construed as providing for the automatic entry of a judgment of non pros. Since such rules are not self-enforcing, they are not construed as providing for the striking of a plaintiff's filing which occurs prior to the defendant's filing of a praecipe for the entry of a judgment of non pros.

In Friedman v. Lubecki, 524 A.2d 987 (Pa. Super. 1987), the plaintiffs filed a timely notice of appeal from a district justice judgment. Pa.R.C.P.D.J. No. 1004A provides that if the appellant was the claimant in the action before the district justice, he or she shall file a complaint within twenty days after filing the notice of appeal. Pa.R.C.P.D.J. No. 1006 provides that "Upon

failure of the appellant to comply with Rule 1004A, . . . the prothonotary shall, upon praecipe of the appellee, mark the appeal stricken from the record."

In Friedman, the plaintiffs filed their complaint on the twenty-fourth day following the filing of the notice of appeal. Four days later, the defendant filed a praecipe to strike the appeal for failure of the plaintiffs to file their complaint within the twenty day period set forth in Rule 1004A. The trial court denied the plaintiffs' petition to reinstate the appeal. The Superior Court reversed.

The Superior Court ruled that the trial court had misconstrued the rule; the Superior Court read the rule as providing that it was too late for the defendant to seek relief under Rule 1006 once the plaintiffs had filed their complaint:

> We repeat, Rule 1006 is not self-enforcing. Its effect is not automatically triggered even if, after 20 days have passed, an appellant has not filed his Complaint. In that event, it is incumbent upon an appellee to proceed under Rule 1006 to strike the appeal from the record. Rule 1006 only provides for the striking of an *appeal* filed pursuant to Pa.R.C.P.D.J. 1002. We discern no language in Rule 1006 which encompasses within its terms the striking of an untimely filed Complaint, as well, nor will we read any such requirement into a Rule which clearly on its face provides for a method by which an appeal is to be stricken from the record for failure to comply with Pa.R.C.P.D.J. 1004 A. 524 A.2d at 989.

In making its decision, the Superior Court looked to Alexander v. Mastercraft Construction Co., Inc., 317 A.2d 278 (Pa. 1974), in

September 16, 1983, at 9:29 A.M., the defendant filed with the Prothonotary a praecipe for entry of judgment of non pros. At 2:30 P.M. on the same day, counsel for the plaintiff filed a complaint with the Prothonotary. The Prothonotary did not enter judgment in the docket until September 19, 1983. Subsequently, the trial court struck the complaint for failure to comply with Rule 1037(a).

The issue the Superior Court addressed in Lansdowne was whether it was proper for the trial court to strike the complaint in the situation in which the complaint was filed before the entry of the judgment of non pros. The Superior Court ruled that the complaint was properly stricken because the praecipe was filed before the plaintiff filed his complaint. Id. at 1323. There would have been no need for the Superior Court to address this issue if Rule 1037(a) required the Prothonotary to enter a judgment of non pros whenever a complaint is not filed within the twenty day period.

For these reasons, I enter the following Order of Court:

IN THE COURT OF COMMON PLEAS OF .LLEGHENY COUNTY, PENNSYLVANIA
CIVIL I IVISION

RAYMOND HELFRICK, by
and through his son,
MICHAEL HELFRICK, P.O.A.,

Plaintiff

vs.

UPMC SHADYSIDE HOSPITAL;
UPMC REHABILITATION
HOSPITAL; HEARTLAND
HEALTHCARE CENTER;
HEALTHCARE AND RETIREMENT
CORPORATION; DOUGLAS
SKURA; MICHAEL P. CASEY,
M.D.; DAVID WEBER, M.D.;
FARHAD ISMAIL-BREIGI, M.D.;
JON A LEVY, M.D.; LEONARD
E. EVANS, M.D.; DAVID G.
HALL, M.D.; GREGORY C.
MIECKOWSKI, M.D.; DAVID J.
LEVENSON, M.D.; DR. LEE
ENSON, M.D.; DR. GORDON
CHU,

Defendants

NO. GD03-010082

ORDER O? COURT

On this 7 day of Oct ber, 2003, it is hereby ORDERED that plaintiff's petition to open judgments of non pros entered on July 30 and July 31, 2003 is den: ed.

I Y THE COURT:

WETTICK, J.

Q31573

(3)

COPIES SENT
PURSUANT TO Pa. R.C.P. 236(b)
SEP 2 5 2003
First Judicial District of Pa.
User I.D.: RLM

IN THE COURT O : COMMON PLEAS
OF PHILADEI PHIA COUNTY

CIVIL TRL L DIVISION

KATHLEEN M. FRUNZI And JOSEPH FRUNZI, h/w	:	MARCH TERM, 2003
vs.	:	
GARY W. MULLER, M.D., ET AL.	:	NO. 4067

OP NION

Defendants, Jeanes Hospital and Te nple University Health Systems, Inc., have moved this Court to compel Answers to Su plemental Interrogatories concerning the certificate of merit filed by plaintiff. These interrogatories do not ask whether the author of the statement giving rise to the certifica : of merit will be called to testify at trial. Rather, these interrogatories seek for to as certain the credentials of the author. The interrogatories ask for information about t e author's license to practice medicine, his or her medical practice, his or her specialty, s bspecialty, board certifications and other curriculum vitae information.

Rule 1042 of the Rules of Civil Pr cedure promulgated by the Supreme Court of January 27, 2003, governs professional lia ility actions. These rules, at Rule 1042.3 require the filing of a certificate of merit v ith or after filing a complaint. These rules also preclude discovery of the credentials of th : author of the report on which the certificate of merit is based until the final conclusion of the case. Rule 1042.7, entitled "Sanctions", states that 30 days after a defendant is dis issed through "voluntary dismissal, verdict or order of the Court", the defendant may re uest the written statement upon which the

certificate of merit was based. The Rule further provides that the statement may not be required by any dismissed party until 30 days after resolution of all claims in the matter. Resolution of all claims is the conclusion of trial and all appeals. Neither the rule nor the commentary note provide any support for pre-trial discovery concerning the identity or curriculum vitae of the author.

The defense claims that the note appended to Rule 1042.7 permits discovery of a limited nature while the case is pending. This note states that Rule 4003.5 of the Rules of Civil Procedure, which governs the discovery of expert testimony, is applicable to the written statement of licensed professionals: "until a defendant has been dismissed from the case".

Pennsylvania Rule of Civil Procedure 4003.5 specifically limits discovery of facts known and opinions held by an expert retained by a party in litigation. It specifically limits discovery at 4003.5(a)(1)(a) to "each person whom the other party expects to call as an expert witness at trial." This limitation upon discovery is referred to in the commentary to Rule 1042.7. The note to Rule 1042.7 does not in any way expand the clear language of the Rule itself prohibiting any discovery concerning the certificate of merit. Rather, the note clarifies the fact that Rule 1042.7 does not in any way expand otherwise permissible expert discovery.

Obviously, if plaintiff intends to call the individual who authored the statement as an expert at trial, plaintiff would have to respond with information about that expert pursuant to properly filed interrogatories under Rule 4003.5. Nothing precludes proper discovery if the licensed professional upon whose report the certificate of merit was based will be called as a witness at trial.

Clearly however, the Rules preclude any interrogatories seeking the identity or the credentials of the licensed professional upon whose opinion the certificate of merit was based until the conclusion of the case. The Defendant's motion to compel is denied.

BY THE COURT

MARK I. BERNSTEIN, J.

4/25/03
DATE

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031559

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DONNA HERRMANN as Executrix of the Estate of VELMA TETRICK,

Plaintiff

vs.

PRISTINE PINES OF FRANKLIN PARK, INC.,

Defendant

CIVIL DIVISION

NO. GD03-6835

CODE: 009

OPINION AND ORDER OF COURT

HONORABLE R. STANTON WETTICK, JR.

Counsel for Plaintiff:

John P. Yukevich, Jr., Esquire
1040 Fifth Avenue
Pittsburgh, PA 15219

Counsel for Defendant:

Paul J. Walsh, III, Esquire
707 Grant Street
Suite 2400 The Gulf Tower
Pittsburgh, PA 15219

NO. GD03-6835

OPINION AND ORDER OF COURT

WETTICK, J.

The subject of this Opinion and Order of Court is plaintiff's petition to strike or open a judgment of non pros entered pursuant to Pa.R.C.P. No. 1042.6 based on plaintiff's failure to file a certificate of merit within sixty days after the filing of the complaint. Plaintiff's complaint does not identify the defendant as a licensed professional or allege that plaintiff is asserting a professional liability claim. The issue raised through this petition is whether a judgment of non pros may be entered for failure to file a certificate of merit where the complaint does not allege that the plaintiff is raising a professional liability claim.

Plaintiff is the executrix of the Estate of Velma Tetrick. The only defendant is Pristine Pines of Franklin Park, Inc., which plaintiff identifies as a corporation operating a personal care home where Ms. Tetrick resided.

The complaint alleges that Ms. Tetrick died as a result of blunt trauma to her head and chest. The injury occurred between 11:20 P.M. when Ms. Tetrick had returned to the personal care home

from a hospital emergency room and 6:30 A.M. when an employee of defendant found Ms. Tetrick lying on the floor in her room by a closet door. Ms. Tetrick was never able to describe what happened to her.

The negligence allegations against the personal care home include the home's failure to follow discharge instructions from the hospital to administer pain medication and to evaluate Ms. Tetrick hourly for signs and symptoms of disorientation; the personal care home's failure to have a sufficient number of qualified staff on duty at the time of the incident; and the personal care home's failure to have and to implement various policies and procedures.

The complaint was filed on April 4, 2003. An answer was filed on June 12, 2003.

On July 1, 2003, defendant filed a praecipe for entry of judgment of non pros pursuant to Rule 1042.6. In the praecipe, counsel for defendant certified that plaintiff "has asserted a professional liability claim against the defendant named above who is a licensed professional, that no certificate of merit has been filed within the time required by Pa.R.C.P. No. 1042.3 and that there is no motion to extend the time for filing the certificate pending before the court." The Prothonotary entered a judgment of non pros on the same day.

Rule 1042.3 provides that in an action based on an allegation that a licensed professional deviated from an acceptable

professional standard, the attorney for the plaintiff shall file a certificate of merit with the complaint or within sixty days after the filing of the complaint (unless the court upon cause shown extends the time for filing pursuant to a motion to extend, filed on or before the filing date that the plaintiff seeks to extend). Rule 1042.6 provides that the Prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time, provided there is no pending timely filed motion seeking to extend the time to file the certificate.

If these were the only relevant rules, I would need to consider whether the complaint is based on allegations that a licensed professional deviated from an acceptable professional standard. However, there is a third rule--Pa.R.C.P. No. 1042.2--which governs the situation in which the plaintiff's complaint has not characterized the action as a professional liability claim and the defendant believes that the action is a professional liability claim governed by Pa.R.C.P. Nos. 1042.1-1042.8. Rule 1042.2 reads as follows:

> **Rule 1042.2. Complain:**
>
> (a) A complaint shall identify each defendant against whom the plaintiff is asserting a professional liability claim.
>
> *Note:* It is recommended that the complaint read as follows:

> "Defendant _____ (name) is a licensed professional with offices in _____ County, Pennsylvania. Plaintiff is asserting a professional liability claim against this defendant."
>
> (b) A defendant may raise by preliminary objections the failure of the complaint to comply with subdivision (a) of this rule.
>
> *Note:* The filing of preliminary objections raising failure of a pleading to conform to rule of court is the procedure for bringing before the court the issue whether the complaint is asserting a professional liability claim.

