August 2025

the Quarterly Dose

Your Health Care Litigation Prescription

MARSHALL DENNEHEY

Marshall Dennehey awarded prestigious Litigation Department of the Year award for Professional Liability at *The Legal Intelligencer's* 2025 Pennsylvania Legal Awards

This recognition includes the extraordinary work of our Health Care Department, where our medical malpractice attorneys defend complex, high-exposure claims across the state. From defending thousands of professional liability and medical malpractice cases annually, to serving as trusted counsel on high-stakes appeals, this recognition reflects the dedication, innovation and results-driven advocacy that our attorneys bring to every matter.

In addition, our Appellate Advocacy & Post-Trial Practice Group once again claimed top honors—building on its 2024 win. The group has been retained to challenge many of the largest verdicts returned in Pennsylvania courts in 2024. With many decades of combined experience, the group's attorneys routinely handle post-trial and appellate matters and are engaged to actively participate in and monitor trials in high-exposure cases to ensure that important legal issues are properly raised and preserved for post-trial motions and appeals. ◆

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Precedential Opinion: Superior Court of Pennsylvania Upholds the Enforceability of a Venue-Selection Clause in the Context of a Medical Malpractice Case

Hospitals may once again be able to control where a patient brings a medical malpractice claim through a venue-selection agreement entered into with their patients.

By: Holli K. Archer, Esq.

The plaintiffs, Saramari Somerlot and Ryan Dufresne, brought this medical malpractice lawsuit (*Somerlot v. Jung, M.D.*, J-A16016-25, PA Super 166 (Kunselman, J.)) against multiple medical providers in Philadelphia County, arising from alleged injuries sustained by Ms. Somerlot as a result of an unsuccessful surgical procedure. The plaintiff Somerlot signed a pre-surgery consent contract, which contained a venue-selection clause, stating that any legal claims, including a claim for medical malpractice, could be brought only in the Bucks County, where Ms. Somerlot underwent the surgery.

The defendants, Soon Jung, M.D. and S.E. PA Pain Management and Pain Management Centers of America, LLC, preliminarily objected to venue in Philadelphia County pursuant to the venue-selection agreement. The trial court sustained the defendants' preliminary objections. The plaintiffs appealed the trial court's order sustaining the defendants' preliminary objections and transferring the case to Bucks County from Philadelphia County.

The Superior Court held that the pre-surgery contract, containing the venue-selection clause, was valid and enforceable. Specifically, the venue-selection clause stated:

> **NOTICE**: Any legal claims or civil actions, including, but not limited to, a claim for medical malpractice in any way related to this admission/procedure, and medical services provided by [Pain Management] or its employees, shall be brought solely in the Courts of Bucks County, in the Commonwealth of Pennsylvania.

The plaintiffs argued that one of the defendants, Boston Scientific Corporation, had previously stipulated with the plaintiffs that venue was proper in Philadelphia because it regularly conducted business there. Therefore, the plaintiffs asserted that pursuant to Pa. R.Civ.P. 1006(c)[1], venue was proper as to all defendants and the plaintiffs were, therefore, excused from their contractual obligations because of the procedural rules of venue. The Superior Court ruled that the venue-selection clause supersedes Rule 1006(c). While the Superior Court agreed that Philadelphia County is, in fact, a proper venue for the case to be litigated, it noted that the Rule does not require that the case be litigated there, especially when a plaintiff has contracted to litigate in a different, but also proper, venue. The Superior Court found that Bucks County was also a proper venue in which to litigate against all defendants because that is where the surgery in question was performed and where the cause of action purportedly arose. As such, the Superior Court rejected the plaintiffs' argument that the plaintiffs may breach their contract containing the venue-selection agreement because of Rule 1006(c).

The Superior Court also rejected the plaintiffs' argument that the pre-surgery contract was unconscionable. The court found that the language contained in the venue-selection clause was clear and unambiguous.

This is an important decision for individual health care providers, practice groups and hospitals, especially in the wake of the elimination of the medical malpractice venue carve-out rule, which had provided that "a medical professional liability action may be brought against a health care provider for a medical professional liability claim **only** in a county in which the cause of action arose." Pa. R.Civ.P. 1006(a.1) (emphasis added). Now, a medical malpractice suit may be filed in any county where a defendant could be served, where the cause of action arose or where the corporate defendant regularly conducts business. See Pa. R.C.P. 1006(a).