Defendant contends the filing of preliminary objections is not mandatory because the rule provides that the defendant, by preliminary objection, "may" raise the failure of the complaint to comply with subdivision (a) of this rule. This contention is inconsistent with the note to Rule 1042.2(b) which provides that the filing of preliminary objections raising failure of a pleading to conform to rule of court is the procedure for bringing before the court the issue of whether the complaint is asserting a professional liability claim. Also, defendant's proposed reading of the subdivision would render this subsection meaningless.[1] A defendant would almost never file preliminary objections, which would give notice to the plaintiff that the defendant is contending

[1]See Pa.R.C.P. No. 128(b) which provides that in ascertaining the intention of the Supreme Court in the promulgation of a rule, a court shall be guided by the presumption that the Supreme Court intends the entire chapter of rules to be effective and certain.

the complaint is raising a professional liability claim, if the defendant could, without giving notice to the plaintiff, file a praecipe for the entry of a judgment of non pros on the sixty-first day after the filing of the complaint.

The purpose of Rule 1042.2 is to have a judicial determination of whether the plaintiff is asserting a professional liability claim for which a certificate of merit must be filed before a defendant may obtain a judgment of non pros for failure to file a certificate of merit. It would be unreasonable for a rule of procedure to provide for the entry of a judgment of non pros for failure to comply with a rule where there can be uncertainty as to the applicability of the rule.[2]

Rule 1042.2(b) uses the term "may" because a defendant is not required to file preliminary objections; the defendant may, instead, decide to live with a complaint that fails to conform to a rule of court. The language within Rule 1042.2(b) is identical to the language within Pa.R.C.P. No. 1028(a) governing preliminary objections which provides "[p]reliminary objections may be filed by any party to any pleading and are limited to the following grounds:" (emphasis added). The law is clear that the failure to file a preliminary objection which raises a ground set forth in Rule 1028(a) constitutes a waiver of the objection except where

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[2]See Rule 128(a) which provides that the Supreme Court does not intend a result that is unreasonable.

other rules create exceptions. Roskwitalski v. Reiss, 487 A.2d 864, 868 (Pa. Super. 1985); Rivera v. Philadelphia Theological Seminary, 474 A.2d 605, 614 (Pa. Super. 1984), aff'd as modified on other grounds, 507 A.2d 1 (Pa. 1986).

In summary, Rule 1042.2 requires a plaintiff to identify in the complaint each defendant against whom the plaintiff is asserting a professional liability claim. If a party is so identified, the rules governing professional liability actions are clear: within sixty days of the filing of the complaint, the plaintiff must, as to this party, file a certificate of merit or a motion to extend the time for filing the certificate of merit (Rule 1042.3). If the plaintiff fails to do so, the defendant may file a praecipe with the Prothonotary requesting entry of a judgment of non pros (Rule 1042.6).

However, where a complaint does not allege that the plaintiff is asserting a professional liability claim against a defendant, the plaintiff is not required to file a certificate of merit as to this defendant unless the plaintiff subsequently files an amended complaint stating that the plaintiff is asserting a professional liability claim against this defendant. Through the filing of preliminary objections, a defendant may seek a court order compelling the plaintiff to file such an amended complaint on the ground that the plaintiff is asserting a professional liability claim against this defendant. If the defendant does not file preliminary objections, the defendant waives its claim that the

plaintiff has violated the rule requiring the filing of the certificate of merit.

For this reason, I enter the following order of court:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

DONNA HERRMANN as
Executrix of the
Estate of VELMA
TETRICK,

Plaintiff

NO. GD03-6835

vs.

PRISTINE PINES OF
FRANKLIN PARK, INC.,

Defendant

ORDER OF COURT

On this 29 day of September, 2003, it is hereby ORDERED that plaintiff's petition to strike the judgment of non pros entered in these proceedings pursuant to Pa.R.C.P. No. 1042.6 is granted and the judgment of non pros is stricken.

BY THE COURT:

WETTICK, J.

Q31383

(5)

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BERNICE CAMPBELL Plaintiff,	:	
v.	:	JANUARY TERM, 2000 NO. 1857
THADDEUS GOLDEN, M.D. et al., Defendants.	:	

OPINION

Sandra Mazer Moss, J. Aug. 18, 2003

Facts and Procedural History

Plaintiff Bernice Campbell was admitted to the General Medical Surgical Unit at Mercy Hospital for respiratory problems in January, 1998. After Plaintiff manifested anxiety symptoms from shortness of breath, Defendant resident, Thaddeaus Golden, M. D., administered intravenous Ativan. As a result Plaintiff claims she suffers from persistent Generalized Anxiety Disorder, Panic Disorder and Post-Traumatic Stress Disorder. Plaintiff alleges Dr. Golden was not supervised by an attending physician which violates hospital policy. Thus, his unilateral decisions about dosage and administration of Ativan were negligent.

Plaintiff instituted this medical malpractice suit in January, 2000 and subsequently produced as an expert psychiatrist, Pogos Voskanian, M.D. In his report, Dr. Voskanian states Dr. Golden's treatment was negligent to a reasonable degree of medical certainty because using intravenous Ativan on a patient with a "pulmonary problem is below the standard of care." N.T.

Motion in Limine Proceedings, 07/18/2003 at pg. 8, 20-23. On June 27, 2003, Dr. Golden filed a Motion in Limine to Preclude Dr. Voskanian's testimony since he is not in the same or similar medical field as Dr. Golden. On July 18, 2003 We heard oral argument and granted same. This appeal follows.

Discussion

"In a medical malpractice case in Pennsylvania it is necessary that expert medical testimony be introduced to establish that a defendant has negligently carried out his professional duties and departed from the standard of care exercised by other physicians." *Freed v. Priore*, 247 Pa. Super. 418, 425, 372 A.2d 895, 899 (Pa. Super. 1977), *citing*, *Chandler v. Cook*, 438 Pa. 447, 265 A.2d 794, 796 (1970); *Ragan v. Steen*, 229 Pa.Super. 515, 331 A.2d 724, 727-28 (Pa.Super. 1974). On March 20, 2002 the Medical Care Availability and Reduction of Error (M-CARE) Act was signed into law. 40 P.S. §1303. Chapter 5, Section 512 went into effect on May 19, 2002 and defines required expert qualifications in medical professional liability actions. In pertinent part, Section 512 states:

> "(b) Medical testimony— An expert testifying on a medical matter, including the standard of care, risk and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:
>
> (1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.
>
> (2) Be engaged in, or retired within the previous five years from, active clinical practice or teaching. Provided, however, the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue education, training or experience
>
> (c) Standard of Care- In addition to the requirements set forth in subsections (a) and (b), an expert testifying as to a physician's standard of care must meet the following qualifications:

(1) Be substantially familiar with he 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 subspeci alty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue**, (emphasis added), except as pro vided in subsection (d) or (e).

(3) In the event of the defendant physician is **certified by an approved board, be board certified by the same or a simila approved board**, (emphasis added), except as provided in subsection (e)."

Chapter 5C. Medical Care Availability and Redu ction of Error (M-CARE) Act, 40 P.S. §1303.512.

Plaintiff experienced serious breathing d fficulties which caused her to become anxious. Said anxiety further aggravated her respiratory c ondition. Dr. Golden administered intravenous Ativan, a sedative commonly used for medically induced anxiety, to relax Plaintiff and encourage deep breathing. Defense counsel argued intrave ious treatment was selected " to have the relaxing effect of the Ativan kick in a little bit fa ster, to relax [Plainitiff]" and "to relieve the anxiety component that was making her breathi g problem worse." N.T. Motion in Limine Proceedings, 07/18/2003 at pg. 7, 16-18, 19-21.

Said Ativan was specifically prescribed t o treat a pulmonary problem, not a psychiatric one. See N.T. Motion in Limine Proceedings, 0 7/18/ 2003, at pg. 9-10. Besides Ativan Dr. Golden also increased Plaintiff's oxygen by ten percent hoping the combination would relieve her "pulmonary crisis." N.T. Motion in Limine Proceedings, 07/18/ 2003, at pg. 20, 16-20. Although Ativan is also a drug psychiatrists use in pill form to treat anxiety related mental illnesses, in this particular instance it was presc ibed by an internist to treat a respiratory aliment. All of the care Dr. Golden provided including t e intravenous Ativan was to treat breathing difficulties caused by Plaintiff's pulmonary dist ess.

Plaintiff's medical liability expert, Pogo s Voskanian, M.D., is a psychiatrist. He is a

medical doctor who specializes in mental health issues. Dr. Voskanian does not practice in the "same subspecialty" as Dr. Golden nor in a "sub specialty which has a substantially similar standard of care" as defined by Chapter 5 of the M-CARE Act. Further, Dr. Voskanian is not "certified by the same or a similar approved board" as Dr. Golden. Dr. Voskanian does not possess training or experience in internal medicine. Therefore he is not qualified to opine on standards used by internists when prescribing medication for pulmonary problems.

Conclusion

Plaintiff's medical liability expert Pogos Voskanian, M.D., is not competent to offer an expert medical opinion regarding the standard of care provided by Thaddeus Golden, M.D. as defined by Chapter 5 of the M-CARE Act. Our Order granting Defendant's Motion in Limine to Preclude Testimony of Plaintiffs' Expert Pogos Voskanian, M.D., was correct and should be affirmed.

BY THE COURT,

Sandra Mazer Moss, J.

Interested Counsel

Attorney for Plaintiff

Steven A. Friedman, Esquire
850 West Chester Pike
Havertown, PA 19083
(610) 586-6717

Attorney for Defendants

Fredric L. Goldfein, Esquire
Goldfein & Joseph
1600 Market Street, 33rd Floor
Philadelphia, PA 19103
(215) 979-8200

William F. Sutton, Esquire
1800 J.F.K. Blvd., 19th Floor
Philadelphia, PA 19103
(215) 587-1000

Edward J. David, Esquire
Seven Penn Center, 9th Floor
1635 Market Street
Philadelphia, PA 19103
(215) 751-9450

Stanley P. Stahl, Esquire
Stahl & DeLaurentis, P.C.
One South Broad Street, Suite 1830
Philadelphia, PA 19107
(215) 568-9225

IN THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

DEBRA CALLARI, Administratrix of the Estate of ANGELO CALLARI, Deceased and DEBRA CALLARI in her own right	**: Court Term, March 1999 : NO. 1056**
vs.	**: Superior Court#988EDA2003**
ROBERT H. ROSENWASSER, M.D.	

OPINION

Before the Court is an Appeal taken by Defendant-Appellant Dr. Robert H. Rosenwasser (hereinafter Dr. Rosenwasser) from an Order of the Court dated February 5, 2003, which denied Dr. Rosenwasser's Motion for Post-Trial Relief.

The facts and procedural history are as follows:

On October 9, 1996, Mr. Angelo Callari underwent brain surgery at Will's Eye Hospital in Philadelphia, Pennsylvania to cure a brain aneurysm. Dr. Rosenwasser, a neurosurgeon, performed the surgery and also acted as attending physician responsible for Mr. Callari's post-operative care. (Notes of Testimony, 11/4/02, at 154; hereinafter N.T.). After surgery, Mr. Callari developed a fever and increased white blood cell count, prompting Dr. Rosenwasser and his medical consultants to order blood cultures in order to find an infection. (N.T. at 60). Two blood cultures were taken on October 11, 1996, the first from Mr. Callari's right arm and the second from the arterial line. (N.T. at 61-63). Because of his persistent fever and increased white blood cell count, Mr. Callari was given three antibiotics - Vancomycin, Fortaz, and Gentamicin - on October 12, 1996. Mr. Callari received these antibiotics until October 15,

1996, when his white blood cell count and hi fever began to return to normal. (N.T. at 82). Dr. Rosenwasser testified that on October 15th some of the catheter lines were removed, which Dr. Rosenwasser believed precipitated the ret urn to normal in both Mr. Callari's temperature and his white blood cell count. (N.T. at 123) As a result, Dr. Rosenwasser and his medical consultants concluded that Mr. Callari had a l ne sepsis caused by an infected catheter.

A third culture was taken on October 1 5, 1996 from the Swan-Ganz catheter tip. (N.T. at 64). The results from the first two cultures came back negative on October 17, 1996. (N.T. at 61). A fourth and a fifth blood culture were taken on October 18, 1996, one from the subclavian catheter and the other taken from th e patient's blood, i.e. peripherally.[1] (N.T. at 64-65). Also on the 18th, after noticing another ncrease in Mr. Callari's temperature and white blood cell count, Dr. Rosenwasser placed Mr. Callari back on Vancomycin, Fortaz, and Gentamicin. (N.T. at 134). A sixth blood cult ure was taken on October 19, 1996 from the CVP catheter tip. (N.T. at 65). On October 20, 996, the results of the third culture came back positive for the bacteria enterococcus faecali .[2] (N.T. at 88). The results from the fourth and fifth blood cultures came back positive for e nterococcus faecalis on October 21, 1996. (*See* Microbiology Final Report, P-1 E). On Octo ber 22, 1996, Dr. Rosenwasser removed another intravenous catheter line. (N.T. at 126). On the same day, Mr. Callari's temperature and his white blood cell count began to return to norm al. As a result, Dr. Rosenwasser took Mr. Callari off antibiotics. Although the sixth blood cu lture also came back positive for enterococcus faecalis on October 23, 1996, Dr. Rosenwas er testified that the results stated "isolated from enrichment broth only," indicating a very lov number of bacteria on the catheter tip. (N.T. at

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[1] Dr. Rosenwasser testified that "pe ipheral" meant that this particular blood culture was taken directly from Mr. Callari's blo d and not from an instrument. Therefore, it indicated to Dr. Rosenwasser and his mec ical consultants that Mr. Callari's full blood was turning up positive for enterococcus aecalis. (N.T. at 69-70).

[2] Enterococcus faecalis is a "wides read species that is a normal inhabitant of the human intestinal tract; it causes urinary tr ct infections, infective endocarditis, and bacteremia that is often fatal." *Dorland's Illustrated Medical Dictionary* 559 (28th ed. 1994).

70-71). On October 29, 1996, Mr. Callari wa : released from the hospital.

During the next four months, Mr. Call: ri complained of fatigue and dizziness. He also experienced headaches, lost a significant amc ınt of weight, and continuously gave off a foul odor. (N.T. 11/6/02, at 34-39). He visited :everal doctors during this time, including Dr. Rosenwasser. (N.T. at 34-36). On March 4, 1)97, Mr. Callari was hospitalized for acute renal failure at the Pocono Medical Hospital in Ea :t Stroudsburg, Pennsylvania. Tests conducted there revealed the existence of enterococcus fa :calis. (N.T. 11/4/02, at 178). Tests also showed that Mr. Callari had vegetation on the surfa: e of the aortic valve necessitating open heart surgery. (N.T. at 179). Mr. Callari was tr: nsferred to St. Luke's Hospital in Bethlehem, Pennsylvania, where he had emergency heart : urgery to replace the aortic valve. (N.T. at 179). Mr. Callari continued to have a fever. Tests r :vealed he had infections in various places in his body. After undergoing several more surg: :al procedures, Mr. Callari passed away from enterococcus faecalis endocarditis on April 6 1997, at St. Luke's Hospital.

On March 5, 1999, Plaintiff/Appellee Mrs. Debra Callari (hereinafter Mrs. Callari) as administratrix of Mr. Angelo Callari's (herei :after Mr. Callari) estate filed this action against Dr. Rosenwasser with a Praecipe to Issue W :it of Summons. On June 1, 1999, Mrs. Callari filed her Complaint. On September 16, 199! she filed a sixteen count Amended Complaint. She alleged, inter alia, that Dr. Rosenwasser improperly diagnosed and treated Mr. Callari's infection and also improperly administered a :tibiotics during Mr. Callari's stay at Will's Eye Hospital. (Compl. ¶ 37). Mrs. Callari allege 1 that Dr. Rosenwasser's negligence caused Mr. Callari's death months later on April 6, 1997 (Compl. ¶ 34).

On October 17, 2002, Dr. Rosenwa ser filed a Motion In Limine asking that Mrs. Callari's expert witness, Dr. Joseph Cervia, b : precluded from testifying. Because Dr. Cervia is board certified in infectious disease and Dı Rosenwasser is board certified in neurosurgery, Dr. Rosenwasser argues that Dr. Cervia was p :ecluded from testifying under 40 P.S. §1303.512 of the Medical Care Availability and Reduc :on of Error Act (hereinafter Mcare Act), which became effective on May 20, 2002. (Def 's Mot. Limine Prec. Pl.'s Expert ¶ 13). On November 4, 2002, this Court denied Dr. R :senwasser's Motion In Limine to preclude Dr. Cervia's testimony. In consideration of the M care Act, this Court determined that although Dr.

Cervia is not a neurosurgeon, his testimony w is directed to the standard of care and causation relating to Dr. Rosenwasser's post-operative reatment of an infectious disease, and therefore such testimony from an infectious disease exp rt properly fit within the exceptions enumerated in the Mcare Act. (N.T. 11/4/02, at 160-161)

The trial commenced on November 4, 2002. At trial, Dr. Cervia testified that Dr. Rosenwasser's treatment of Mr. Callari's post-operative enterococcus faecalis infection breached the standard of care related to tr atment of such an infection. (N.T. at 193). Specifically, Dr. Cervia testified that Dr. Ro senwasser should have kept Mr. Callari on the antibiotics Vancomycin and Gentamicin cont nuously for 14 days. (N.T. at 196-197). Instead, Mr. Callari received two discontinuous antibi otic treatments, each individual treatment lasting roughly three and a half days. Dr. Cervia also testified that Fortaz was not an effective antibiotic for treating an enterococcus faec is infection. (N.T. at 189). Furthermore, Dr. Cervia opined that Dr. Rosenwasser should have consulted an infectious disease specialist. (N.T. at 198). Finally, Dr. Cervia stated that D r. Rosenwasser placed too much reliance on Mr. Callari's white blood cell count and fever v ithout allocating more importance to the blood culture results. (N.T. at 194-195). As a resul , Dr. Cervia testified, Mr. Callari was discharged prematurely. (N.T. at 199). Dr. Cervia testifi d that Dr. Rosenwasser's failure to properly treat Mr. Callari's infection placed Mr. Callari at g reat risk of harm and acted as a substantial factor in causing the endocarditis condition that u timately killed Mr. Callari. (N.T. at 201-202). However, Dr. Cervia did admit that he co uld not be certain whether Dr. Rosenwasser's treatment failed to eradicate Mr. Callari's in ection. (N.T. at 200-201).

On November 6, 2002, at the close o f Mrs. Callari's case-in-chief, Dr. Rosenwasser moved for Compulsory Non-suit. Dr. Ros nwasser renewed his argument that Dr. Cervia should be precluded from testifying pursu nt to the Mcare Act. Dr. Rosenwasser also maintained that Dr. Cervia failed to testify to a reasonable degree of medical certainty that the particular enterococcus faecalis infection he treated in October 1996 caused the enterococcus faecalis endocarditis that killed Mr. Callari. (N.T. 11/6/02, at 57). This Court, in considering the evidence most favorable to the non-mo ing party, denied Dr. Rosenwasser's Motion for Compulsory Non-suit. (N.T. at 63). On No ember 7, 2002, the trial ended with a unanimous

jury verdict in favor of Mr. Callari, awarding $)00,000 in damages. (N.T. 11/7/02, at 156). On November 14, 2002, Dr. Rosenwasser timely filed his Motion for Post-Trial Relief asserting that this Court erred in denying his Motion In Limine to preclude Dr. Cervia's testimony and also in denying his Motion for Compulsory N(nsuit. On February 5, 2003, upon consideration of Dr. Rosenwasser's Motion for Post-Trial ! :elief and Mrs. Callari's Response thereto, this Court denied Dr. Rosenwasser's Motion.

Appellant raises the following claims n his Statement of Matters Complained of Upon Appeal Pursuant to Pa.R.A.P. 1925(b):

(1) The Trial Court erred in denying Dr. Rc senwasser's Motion In Limine to preclude Dr. Cervia's testimony pursuant to § 1303.512 of the Mcare Act because Dr. Cervia and Dr. Rosenwasser do not share board certification n the same subspecialty. (2) Trial Court erred in overruling Dr. Rosenwasser's objection to)r. Cervia's testimony on the grounds he was precluded under the Mcare Act. (3) Dr. Cervi ı was not qualified under Pennsylvania common law to testify against Dr. Rosenwasser. (4) Trial Court erred in denying Dr. Rosenwasser's Motion For Compulsory Non-suit and in faili ıg to grant defendant a directed verdict based on the grounds that Dr. Cervia was not qualif ed to testify as an expert witness against Dr. Rosenwasser because the two doctors do not s ıare board certification in the same subspecialty. (5) Trial Court erred in denying Dr. Rosenv asser's Motion For Compulsory Non-suit based on the grounds that Dr. Cervia failed to testif to a reasonable degree of medical certainty that Dr. Rosenwasser's actions or inactions caus(d the decedent's death. (6) Dr. Cervia failed to testify to a reasonable degree of medical cer ainty that the infection that the decedent had in October 1996 caused his death in April 19)7. (7) Trial Court erred in ruling on the Dr. Rosenwasser's Motion For Post-Trial Relie: without scheduling oral argument and without giving the parties opportunity to brief the iss ıes raised in the motions.

Legal Argum nt

Defendant Dr. Rosenwasser, a neuro urgeon, maintains that § 1303.512 of the Mcare Act precludes Dr. Cervia from testifying as a nedical expert against him because Dr. Cervia is not board certified by the same or similar a)proved board as Dr. Rosenwasser. He further contends that Dr. Cervia is also precluded fro n testifying as a medical expert in this case under Pennsylvania common law. However, beca ıse the issue in this case deals with the allegedly negligent diagnosis and treatment of an infec ion, Dr. Cervia's expertise in infectious diseases qualifies him as a medical expert in this case nder both the Mcare Act and under Pennsylvania common law.

Before discussing the issue regarding Dr. Cervia's qualification pursuant to the Mcare Act, this Court will address Mrs. Callari's assertion that the Mcare Act does not apply to the instant matter. Because Mrs. Callari initiated his action on March 5, 1999, and the Mcare Act did not become effective until May 20, 2002, Mrs. Callari argues that applying this act to the instant matter would impermissibly give it retroactive effect. It is true that absent clear legislative intent to the contrary, statutes are to be construed to operate prospectively only. *Gehris v. Department of Transportation*, 471 Pa. 210, 215, 369 A.2d 1271, 1273 (1977) (citing Statutory of Construction Act of 1972, 1 Pa. C.S.A. § 1926). However, a statute will not operate retrospectively merely "because some of the facts or conditions upon which its application depends came into existence prior to its enactment." Id. at 215, 369 A.2d at 1273. Rather, "an act is not retroactively construed when applied to a condition existing on its effective date even though the conditions result from events which occurred prior to that date...." *Creighan v. City of Pittsburgh*, 389 Pa. 569, 575, 132 A.2d 867, 871 (1957). Although Mrs. Callari retained Dr. Cervia prior to the Mcare Act becoming effective, Dr. Cervia did not testify until November 4, 2002. Because the Mcare Act sets the standards a witness must meet in order to provide expert medical testimony, and such testimony in this case was not given until more than five months after the Mcare Act became effective, applying the act to the instant matter would not be retroactive, but rather prospective. Therefore, the Mcare Act applies to this case.

Resuming our analyses, Dr. Cervia qualifies as a medical expert in this case under the Mcare Act. § 1303.512 of the Mcare Act codifies the standards that a witness must meet in order to offer expert medical testimony against a physician in a medical professional liability action. § 1303.512 of the Mcare Act, in relevant part, states:

> (c) Standard of care -...an expert testifying as to a physician's standard of care also must meet the following 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 defend ant physician is certified by an approved board, be board certified by th same or a similar approved board, except as provided in subsection (e).