Therefore, the takeaway from this seminal opinion is that health care professionals, practice groups and hospitals may once again be able to control where a patient brings a medical malpractice claim through a venue-selection agreement entered into with their patients. That means the providers may be able to avoid venues that are perceived to be "plaintiff-friendly" and curtail forum shopping on behalf of plaintiffs.

The ultimate takeaway: have a clear, unambiguous venue agreement signed by your patients mirroring the language used by Dr. Jung and Pain Management in their pre-surgery contract. ◆

Our Health Care Department Continues to Grow!

Susan Kostkas joins our department as a shareholder in Pittsburgh. She is an experienced trial attorney, with decades of experience defending nursing homes and personal care facilities in professional negligence claims resulting in personal injury and death. Prior to becoming a lawyer, Susan was a registered nurse in cardiology and intermediate care units, and she continues to maintain her RN license.

Joel Snavely joins us as as shareholder in our Erie office. Joel's legal career spans more than 30 years, with the majority of his practice focusing on the defense of health care providers in professional negligence and licensure actions. With a primary focus on health care law, Joel represents and advises health care providers in matters that include employment contracts, credentialing, peer review, end of life issues, guardianships, medical records, risk management, controlled substances, fraud and abuse, and nonprofit corporation law.

Amelia Salem Rashid joins our Pittsburgh office as an associate, bringing with her a background in trial preparation and strategy, managing discovery, and presenting motions and pleadings for common pleas and federal district court.

In our Philadelphia office, we welcome new associates **Ryan Harvie** and **Travis Talbot** to the team. Ryan works closely with our clients, guiding them through all phases of litigation. In addition to handling complex medical malpractice and skilled nursing home matters, he handles child welfare cases involving severe allegations of sexual and physical abuse. Travis is experienced in defending health care providers in cases involving complex issues of medical malpractice. As a former public defender and Principal Court Attorney to a justice of the New York State Supreme Court in New York County, he gained invaluable insight into trial practice, motion writing, legal research and judicial decision-making.

As a new associate in our Harrisburg office, **Michael Cadigan, Jr.**, defends medical professional liability matters filed against hospitals, long-term care and rehabilitation facilities, medical practices, physicians, dentists, veterinarians and other health care providers. Having also worked for a plaintiffs' firm earlier in his career, Michael draws from his experience practicing on both sides of the aisle to effectively counsel clients and help them achieve their desired outcomes.

In our Cleveland office we welcome associate **Michael Vigorito**, whose legal practice focuses on defending health care clients in civil litigation matters involving medical malpractice and long-term care liability. Prior to practicing law, Michael worked for fire departments and EMS companies in Ohio and Pennsylvania, and he maintains his paramedic certification and continues to work as a flight paramedic and EMS Instructor.

David McColloch, who joins our King of Prussia office as an associate, has devoted his career to helping health care providers and professionals navigate challenging legal situations. He is experienced in handling litigation in state and federal court, from investigation and initial pleadings,to discovery, depositions and expert review, through to resolution. Known for his collaborative style, David provides his clients with comprehensive and strategic representation.◆

ALL RISE

Recent Victories and Success Stories

Gary Samms (King of Prussia) and **Shane Haselbarth** (Philadelphia) succeeded in partially dismantling a complex claim against a major health care client. The family of a former in-patient resident who died as a result of complications from the Covid-19 virus filed suit, raising claims that the patient was sexually assaulted while in the care of the hospital and a subsidiary ambulance company. Asked to join the defense team shortly before trial, Gary effectively discredited the plaintiff's witnesses throughout the plaintiff's case-in-chief. Then at the nonsuit stage, Gary wholly extricated his client—sealing off any exposure to liability for the large, corporate parent company. Following the jury's $3.5 million verdict against the remaining defendants, Shane was engaged as appellate counsel and succeeded in further winnowing the liability exposure. He convinced the trial judge to: (1) deny the plaintiff's request to reinstate the punitive damages claim based on the trial record; (2) grant a partial judgment notwithstanding the verdict on one claim, lopping a full $700,000 off the jury's verdict; and (3) outright deny the plaintiff's motion for delay damages, which had sought to add $742,000 to the jury's verdict. All in all, a terrific result from a hard-fought trial.