(d) Care outside specialty - A cou t may waive the same subspecialty requirement for an expert testifying o the standard of care for the diagnosis or treatment of a condition if the c urt determines that:

(1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and

(2) the defendant physicia provided care for that condition and such care was not within the physic an's specialty or competence.

(c) Otherwise adequate training, xperience and knowledge - A court may waive the same specialty and board c rtification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge o provide the testimony as a result of active involvement in or full-time teaching o medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

Dr. Cervia falls under § 1303.5 12(c)(1) inasmuch as the care complained of deals with the care for an infection. When com nenting on how the Mcare Act applied to this situation, this Court made the following obs rvation:

COURT:...The area under scrutiny h re is infectious disease and the treatment of infectious disease, not the specialty or subsp cialty of surgical care, so that I thought that though he's [Dr. Cervia] not a surgeon, the i sue here is whether or not the infection was treated properly and thus the proper expert o inion would have been in the area of infectious disease, and I believe that does fit in to a exception to the act at this point. (N.T. 11/4/02, at 162).

Mrs. Callari's Complaint alleges that Dr. R senwasser negligently diagnosed Mr. Callari's infection, failed to treat it properly with a tibiotics, failed to consult an infectious disease specialist, and failed to perform other tasks n ecessary to properly treat Mr. Callari's infection. (Compl. ¶ 37). Mrs. Callari did not assert t at Dr. Rosenwasser was negligent in performing surgery on Mr. Callari. Furthermore, while n ot opining on the quality of surgery performed by Dr. Rosenwasser, Dr. Cervia did opine tha Dr. Rosenwasser breached the standard of care relating to the treatment and diagnosis of an nfectious disease. (N.T. at 193-200). Clearly, the specific standard of care at issue in this cas deals with the proper diagnosis and treatment of an infectious disease, and that was the only tandard upon which Dr. Cervia opined.

Dr. Rosenwasser argues that because ıe, as a neurosurgeon, was treating Mr. Callari post-surgically for a brain aneurysm, Dr. Cerv a cannot opine on his treatment of Mr. Callari's infection. However, Dr. Rosenwasser's own testimony undermines such an argument. Dr. Rosenwasser admitted that he was the atten ling physician in charge of the post-operative treatment of Mr. Callari's infection. (N.T. at 4'). Yet he testified during cross-examination that issues relating to his treatment of Mr. Callari s infection were out of his area of expertise as a neurosurgeon.

Q: And what was the type of organisr that was involved [with Mr. Callari's infection in October 1996]?

A: Well, again, it's out of my area bec ıuse I'm a neurosurgeon.... (N.T. 11/4/02, at 5)

...

Q: Sir, you had mentioned in [your] d :position...one of the reasons that you discontinued the antibiotics for this infection vas that you were concerned about a super infection?

A: Well, again, I'll have to clarify wh ıt that is....So the - again I'm speaking of - it's a little bit out of my area because I'm a neur surgeon... (N.T. at 83-84).

Clearly, based on Dr. Rosenwasser's own test mony, the specific care at issue in this case does not fall within the exclusive expertise of a neu osurgeon. Instead, the care complained of deals with the diagnosis and treatment of an infec ion, and an infectious disease expert would be substantially familiar with such a standard of care.

Dr. Cervia, an infectious disease expe t, has substantial familiarity with the applicable standard of care relating to the treatment and diagnosis of an enteroccocus faecalis infection, including treatment of that infection given by a neurosurgeon post-operatively. According to the curriculum vitae Dr. Cervia submitted to the Court, he was board certified in infectious diseases since 1990, and remained so during the time Dr. Rosenwasser treated Mr. Callari's post-operative infection of enterococcus fae alis in October 1996. Dr. Cervia testified that about ninety percent of his practice deals v ith treating adults suffering from an infectious disease. (N.T at 154). Dr. Cervia's teach ng position deals mainly with adult infectious diseases, some of his research involves adul infectious diseases, and in 1998 he renewed his board certification in adult infectious disease which will remain valid through 2010. (N.T. at

154-155) Dr. Cervia also testified that he g ves approximately 100-120 infectious disease consultations per month at Long Island Jev ish Medical Center for attending physicians, including neurosurgeons. (N.T. at 164-165). S me of these consultations also deal with patients diagnosed with enterococcus faecalis. (N.T. a 165). Because the standard of care at issue in this case involves the post-operative care giv en by a neurosurgeon treating an enterococcus faecalis infection, Dr. Cervia's practice in adu t infectious diseases, which, as this Court noted above, includes assisting neurosurgeons in sit ations similar to the instant matter, qualifies him as an expert pursuant to § 1303.512(c)(1). Th fact that Dr. Rosenwasser was also the surgeon does not limit his responsibility to the surgical care, especially since he assumed responsibility as the attending physician for Mr. Callari's p st-surgical care. (N.T. at 76).

The circumstances in this case also s atisfy the conditions set forth in §1303.512(d). Pursuant to §1303.512(d), a court may waiv the same subspecialty requirement enumerated in §1303.512(c)(2) for an expert testifying or the standard of care or treatment of a condition if the court determines that:

(1) the expert is trained in the diagnosis r treatment of the condition, as applicable; and
(2) the defendant physician provided car for that condition and such care was not wi the physician's specialty or competence. §13 03.512(d)(1)(2).

As noted above, Dr. Cervia is board certifie in infectious diseases. He also has experience diagnosing and treating enterococcus faecali infections. Therefore, this Court found that Dr. Cervia's training in the diagnosis and treatm nt of infectious diseases, including enterococcus faecalis infections, satisfied §1303.512(d)(1)

Moreover, this Court found Dr. Ros wasser provided Mr. Callari with care that was not within his specialty and competenc , pursuant to §1303.512(d)(2). Again, Dr. Rosenwasser's aforementioned testimony act as persuasive. When addressing issues pertaining to his diagnosis and treatment of Mr. Callari' infection, Dr. Rosenwasser repeatedly admitted that such issues were "...out of my area...b cause it's not neurosurgery...." (N.T. at 119). Nevertheless, while acting as the attending p ysician responsible for Mr. Callari's post-surgical care, Dr. Rosenwasser diagnosed and treated Mr. Callari's infection. He did so without the aid of an infectious disease expert, even though t was within his power as the attending physician

to request such assistance. (N.T. at 81). C learly, as evinced by his own testimony, Dr. Rosenwasser's diagnosis and treatment of Mr Callari's infection was not within his specialty or competence. Therefore, this Court found s ich care satisfied §1303.512(d)(2).

Moreover, even if the Mcare Act does ıot apply to the instant matter, Dr. Cervia easily qualifies as a competent medical expert under he more liberal Pennsylvania common law. As the Pennsylvania Supreme Court set forth in *M ller v. Brass Rail Tavern*, 541 Pa. 474, 664 A.2d 525 (1995), the common law test to be applic l when qualifying an expert witness is "whether the witness has any reasonable pretension t › specialized knowledge on the subject under investigation." *Miller*, 541 Pa. at 480, 664 A.2 1 at 528. Dr. Cervia, as a doctor board certified in infectious diseases, clearly has a reasonabl pretension to specialized knowledge regarding the treatment and diagnosis of an infectio s disease. Therefore, he easily satisfies the Pennsylvania common law standard for quali ying a witness as a competent expert.

In *Poleri v. Salkind*, 453 Pa. Super 15 9, 683 A.2d 649 (1996), the Superior Court had before it a case where the facts bear close rese nblance to the instant matter. There, the plaintiff claimed that the defendants, including a neu ›surgeon who was treating her after performing surgery on her back, negligently treated an int ection she contracted after surgery. Specifically, she complained that the defendant doctors rc ıcted slowly to her infectious condition and that she had been given the wrong antibiotic thera y. *Id.* at 164-166, 683 A.2d at 652. The Superior Court affirmed the trial court's decision to al ow an infectious disease expert to testify against the neurosurgeon regarding the standard of ca e used to treat the plaintiff's infection.[3] *Id.* at 168 n.1, 683 A.2d at 654.

As in *Poleri*, Mr. Callari suffered ın infection following surgery performed by a neurosurgeon, and similar to the facts in *Pol ri* the neurosurgeon treated that infection. Also similar to *Poleri*, Dr. Cervia, as an infecti us disease expert, was allowed to opine on the treatment of a post-operative infection giver by a neurosurgeon.

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[3] In *Poleri*, the Superior Court ratif ed the trial court's decision to allow an infectious disease expert to opine on the are given by the neurosurgeon because of the apparent overlap that existed between the specialties when treating an infectious disease. *Id.* at 166, 683 A.2d 653.

Dr. Rosenwasser's next argument s ggests that Dr. Cervia failed to testify to a reasonable degree of medical certainty that Dr. Rosenwasser's treatment of Mr. Callari's infection in October 1996 caused Mr. Cal ari's death in April 1997. Specifically, Dr. Rosenwasser argues that because Dr. Cerv a admitted he was not certain whether Dr. Rosenwasser's negligent treatment failed to e adicate Mr. Callari's infection in October 1996, such testimony fails to establish the necessary causal link between the infection that existed in October to the infection that killed Mr. Callar in April 1997. (N.T. 11/6/02, at 58). However, Pennsylvania law only requires that the expert witness testify to a reasonable degree of medical certainty that the defendant's negligence inc eased the risk of harm to the plaintiff, and Dr. Cervia's testimony, as will be discussed in de ail below, satisfies such a standard.

In *Mitzelfelt v. Kamrin*, 526 Pa. 54, 5 4 A.2d 888 (1990), the Supreme Court gave the applicable standard:

> "Once there is sufficient testimony to establish that (1) the physician failed to exercise reasonable care, that (2) such failure ncreased the risk of physical harm to the plaintiff, and (3) such harm did in fact occur, hen it is a question properly left to the jury to decide whether the acts or omissions were th proximate cause of the injury." *Mitzelfelt,* 526 Pa. at 68, 584 A.2d at 894-89

In rendering its opinion, the *Mitzelfelt* Court oted that it was the jury's role, not the medical expert's role, to balance probabilities and det rmine whether the defendant's negligence acted as a substantial factor in bringing about the h rm. *Id.*, 584 A.2d at 895.

In satisfaction of *Mitzelfelt*, Dr. Cerv a provided sufficient testimony to establish that Dr. Rosenwasser failed to exercise reasonabl care in the treatment of Mr. Callari's infection.. Dr. Cervia testified, inter alia, that Dr. Rosen vasser should have kept Mr. Callari on antibiotics for fourteen consecutive days, that he should h ve consulted an infectious disease specialist, and that he should have relied more heavily on the blood culture results. (N.T. 11/4/02, at 193-196). Such testimony was made with a reasonable degree of medical certainty as necessary under Pennsylvania law. (N.T. at 193). Therefore, part one of *Mitzelfelt's* holding is here satisfied.

Dr. Cervia also gave sufficient testim ny to establish that such negligence increased the risk of the harm suffered, as required unde part two of *Mitzelfelt's* holding. Under direct examination, Dr. Cervia made the following comments:

Q: What is your opinion as to these dif erent failures that you've mentioned to diagnose the condition and treat the condition with antibiotics, what is your opinion as to whether or not that was a substantial factor n causing the conditions that led to Mr. Callari's death?

A: I believe that they did contribute, y s.

Q: As a substantial factor?

A: Yes, I would say so.

Q: Did the actions increase the risk o harm that eventually took place?

A: I would say they did, yes. (N.T. at 201-202).

Dr. Cervia also testified that he was making ach one of these statements with a reasonable degree of medical certainty. (N.T. at 193). Th refore, his testimony satisfies the second part of *Miltzelfelt's* holding.

Because Mr. Callari did, in fact, suffe from the harm that Dr. Cervia testified he was placed in risk of suffering, this Court properly ubmitted this case to the jury. The same bacteria found in Mr. Callari in October 1996 - enterc occus faecalis - can develop into endocarditis. (N.T. at 181). Tests revealed that he had ente ococcus faecalis in his system in March of 1997. (N.T. at 178). Mr. Callari subsequently died om enterococcus faecalis endocarditis on April 6, 1997. (N.T. at 181). Although the expert witnesses disagreed on whether the infection in 1996 actually caused the endocarditis that wa diagnosed in March 1997, this dispute does not prevent this case from going to the jury. The fact that Dr. Cervia stated that he could not be certain whether Dr. Rosenwasser failed to to ally eradicate Mr. Callari's infection in October 1996 also does not preclude this case from be ng submitted to the jury. Pursuant to *Mitzelfelt*, it is the jury's duty to balance the probabilit es as to whether Dr. Rosenwasser's negligence proximately caused Mr. Callari's harm and ev ntual death. Dr. Cervia testified that he believed, with a reasonable degree of medical certainty, that Dr. Rosenwasser's actions increased the risk of harm to Mr. Callari. Therefore, his testimc ny satisfied the standard as set forth in *Mitzelfelt,* and this Court, pursuant to *Mitzelfelt*, submi ed this case to the jury.

Finally, Dr. Rosenwasser avers that th s Court abused its discretion when it ruled on his Motion for Post-trial Relief without schedulir g oral argument and without giving the parties the opportunity to brief the issues raised. Pursu ant to Pa.R.C.P., Rule 227.1(b)(2), grounds not specified in post-trial motions are deemed w ived. Because there is no evidence in the record

before this Court that suggests Dr. Rosenwass :r requested an oral argument or an opportunity to brief the issues raised in his post-trial motio ıs, such requests have been waived. *See Young v. Brush Mountain Sportsmen's Assoc.*, 697 ۱.2d 984, 993 (Pa. Super. 1997) (holding that appellant waives issues regarding a trial court s decision to decide post-trial motions without oral argument or permitting reply brief after tr al if issues are not raised in post-trial motions). Furthermore, because Dr. Rosenwasser did no raise these issues in the lower court and instead is raising these issues for the first time on ap eal, he is prevented from doing so pursuant to Pa.R.A.P., Rule 302(a).

Moreover, Dr. Rosenwasser did in fac have an opportunity to fully argue the issues he raised in his post-trial motions during trial. H had the opportunity to brief the issue regarding the admissibility of Dr. Cervia as an expert wi ness in his Motion in Limine. Dr. Rosenwasser orally argued that issue when he renewed his Motion in Limine during Dr. Cervia's voir dire examination. (N.T. at 158-159). This issue v as again revisited when Dr. Rosenwasser made his Motion for Compulsory Non-suit. (N.T. 11/6/02, at 56-57). Also during his Motion for Compulsory Non-suit, Dr. Rosenwasser orall / argued that Dr. Cervia failed to testify with a reasonable degree of medical certainty as to ca ısation. (N.T. at 57). "There is no authority that grants a party the right to oral argument after tr al." *Young*, 697 A.2d at 993. Furthermore, "the filing of trial memoranda is a matter to be exc usively decided by the trial judge." *Young*, 697 A.2d at 994. For these reasons, the Trial Co rt did not abuse its discretion in not scheduling additional oral arguments or in not allowing th e parties to additionally brief the issues raised in Dr. Rosenwasser's Motion for Post-Trial Rel ef.

Conclu ion

For the reasons set forth above, this C ourt respectfully requests the Superior Court to affirm its February 3, 2003 denial of Defend nt/Appellant's Motion for Post-Trial Relief.

BY THE COURT:

DATE

ALLAN L. TERESHKO, J.

cc: Fredric L. Goldfein, Esq./ Samantha L. Conway, Esq. For Appellant
Martin Goch, Esq. For Appellee

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IN THE COURT OF COMMON PL EAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTI ICT OF PENNSYLVANIA
CIVIL TRL L DIVISION

WALTER LONG Plaintiff, v. JONATHAN OSTROFF, D.O. Defendant.	:	AUGUST TERM, 2000 NO. 000391

OPI NION

Sandra Mazer Moss, J. Aug. 14, 2003

Facts and Pr cedural History

Plaintiff Walter Long ("Plaintiff") brou ght suit for professional negligence against Defendant Jonathan Ostroff, D.O. ("Defendant "), his family physician, based upon Defendant's adulterous relationship with Plaintiff's wife. W hile serving as Plaintiff's physician for six years (1992-1998), Defendant began a sexual affair with Roseanne Long in September, 1998. Plaintiff alleges Defendant was negligent because durin g an office visit on October 27, 1998, where he was examined for chest pain, back pain, and a xiety Defendant Long did not disclose his sexual relationship with said wife. We note Mrs. Lon had previously expressed her intent to divorce Plaintiff. In fact, five days prior to said office visit, Walter and Roseanne Long separated for the final time. They divorced five months later.

Plaintiff filed this medical malpractice suit against Defendant on August 9, 2000. Defendant filed a Motion to Dismiss on May 9, 2003. After oral argument on June 20, 2003 We

granted the Motion. Plaintiff now appeals focu ing on the novel claim that a physician has a duty to refrain from sexual relationships with patient s spouses. We find no such duty exists.

Disc ussion

A sexual relationship between a physician and atient does not constitute medical malpractice

The majority of jurisdictions have conc ided only psychiatrists' sexual relationships with patients are sufficient to constitute medical mal ractice. This conclusion is predicated upon the special relationship and fiduciary duty arising l etween patient and psychiatrist. However, even case law on this specific issue is split.

The special relationship between patien and psychiatrist is based upon "transference," used by psychiatrists to treat patients. Transfe ence is described as:

> "a patient's emotional reaction o a therapist; generally applied to the projection of feelings, thc ughts and wishes onto the analyst, who has come to represent som person from the patient's past. ... Transference is crucial to the th rapeutic process because the patient unconsciously attributes to the sychiatrist or analyst those feelings which he may have repressed tc wards his own parents."

Simmons v. United States, 805 F.2d 1363, 136 (9th Cir. 1986). Lacking a therapist-patient relationship with either Walter or Roseanne L ng, Defendant's sexual conduct with Plaintiff's estranged wife did not constitute malpractice nder Pennsylvania law.

Plaintiff's expert is not qualified to testify und r the MCARE Act

To recover under a professional negli ence theory, Plaintiff must prove Defendant owed a duty of care and breach of said duty resulted i cognizable injury. *Brown v. Philadelphia College of Osteopathic Medicine*, 760 A.2d 8 3, 868 (Pa. Super. Ct. 2000). To prove Defendant

owed Plaintiff a duty, he offered as an expert, D vid Behar, M.D., a certified psychiatrist.

Pursuant to the unambiguous language o the Medical Care Availability and Reduction of Error (MCARE) Act, Plaintiff's expert is not qu lified to opine in this medical liability action since he does not possess "sufficient education, raining, knowledge, [or] experience to provide credible [and] competent testimony." 40 P.S. § 1303.512(a). In pertinent part, the MCARE Act states that an expert testifying as to standard of are must:

> (2) Practice in the same subspeci alty as the defendant physician or in a subspecialty which has a substan ially similar standard of care for the specific care at issue...
>
> (3) In the event the defendant ph ysician is certified by an approved board, be board certified by the same or a similar approved board...

40 P.S. § 1303.512(c). The only existing gener l exception is one which permits a court to waive expert requirements if it determines said expert possesses otherwise adequate training, experience, and knowledge on standard of care from active involvement in Defendant's subspecialty. 40 P.S. § 1303.512(e).

Dr. Behar is a board-certified psychiatr st. He does not practice in Defendant's subspecialty, nor does he practice in a substant ally similar subspecialty. Furthermore, Dr. Behar is certified by neither the same nor a similar ap proved board. Accordingly, Dr. Behar lacks the requisite qualifications to render an expert opi ion on Defendant's applicable standard of care. Additionally, Dr. Behar does not possess suffi ient training, experience, or knowledge of Defendant's subspecialty which might prompt Js to waive statutory requirements. Therefore, Plaintiff's action must fail.

Plaintiff did not adequately plead a claim which would entitle him to relief

Plaintiff has failed to state a valid cause of action. At its core, Plaintiff's allegations seem to stem from a claim of intentional infliction of emotional distress, rather than negligence. However, his Complaint failes to raise a claim for same. Rather, Plaintiff made only vague assertions of mental damage suffered from Defendant's actions. Accordingly, Plaintiff's general and inadequate mental claims were stricken by the Honorable Nitza Quinones Alejandro on November 3, 2000. Plaintiff subsequently filed a Motion to Amend Complaint to include intentional infliction of emotional distress on May 13, 2002, but same was denied on June 19, 2002 by the Honorable Arthur Kafrissen. Where Plaintiff's only valid cause of action might have been intentional infliction of emotional distress he should not be allowed to recover under the guise of negligence.

Conclusion

Plaintiff'snegligence claim lacks firm precedential support. There is no authority which suppports liability for a physician involved personally with a patient's estranged spouse. Further, Plaintiff is unable to prove said claim since his only expert lacks the requisite statutory qualifications to render an informed opinion. Lastly, where Plaintiff has failed to raise appropriate claims adaquately, his negligence claim should not go forward. Based on the foregoing, this Court's decision, granting Defendant's Motion to Dismiss, should be affirmed.

BY THE COURT,

Sandra Mazer Moss, J.

Interested Counsel

Attorney for Plaintiff

Timothy M. Kolman, Esquire
Tomothy M. Kolman & Associates
225 N. Flowers Mill Road
Langhorne, PA 19047
(215) 750-3134

Attorney for Defendant

Richard Geschke, Esquire
McCann & Geschke
1819 J.F.Kennedy Blvd., Suite 330
Philadelphia, PA 19103
(215) 568-1133

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA
CIVIL

MICHAEL S. McGLAUGHLIN and TAMMY J. McGLAUGHLIN,

Plaintiffs

99-S-675

v.

THE GETTYSBURG HOSPITAL, RUKHSANA K. RAHMAN, M.D., GREGORY J. CODORI, D.O., and JOHN DUFENDACH, M.D.,

Defendants

OPINION

The Plaintiffs in this matter, Michael S. McGlaughlin and Tammy J. McGlaughlin (hereinafter referred to collectively as "McGlaughlin"), asked this Court to reconsider the September 5, 2003 Order in which summary judgment was granted in favor of Defendants, Dr. Gregory J. Codori and Dr. John Dufendach. In the alternative, McGlaughlin has requested this Court amend the September 5, 2003 Order to include a statement pursuant to 42 Pa.C.S.A. § 702(b) allowing McGlaughlin to appeal the interlocutory order.[1] Although the factual history of this matter is set forth at length in the Opinion accompanying the September 5, 2003 Order, a brief review of the procedural history will assist in disposition of McGlaughlin's requests.

On October 7, 1999 McGlaughlin initiated a medical malpractice action against Gettysburg Hospital and a number of physicians, including Dr. Codori and Dr.