Robert Aldrich (Scranton) obtained a defense verdict in binding arbitration on behalf of a nursing home. The plaintiff alleged that the nursing staff provided inadequate pressure reducing devices and negligently cared for his lower extremity, resulting in a below-the-knee amputation and permanent and total disability. Rob defended the case by establishing not only that the nursing staff treated the resident in accordance with the standard of care, but also that the resident's below-the-knee amputation was caused by vascular conditions and comorbidities, not by any alleged actions and/or inactions of the nursing home staff. After a lengthy arbitration, the arbitrator ultimately found in favor of the defense.

Leslie Jenny (Cleveland) successfully won enforcement of an arbitration agreement on behalf of a nursing home. In this case, the 63-year-old plaintiff fell at home and sustained a spinal fracture, after which he was admitted to a nursing home for rehabilitation. The plaintiff underwent a series of three epidural injections. He subsequently developed multiple pressure injuries that became infected with MRSA, as well as paralysis. The plaintiff was transferred to the hospital and diagnosed with an epidural abscess, and later died. This case went up and down twice to the Court of Appeals and was accepted by the Ohio Supreme Court, where Leslie argued and won enforcement of the arbitration agreement.

Matthew Butler (Scranton) succeeded in having a default judgment opened in Lackawanna County on behalf of a long-term care client. Default had been entered and a hearing on damages was scheduled before the insurance carrier was on notice of the case. In having the default judgment opened, the court adopted Matt's arguments that the petition to open was filed timely, that the judgment was entered in error, and there was a viable meritorious defense to the claim. In this case, the defense had to overcome both the default judgment and the damages hearing in order to achieve a successful outcome. ◆

WISHING A FOND FAREWELL AND RETIREMENT TO THREE LONG-TIME MEMBERS OF OUR HEALTH CARE DEPARTMENT!

T. Kevin FitzPatrick is retiring this month after a 32-year career at Marshall Dennehey. During his tenure, Kevin served as Director and Assistant Director of the Health Care Department and on the Board of Directors. Among his colleagues and clients, Kevin is recognized for always practicing law with class. His leadership, dedication and guidance will leave a lasting impact on not only our department, but also our firm.

William Banton, Jr. joined us in 1990 in our Philadelphia office. For those of you who know William, we're sure you will agree that he practiced law consistent with his personality – as a consummate gentlemen. William also served as the Assistant Director of our Health Care Department under Kevin FitzPatrick.

Carolyn DiGiovanni joined the firm in 2010 in our King of Prussia office. Known for her tenacity and passion in zealously defending our clients, Carolyn was a valued and respected member of our health care team.

We will miss Kevin, William and Carolyn tremendously. It is hard to see our friends move on, but we thank them for their contributions and wish them the best in their retirement years.

SIDEBAR

News and Happenings

Karen "Missy" Minehan (Harrisburg) presented "Mitigating and Responding to a Professional Liability Claim: Documentation, Discovery, and Depositions" for the Skilled Nursing Development Institute's administrator appreciation event. Missy discussed pre-suit documentation issues, including documentation of arbitration agreements, missing medical records documentation and maintenance of key paper records, intra-lawsuit discovery and depositions.

Melissa Dziak and **Victoria Scanlon** (Scranton) presented The CHART Institute June member webinar, which focused on advanced practice providers. They discussed the medical legal landscape post-pandemic, jury verdict trends, scope and use of Advanced Practice Providers (APPs), and best practices to mitigate legal risk.