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[1] 42 Pa.C.S.A. § 702(b) provides:

Interlocutory appeals by permission. –When a Court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

Dufendach.[2] Thereafter, the parties parti ipated in discovery and trial preparation through December 3, 2002 at which tim this Court held a pre-trial conference.[3] Following the pre-trial conference, and upor agreement of counsel, trial was scheduled for a term beginning September 8, 2003. n compliance with a scheduling Order this Court entered, the Defendants filed a Motio n in Limine to preclude the expert testimony of McGlaughlin's two prospective medical e perts, Dr. Thomas Howard and Dr. Peter G. Bernad. In their motion, Defendants Dufe ndach and Codori successfully argued that these two prospective expert witnesses we e incompetent to render expert opinions on the applicable standards of care pursuant to the requirements set forth in the Medical Care Availability and Reduction of Error Ac : (hereinafter referred to as "MCARE") which was recently enacted on March 20, 2002. On September 5, 2003 this Court entered an Order granting Defendants Codori and Duf endach's motion to preclude the testimony of McGlaughlin's prospective experts on the applicable standards of care. Additionally, since the preclusion of these experts left McGlaughlin with the inability to establish the elements of medical malpractice action ag inst Dr. Codori and Dr. Dufendach, summary judgment was granted in their favor.[4]

In the Motion to Reconsider, M Glaughlin does not challenge this Court's interpretation of MCARE provisions or its applicability to the proffered expert testimony

[2] The action against Gettysburg Hospital was bas d upon a theory of vicarious liability.
[3] In early February of 2002, the insurance carrier f r the several Defendants, PHICO Insurance Company, filed bankruptcy proceedings. This Court, on Fel ruary 15, 2002 entered a stay pursuant to an Order of the Pennsylvania Commonwealth Court docketed at 427 M.D. 2001. This Court lifted the stay on October 23, 2002, as a result of pleadings the Defendants filed.
[4] Similar omnibus pre-trial motions were filed o behalf of Defendant Dr. Rukhsana K. Rahman which were granted in part and denied in part. The c aim against Dr. Rahman, however, was not dismissed pursuant to summary judgment. In the Septemb r 5, 2003 Order, this Court reserved ruling until the time of trial on whether Dr. Bernad may express an e pert opinion in regard to the standard of care applicable to Dr. Rahman's actions. Rather than proceed to trial as scheduled against the remaining Defendant doctor, McGlaughlin requested a continuance in rder to allow an opportunity for the filing of a motion to

but rather, for the first time, argues that he legislature's enactment of MCARE is unconstitutional in light of Article V, Section 10 of the Pennsylvania Constitution.[5] For the reasons set forth below, McGlaughlir 's constitutional challenge of MCARE is denied.[6]

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reconsider and a request to have this matter certi ed for appeal. As a result, trial of McGlaughlin's remaining claim against Dr. Rahman and Gettysburg Hospital was continued at the call of either party.

[5] Article 5, Section 10 of the Pennsylvania Constitutic n provides:

Section 10. **Judicial administration.**

(a) The Supreme Court shall exercise general supervisory and administrative authority over all he courts and justices of the peace, including authority to temporari y assign judges and justices of the peace from one court or district o another as it deems appropriate.

* * *

(b) **The Supreme Court shall ha e the power to prescribe general rules governing practice, p ocedure and the conduct of all** courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of acti ons or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to p actice law, and the administration of all courts and supervision of al officers of the judicial branch, if such rules are consistent with thi s Constitution and neither abridge, enlarge nor modify the substa ntive rights of any litigant, nor affect the right of the General Assem bly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. **All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.**

Pa. Const. art. V, § 10 (emphasis added).

[6] McGlaughlin's Motion to Reconsider tri gers consideration of issues related to waiver and procedural compliance with Pa.R.C.P. 235 (relating to notice to Attorney General when a party challenges the constitutionality of a statute). Indeed, McGlaug hlin's constitutional challenge to MCARE was pled for the first time in the Motion to Reconsider desp te extensive briefing and argument on the several Defendants' Motions in Limine prior to the Sept mber 5, 2003 Order. Similarly, as of the date of McGlaughlin's Motion to Reconsider, the Pennsyl ania Attorney General's Office had not been provided notice of the challenge. It appears that on Septer ber 26, 2003 McGlaughlin, for the first time, provided notice of the challenge to the Attorney General.

Although McGlaughlin's belated assertion of this issue is not favored and presents the potential for waste of judicial resources, appellate authority dvises that "there is no requirement that grounds for a petition for reconsideration be raised during the tri l or during the pre-trial period. ***Moore v. Moore***, 634 A.2d 163, 167 n. 1 (Pa. 1993) (citing ***Commonw alth of Pennsylvania, Pennsylvania Liquor Control Bd. v. Willow Grove Veterans Home Ass'n.***, 5 09 A.2d 958 (Pa.Cmwlth. 1986); ***Pedersen v. South Williamsport Area Sch. Dist.***, 471 A.2d 180 (Pa Cmwlth. 1984)). While a strict waiver rule enunciated by our appellate courts would aid the efficient adm inistration of justice, an exhaustive search for authority in this area has failed to reveal any such clear d rective. Accordingly, in the exercise of discretion, the Issue will be considered despite the procedural po ture within which it was raised.

In considering McGlaughlin's constitutional challenge, I am mindful of appellate instruction that one who challenges the constitutionality of an act of the legislature must overcome "the strong presumption of constitutionality and the heavy burden of persuasion". ***Commonwealth v. Mikulan***, 470 A.2d 1339, 1340 (Pa. 1983). Accordingly, legislation must "'*clearly, palpably,* and *plainly*'" violate the Constitution before it will be declared unconstitutional. ***Snider v. Thornburgh***, 436 A.2d 593, 596 (Pa. 1981) (quoting ***Tosto v. Pennsylvania Nursing Home Loan Agency***, 331 A.2d 198, 205 (Pa. 1975) (emphasis in original)).

The gist of McGlaughlin's argument is that MCARE improperly encroaches upon the exclusive authority of the Pennsylvania Supreme Court to prescribe rules governing the "practice, procedure and conduct of all courts". Pa. Const. art. V, § 10; see also ***Bergdoll v. Kane***, 731 A.2d 1261 (Pa. 1999). Although referencing the Pennsylvania Rules of Evidence throughout his brief, McGlaughlin argues that MCARE improperly sets forth procedural rules which invade the Supreme Court's exclusive rule-making authority. The flaw in this argument, however, is that McGlaughlin mistakenly characterizes MCARE as a procedural rule rather than a rule of evidence.

Determination of whether MCARE is purely procedural, as compared to a rule of evidence, is critical. As previously mentioned, the Pennsylvania Supreme Court possesses exclusive authority over procedural rule-making. ***Bergdoll***, cited above. On the other hand, Pennsylvania has a "long-standing practice of establishing rules of

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The manner in which McGlaughlin raised the constitutional challenge most likely precipitated his non-compliance with Pa.R.C.P. 235. Although that rule requires notice of a constitutional challenge to the provisions of a statute be provided to the Attorney General of Pennsylvania, it also provides exceptions for the court to proceed without prior notice. Additionally, our appellate courts have recognized that it is sufficient for a party to substantially comply with the requirements of this rule. ***Adelphia Cablevision Assocs. of Radnor, L.P. v. University City Housing Co.***, 755 A.2d 703, 709 (Pa.Super. 2000). In light

evidence . . . by legislative action". ***Coughlin v. Westinghouse Broadcasting and Cable, Inc.***, 603 F.Supp. 377, 381 (E.D. Pa 1985). Thus, while the legislature may not "tell the Judiciary how to hear and dispose of a case", ***Appeal of Borough of Churchill***, 575 A.2d 550, 554 (Pa. 1990), the legislature may enact rules of evidence. The Superior Court recently succinctly stated this principle in ***Commonwealth v. Presley***, 686 A.2d 1321 (Pa.Super. 1996) wherein they opined:

> Nevertheless, "[i]t is well settled that the legislature of a state has the power to prescribe new rules of evidence, providing that they do not deprive any person of his constitutional rights." ***Dranzo v. Winterhalter***, . . . 577 A.2d 1349, 1354 (Pa.Super. 1990) . . . . This principle was settled nearly sixty years ago, when our Supreme Court stated that "[w]e recognize the right of the legislature to create or alter rules of evidence". ***Rich Hill Coal Company v. Bashore***, . . . 7 A.2d 302, 319 (Pa. 1939). More recently, the court reaffirmed this holding by stating that "[s]ubject only to constitutional limitations, the legislature is always free to change the rules governing the competency of witnesses and the admissibility of evidence". [***Commonwealth v. Newman***, . . . 633 A.2d 1069, 1071 (Pa. 1993)].

Appellate court efforts to define the meaning of procedural rules for the purpose of the exclusivity clause of the Constitution have not altogether been successful perhaps because the line between procedural law and substantive law is often difficult to draw. "As threads are woven into cloth, so does procedural law interplay with substantive law." ***Laudenberger v. Port Authority of Allegheny County***, 436 A.2d 147, 150 (Pa. 1981). It is important, therefore, to determine MCARE's purpose in order to properly characterize its nature. See *Id.*

MCARE is a comprehensive effort by the General Assembly to allow for fair compensation to those injured as a result of medical negligence, while attempting to maintain medical professional liability insurance at an affordable and reasonable cost.

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of the procedural posture of this case, I will address McGlaughlin's issue on its merits noting that the

See 40 P.S. § 1303.102. The section of MCARE at issue addresses the competency of an expert to offer an expert medical opinion in a medical professional liability action. 40 P.S. § 1303.512. One need look no further than the Pennsylvania Rules of Evidence, Pa.R.Evid. § 101, et. seq., to conclude that this section of MCARE is a rule of evidence. For instance, Pennsylvania Rule of Evidence 601 relates to the competency of witnesses. Similarly, Pennsylvania Rule of Evidence 702 addresses expert witness testimony. Although McGlaughlin argues that the Pennsylvania Supreme Court's adoption of the Pennsylvania Rules of Evidence is indicative of the Supreme Court's exclusive authority in this area, that argument ignores the plain language of the Rules of Evidence. Pennsylvania Rule Evidence 601 unambiguously states that "[e]very person is competent to be a witness **except as otherwise provided by statute . . . .**" Pa.R.Evid. 601 (emphasis added). Thus, the very rule the Supreme Court adopted under the authority of Article V, Section 10(c) of the Pennsylvania Constitution recognizes the legislature's authority to regulate in this area. *Id.*; see also ***Commonwealth v. Newman***, 633 A.2d 1069, 1071 (Pa. 1993) (stating the legislature is constitutionally authorized to enact rules governing witness competency). In accordance with the legislature's history of enacting rules of evidence as confirmed by the abundance of case law on this issue, I find that the legislature's enactment of MCARE Section 512, 40 P.S. § 1303.512, is not an unconstitutional infringement upon the rule-making authority of the Pennsylvania Supreme Court.

Attorney General has since been notified of McGlaughlin's challenge.

In the alternative, McGlaughlin requested this Court to certify the interlocutory order of September 5, 2003 for appellate consideration.[7] I will grant McGlaughlin's request in this regard.

The Order in question addresses the applicability and interpretation of a recent legislative enactment, MCARE Section 512. 40 P.S. § 1303.512. Due to the recency of the legislation, appellate courts have yet to consider the precise issue which the September 5, 2003 Order addressed. One need look no further than the Lancaster Court of Common Pleas decision in ***Spotts v. Small***, 61 D.&C.4th 225 (C.P. Lancaster 2003)[8] to recognize that there is substantial ground for a difference of opinion in construing MCARE Section 512. Moreover, as evidenced by the grant of summary judgment, resolution of the issue presented a controlling question of law as it affected two out of three of the primary Defendants. Proceeding to trial against the sole remaining primary Defendant prior to appellate consideration of the subject issue may result in duplication of trial and a waste of judicial assets. Thus, immediate appellate consideration of the September 5, 2003 Order will materially advance the ultimate determination of this litigation.

For the foregoing reasons, the attached Order is entered.

BY THE COURT:

MICHAEL A. GEORGE
Judge

Date filed: October 6, 2003

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[7] Although the Court's grant of summary judgment in favor of Dr. Codori and Dr. Dufendach effectively ended the litigation in regard to those Defendants, McGlaughlin's action against Dr. Rahman and Gettysburg Hospital survived summary judgment. Since the Order did not dispose of the entire litigation, the Order is interlocutory in nature. 42 Pa.C.S.A. § 742; ***Napet, Inc. v. John Benkart & Sons Co.***, 431 A.2d 351, 352 (Pa.Super. 1981).

[8] In ***Spotts***, the Lancaster Court of Common Pleas reached a contrary result in considering the identical issue presented to this Court.

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(8)

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA
CIVIL

MICHAEL S. McGLAUGHLIN and TAMMY J. McGLAUGHLIN,

Plaintiffs

v.

THE GETTYSBURG HOSPITAL, RUKHSANA K. RAHMAN, M.D., GREGORY J. CODORI, D.O., and JOHN DUFENDACH, M.D.,

Defendants

99-S-675

FILED
Oct 6 3 40 PM '03
PROTHONOTARY

ORDER OF COURT

AND NOW, this 6th day of October, 2003, the Plaintiffs' Motion for Reconsideration is denied. However, the Plaintiffs' request for amendment of the September 5, 2003 Order is granted. The September 5, 2003 Order is amended to include the following:

> The Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from this Order may materially advance the ultimate determination of the matter.

In all other respects, the September 5, 2003 Order is confirmed.

BY THE COURT:

MICHAEL A. GEORGE
Judge

10/8 2003. This being a true and attested copy taken from and compared with the original
Attest:

Deputy Prothonotary

*61 Pa. D. & C.4th 225, *; 20 3 Pa. D. & C. LEXIS 23, ***

Spotts v Small

no. CI-9 -00700

COMMON PLEAS COURT OF LANC STER COUNTY, PENNSYLVANIA

61 Pa. D. & C.4th 225; 2(03 Pa. D. & C. LEXIS 23

April 2, 200 , Decided

DISPOSITION: **[**1]** Defendant's motion tc preclude testimony and opinions of plaintiff's proposed expert witness denied. Plaintiff's chall nge to constitutionality of section 512 of the **MCARE** Act dismissed as moot.

CORE TERMS: standard of care, expert witnes , MCARE Act, teaching, clinical, qualifications, time of trial, retired, testifying, five-year, appli able standard of care, medical malpractice, retirement, occurrence, medicine, training, mec ical professional, liability action, subspecialty, deviation, licensed, preceding, Reduction of Err r Act, license to practice medicine, expert testimony, medical opinion, unrestricted, anest esia, calculated, scheduled

COUNSEL: John J. Speicher, for plaintiff.

James W. Saxton, for defendant Schantz.

Wiley P. Parker, for defendants Small and Card ovascular, et al.

Amanda L. Smith, for PA office of Attorney Gen eral.

Robert B. Hoffman, for Medical Society of PA a d Lancaster.

JUDGES: CULLEN, J.

OPINIONBY: CULLEN

OPINION: **[*226]** Presently pending before he court is the motion of defendant, Beverly Schantz D.O., to preclude the testimony of plai tiff's proposed expert witness, Henrietta Pagan Athole Graeme McNeil Jacobi, pursuant t o the Medical Care Availability and Reduction of Error Act. n1 Also pending is plaintiff's challe nge to the constitutionality of section 512 of the **MCARE** Act.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 40 P.S. § 1303.101 et seq.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*227] The procedural and factual backgroun d of this matter is uncomplicated.

In early December **[**5]** 1995, Charles Spott: suffered an acute myocardial infarction. He was transferred from Lock Haven Hospital to La ncaster General Hospital where he underwent a coronary angioplasty and stent placement in l is left anterior descending coronary artery. During the procedure, he developed hypertensi n and syncope which prevented the placement of a second stent. His right coronary artery remained totally occluded.

Mr. Spotts was discharged from the hospital on December 10, 1995, under the care of Roy Small M.D., and Cardiovascular Associates of L ncaster Ltd.

On January 9, 1996, Mr. Spotts slipped on an ic y sidewalk and suffered a torn medial meniscus in his left knee.

On February 23, 1996, Mr. Spotts underwent su rgery to repair the torn medial meniscus. Beverly Schantz D.O., was the anesthesiologist assigned for this surgical procedure. During the surgery, Mr. Spotts suffered a myocardial in farction and died shortly afterwards.

On January 20, 1998, plaintiff, Vickie Spotts, M '. Spotts' widow and administratrix of his estate, commenced a medical malpractice actio n against Dr. Small, Cardiovascular Associates of Lancaster Ltd., Dr. Schantz, Alfred Cooke Jr. M.D., the orthopedic surgeon, **[**6]** and Lancaster General Hospital. n2 The defendants filed answers to the complaint denying liability, and the parties undertook discovery.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Dr. Cooke and Lancaster General Hospital w ere subsequently dismissed as defendants in this action.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*228] In the course of discovery, plaintiff id entified Dr. Henrietta Pagan Athole Graeme McNeil Jacobi as her expert witness in the area of anesthesiology who would testify with respect to Dr. Schantz' deviation from the stan dard of care with respect to her treatment of Mr. Spotts.

On July 9, 2002, Dr. Schantz filed a motion to p reclude Dr. Jacobi's testimony and opinions on the ground that she did not meet the requir ments to render an expert medical opinion specified in section 512 of the **MCARE** Act. n3 O n July 12, 2002, a similar motion was filed on behalf of Dr. Small and Cardiovascular Asso iates of Lancaster Ltd. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

N3 40 P.S. § 1303.512.

n4 The motion was filed on behalf of Dr. Small and Cardiovascular Associates of Lancaster Ltd., because Dr. Jacobi had expressed certain opinions in her report with respect to the care provided to Mr. Spotts by the cardiologist. (Def endant Beverly Schantz D.O.'s, motion to preclude the testimony and opinions of plaintiff s proposed expert witness, Athole Jacobi M.D., pursuant to the Medical Care Availability and Reduction of Error Act, Exhibit A) (hereafter defendant's motion to preclude testi mony). The motion on behalf of these defendants was not pursued because plaintiff's counsel had represented to the court and

opposing counsel that Dr. Jacobi would not be a iked to express any opinion in the area of cardiology at trial. (N.T. November 21, 2002, p . 4-5.)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - [**7]

Whether Dr. Jacobi would testify as an expert w tness at trial was discussed at the pretrial conference on August 7, 2002. On September 5 2002, plaintiff's counsel notified the court and opposing counsel that he still intended to c: ll Dr. Jacobi as an expert witness and requested the court address the pending motior s in limine. Following further consultation with counsel, a hearing on the motion was sche luled for November 21, 2002.

[*229] On November 20, 2002, plaintiff notif :d the attorney general pursuant to Rule 235 of the Pennsylvania Rules of Civil Procedure tha she was challenging the constitutionality of section 512 of the **MCARE** Act.

The court held an evidentiary hearing on the m tion in limine on November 21, 2002.

On January 27, 2003, the court heard oral argu nent on plaintiff's challenge to the constitutionality of section 512 of the **MCARE** A t. n5

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - -

n5 In addition to briefs submitted by the partie , the attorney general filed a brief in support of the constitutionality of section 512 of the **MC ARE** Act as did the Pennsylvania Medical Society and Lancaster County Medical Society.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**8]

Dr. Jacobi has been an anesthesiologist since 1 55. (N.T. November 21, 2002, p. 14.) She is currently licensed in Pennsylvania and Californi , and has the equivalent of board certification in her field. (*Id.* at 16-17.) Prior to 1993, she h d an active clinical and academic career. (Plaintiff's exhibit 1.)

As a result of an automobile accident in 1993, I r. Jacobi is disabled and no longer able to practice anesthesiology. (N.T. November 21, 2(02, pp. 16, 47-48; defendant's motion to preclude testimony, exhibit E, p. 107.n6) At th at time, she was Professor of Anesthesiology at the Medical College of Pennsylvania (plaintif s exhibit 1) and is now professor emerita at that institution. n7 (*Id.*, N.T. November 21, 20(2, pp. 21, 60-61).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - -

n6 Exhibit E of defendant's motion to preclude estimony is a transcript of a portion of Dr. Jacobi's April 2000 trial testimony in *Curley v. urkin*, No. 1998-1710, Pa.C. Centre Cty. (N.T. November 21, 2002, pp. 13-14, 64.)

n7 The former Medical College of Pennsylvania s now part of Drexel University.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**9]

[*230] Dr. Jacobi has not been in an operati ng room as a practicing physician since 1993.

(*Id.* at 36; defendant's motion to preclude testi nony, exhibit E, p. 139). She has no teaching responsibilities as professor emerita at Drexel U niversity and has offered only one two-hour lecture in anesthesia in a medical setting since ıer retirement due to disability. n8 (N.T. November 21, 2002, pp. 21-22, 34-36; defend: nt's motion to preclude testimony, exhibit E, p. 121.) She does complete the continuing edu: ation requirements necessary to maintain her license (N.T. November 21, 2002, pp. 18-20, 2! -30) subscribes to professional journals and purchases textbooks in the field of anesthesia. *Id.* at 21, 29.)

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n8 Dr. Jacobi has been a speaker at three legal seminars since her retirement as well as speaking on health policy on one occasion. (N.T. November 21, 2002, pp. 22, 35; plaintiff's exhibit 1; defendant's motion to preclude testin ony, exhibit E, pp. 127-28, 136-38.)

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Dr. Jacobi ceased to act as a reviewer **[**10]** for professional journals in 1993 and all of her research and grants and publications occur ed prior to her retirement. (Plaintiff's exhibit 1.)

In April 2000, Dr. Jacobi testified that since reti ement all of her professional income has come from her services as an expert witness. ( )efendant's motion to preclude testimony, exhibit E, p. 127.) Dr. Jacobi further testified a the hearing on November 21, 2002, that she would be providing two lectures in her field at D rexel University in the near future, one to members of the otorhinolaryngology departme t and one to members of the department of orthopedics. (N.T. November 21, 2002, pp. 22, 24-25, 33-34; defendant's exhibit 1 and 2.)

[*231] Effective October 4, 2002, Dr. Jacobi was appointed clinical associate professor in the department of medicine at the University o Medicine & Dentistry of New Jersey--School of Osteopathic Medicine. n9 (*Id.* at 26-27, 39-4); defendant's exhibit 4.) At the time of the hearing in November 2002, Dr. Jacobi's duties n this position had not yet been defined although it was her understanding that initially n 2003 she would be lecturing to interns. (*Id.* at 26-28, 47.)

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - -

n9 Dr. Jacobi testified that she will be a clinical associate professor in the department of medicine because the School of Osteopathic Me dicine does not have an anesthesia department. (N.T. November 21, 2002, pp. 40, 46.)

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**11]**

DISCUSSION

Section 512 of the **MCARE** Act effective May 1 , 2002, provides as follows:

"Section 1303.512. Expert qualifications

"(a) General rule.--No person shall be compete nt to offer an expert medical opinion in a medical professional liability action against a p ysician unless that person possesses sufficient education, training, knowledge and e perience to provide credible, competent testimony and fulfills the additional qualificatio s set forth in this section as applicable.

"*(b) Medical testimony*.--An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:

"(1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.

[*232] "(2) Be engaged in or retired within the previous five years from active clinical practice or teaching.

"Provided, however, the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of **[**12]** education, training or experience.

"*(c) Standard of care*.--In addition to the requirements set forth in subsections (a) and (b), an expert testifying as to a physician's standard of care also must meet the following 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).

"*(d) Care outside specialty*.--A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that:

"(1) the expert is trained in the diagnosis or treatment of the condition, as applicable, and

"(2) the defendant physician provided care for that condition and such care was not within the physician's **[**13]** specialty or competence.

[*233] "*(e) Otherwise adequate training, experience and knowledge*.--A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care 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." 40 P.S. § 1303.512.

In addition to the general requirements enumerated in section 512(a) which must be met by any witness offering expert testimony in a medical professional liability action, a witness such as Dr. Jacobi who will offer an opinion on the standard of care must also meet the additional qualifications specified in sections 512(b) and (c). There is no allegation that Dr. Jacobi fails to meet the qualifications listed in section 512(c). Accordingly, the focus of the inquiry will be on the requirements of section 512(b).

In order to render an opinion with respect to the standard of care, section 512(b) mandates that the witness **[**14]** must (1) possess an unrestricted physician's license to practice medicine in any state or the District of Columb[illegible], n10 and (2) be engaged in or retired within

the previous five years from active clinical pract ce or teaching. To determine whether Dr. Jacobi meets these criteria in this case, the cou t must first decide at what point in time these qualifications must be met.

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N10 The testimony reflects, and Dr. Schantz do s not dispute, that Dr. Jacobi is currently licensed to practice medicine in Pennsylvania ar d California and had been continuously licensed since 1993 when she retired due to he disability. (N.T. November 21, 2002, p. 16.)

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[*234] The statute is silent with respect to th e point from which the five-year period specified in section 512(b)(2) is to be calculate . n11

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n11 Implicit in the statute is a recognition that witness could hold an unrestricted license to practice medicine and still not have engaged in active clinical practice or teaching for a period in excess of five years. Since Dr. Jacobi is and h as been licensed at all relevant times, the court need not decide whether the witness mus be licensed at the time of the occurrence, the time of the report, or the time of trial.

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Dr. Schantz argues that the proposed expert wi ness must meet the requirements of section 512 as of the time of trial. As an alternative, sh e posits that at the earliest, the relevant point should be when the expert witness submits a r port which will be the basis for trial testimony. Plaintiff contends that the relevant t me at which to assess the expert witness' qualifications is the time of the occurrence of th e events about which the witness will render an opinion, *i.e.*, the time of the deviation from he standard of care.

After considering the arguments of the parties, the court concludes that to be qualified to render an opinion with respect to the standard of care, the witness must be engaged in or retired within the previous five years from activ e clinical practice or teaching calculated from the time of the alleged deviation from the stan ard of care which is the basis of the medical professional liability action against the physicia .

The object of all interpretation and constructior of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. § 1921(a). When the words of the statute are not explicit, the intent **[**16]** of the legislatu e may be ascertained by considering (1) the occasion and necessity for the statute, (2) the ircumstances under **[*235]** which it was enacted, (3) the mischief to be remedied, (4) t ie object to be attained, (5) the former law, if any, including other statutes upon the same or similar subjects, (6) the consequences of a particular interpretation, (7) the contemporane ous legislative history, and (8) legislative and administrative interpretations of such statute. Pa.C.S. § 1921(c)(1)-(8) It is to be presumed that the legislature does not intend result that is absurd, impossible of execution or unreasonable. 1 Pa.C.S. § 1922(1).

The **MCARE** Act does not set forth explicitly th legislature's intention in enacting section 512, and the available legislative history does ot provide reliable guidance. n12 Based upon the language employed, the purpose of section 512 of the **MCARE** Act is to establish a more

stringent standard for the admission of expert m edical testimony in medical malpractice actions.

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n12 Legislators' remarks with respect to 1802 o 2001 provided no guidance. See Pa. Legis. Journal-House, pp. 88-140 (January 29, 2002); Pa. Legis. Journal-House, pp. 297-323 (February 13, 2002); Pa. Legis. Journal-Senate, pp. 1453-54 (March 13, 2002); Pa. Legis. Journal-House, pp. 407-409 (March 13, 2002).

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In order to establish a prima facie case of medic al malpractice, the plaintiff must present an expert witness n13 who will testify, to a reason ble degree of medical certainty, that the acts of the defendant physician deviated from good nd acceptable medical standards, and that such deviation was the legal cause of the plainti f's harm. **[*236]** *Mitzelfelt v. Kamrin*, 526 Pa. 54, 584 A.2d 888 (1990). The applicable sta ndard of care is that which existed at the time of the event or events giving rise to the pl intiff's claim. *Maurer v. Trustees of the University of Pennsylvania*, 418 Pa. Super. 510, 614 A.2d 754 (1992). The **MCARE** Act does not change existing law. Section 512(c)(1) spec fically provides that an expert testifying as to a physician's standard of care must be substant ally 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.

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n13 There is an exception to the general rule th at expert testimony is required to establish a prima facie case in a medical malpractice actior . Expert testimony is not required when the matter in dispute is so simple and the lack of sk ill or want of care so obvious as to be comprehensible by lay persons. *Brophy v. Brizu ela*, 358 Pa. Super. 400, 517 A.2d 1293 (1986).

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Viewed against this background, and in the abs nce of contrary disclosed legislative intent, section 512 (b)(2) should be interpreted as req iring an expert medical witness to be engaged in, or retired within the previous five y ears from active clinical practice or teaching as of the time of the alleged breach of the stan lard of care. The fact that the General Assembly did not use the phrase "as of the tim of the alleged breach of the standard of care" in section 512(b)(2) as it did in section 5 2(c)(1) which addresses the same subject matter does not prohibit the court from constru ng the two sections consistently. See 1 Pa.C.S. § 1932.

In addition to the language and structure of th statute, several other considerations lend support to the court's construction of section 5 2(b)(2).

A physician in active clinical practice or teachin at the time of or within five years n14 prior to the alleged breach of the standard of care is likely to have more familiarity **[*237]** and experience with the applicable standard of care than a witness who may meet these requirements as of the time of trial. This is of p articular significance in medical malpractice cases **[**19]** where a substantial period of ti ne may elapse between the time of the injury and the time of trial. In the present case, for e ample, the alleged breach of the standard of care occurred in February 1996, and trial is no scheduled for June 2003.

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n14 While one may argue that five years is too long a period of time to be removed from active clinical practice or teaching, this is a policy determination to be made by the legislature and not by the courts.

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The time of the alleged breach of the standard of care, unlike the time of the filing of an expert report or the time of trial, is a fixed point and not subject to change over the course of the litigation. Using the time of the breach of the standard of care as a focal point avoids the problem which could otherwise arise where an expert who met the statutory requirements as of the time of the alleged negligent conduct and who provided an expert report before retirement and was prepared to testify at trial could become "unqualified" if the trial were postponed to **[**20]** a date more than five years after his retirement. Further, calculating the five-year period from the time of trial instead of the time of the alleged breach of the standard of care could have the unintended consequence of preventing a retired defendant physician from presenting his own expert testimony in his defense at trial as he would be entitled to do. n15 *See* Katz v. St. Mary Hospital, **[*238]** 2003 Pa. Super. 37, 816 A.2d 1125; *Neal by Neal v. Lu*, 365 Pa. Super. 464, 530 A.2d 103 (1987).

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n15 Section 512(a) provides that, "*No person* shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person . . . fulfills the additional qualifications set forth in this section as applicable." 40 P.S. § 1303.512 (a). Section 512 applies to all expert medical witnesses whether testifying for the plaintiff or the defendant, and there is no exception for a witness who is also a party. Had Dr. Schantz retired completely within a week after the filing of the complaint in January 1998, she would not be qualified under her interpretation of the statute to provide expert medical testimony in her own defense at trial. The court cannot presume that the legislature intended such an absurd and unreasonable result.

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The few statutes from other jurisdictions dealing with the qualifications of expert witnesses cited by Dr. Schantz in her brief are consistent with the court's interpretation. Unlike section 512, the time period in which the expert witness must be engaged in practice or teaching in each of these statutes is defined specifically, and in each instance it is done with reference to the time of the alleged negligent act. Ala. Code § 6-5-548(b)(3), (c)(4) (during the year preceding the date that the alleged breach of the standard of care occurred); N.C. Evid. Code § 8C-1, Rule 702 (during the year immediately preceding the date of the occurrence that is the basis for the action); n16 M.C.L.A. § 600.2169 (1)(a)-(c) (during the year preceding the occurrence; and if a specialist, at the time of the occurrence); Tex. Rev. Civ. Stat. Ann. Art. 4590c, § 14.01(a)(1) (at the time such testimony is given or was practicing medicine at the time the claim arose). n17

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n16 See *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 564 S.E.2d 883 (2002). **[**22]**

n17 Kansas requires that an expert witness in a medical malpractice case spend 50 percent of the expert's professional time in actual clinica l practice within the two-year period preceding the incident giving rise to the action. K.S.A. 60-3412. *Endorf v. Bohlander*, 26 Kan. App. 2d 855, 995 P.2d 896 (Kan. App. 2000).

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The court finds the arguments for calculating th e five-year period from the time of trial unpersuasive. While section 512 does refer to e xpert medical "testimony" and an expert "testifying," the thrust of the statutory **[*239]** requirements is directed to the *reliability* of this evidence, not the *time* at which it may be p resented to the fact-finder. The argument that the five-year period should be determined vith reference to the time of trial because the expert will have the benefit of the most up-to-d ate information on the most current medicine and science and have the most current experie ce and knowledge is fatally flawed. The most up-to-date information and most current medic ne are irrelevant to a determination of whether the defendant physician has breached he applicable **[**23]** standard of care. The standard of care is determined as of the time o the alleged breach, not the time of trial. *Maurer v. Trustees of the University of Pennsyl vania*, 418 Pa. Super. 510, 614 A.2d 754 (1992) (insufficient evidence to establish the st ndard of care with respect to the use of Didronel on brain-injured patients in 1981, the ime of the alleged negligent conduct).

Dr. Schantz' argument also fails to address ade quately the consequences of her interpretation of section 512, some of which ha ve been previously noted. n18 The most serious consequence is that the competence of an expert witness to testify could be determined by a factor as fluid and arbitrary as the trial date which has no relationship whatsoever to the education, training, knowled ge and experience of the witness, the applicable standard of care or the substance of he medical expert's opinion.

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n18 The court does not intend to comment upo n the ad hominem arguments presented.

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Dr. Schantz did not present any argument in [* **24]** support of her alternate position that the five-year period is to be calculated from the date the expert witness files a report. **[*240]** The court can find no support for this alternate position in the statute or any other source.

The breach of the standard of care at issue in t his case is alleged to have occurred in February 1996. Dr. Jacobi retired from active t aching in 1993 which is within the five-year period provided in section 512(b)(2). The court finds, therefore, that she satisfies the requirements of the **MCARE** Act with respect t the challenge made by Dr. Schantz. Accordingly, the motion to preclude the expert estimony of Dr. Jacobi will be denied.

Since the court has determined that an expert nedical witness must meet the requirements of section 512(b)(2) as of the time of the alleg d breach of the standard of care, it is not necessary to determine whether Dr. Jacobi is e gaged in active clinical practice or teaching as of the time of trial. The hearing on Dr. Jacob i's qualifications was held in November 2002, but trial is not scheduled until June 2003, seve n months after the hearing. In order to

provide the parties with an adequate record for purposes of appellate **[**25]** review, if necessary, regarding the court's interpretation of section 512(b)(2), plaintiff will be provided with the opportunity prior to trial to supplement the record with respect to Dr. Jacobi's teaching schedule since the hearing.

Finally, the court concludes that it would be inappropriate and unnecessary to address plaintiff's challenge to the constitutionality of section 512 of the **MCARE** Act since the matter in dispute has been decided on nonconstitutional grounds. *In re Fiori*, 543 Pa. 592, 673 A.2d 905 (1996) (courts should avoid constitutional issues when the issue at hand may be decided upon other grounds). Any discussion of the constitutional issue raised would constitute an unwarranted advisory opinion.

[*241] Therefore, the court enters the following:

ORDER

And now, April 2, 2003, defendant Beverly Schantz D.O.'s motion to preclude the testimony and opinions of plaintiff's proposed expert witness, Athole Jacobi M.D. pursuant to the Medical Care Availability and Reduction of Error Act is denied.

Plaintiff's challenge to the constitutionality of section 512 of the **MCARE** Act is dismissed as moot.