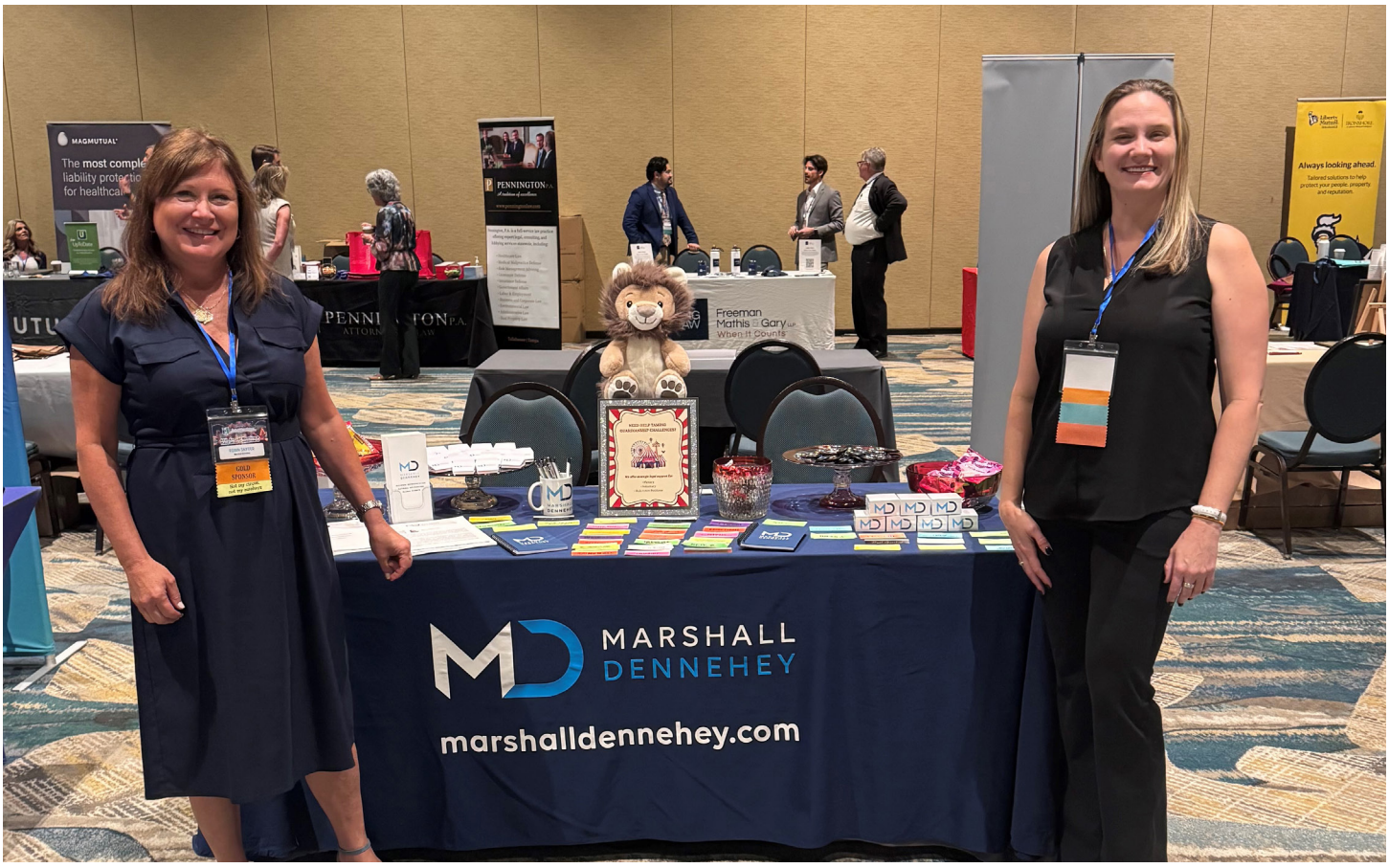
Matthew Keris (Scranton) joined a panel presentation for a webinar put on by the Pennsylvania Coalition for Civil Justice Reform. The program, "Medical Malpractice Pennsylvania Update," explored a number of emerging issues in medical malpractice, including the continuing surge of Philadelphia cases; dilution of plaintiffs' burden to prove agents causing harm; preserving issues on appeal and waiver rulings of Superior Court; ethical concerns of double and triple booking; and rise of punitive damages.

Matt also presented two seminars at the Hospital Insurance Forum 2025 Conference in Charleston, South Carolina. He co-presented with Jill Huntley Taylor to discuss "New Jury Considerations in the Age of Big Law, Verdicts, and Medicine," and he also presented "AI in Healthcare: Views From a Clinical and Legal Perspective."

Matt also joined a panel discussion at the Medical Professional Liability Association's annual conference in Austin, Texas, on the topic of preparing for AI from a medico-legal perspective.

Megan Nelson (Orlando) is presenting a webinar on incident reporting for the American College of Healthcare Executives Central Florida Chapter. As an attorney and registered nurse, Megan will offer insight into the importance of incident reporting from both a health care and legal point of view. More information can be found **here**.

Megan also presented at the Florida Society for Health Care Risk Management and Patient Safety (FHSRMPS) 45th Annual Conference in Orlando. During a panel presentation on "The Latest on Medical AI and Liability Claims," Megan discussed the rapid rise in the use of AI technology and the implications for potential liability and increased claims. ◆



Robin Snyder and Megan Nelson are all smiles in the exhibit hall at the Florida Society for Healthcare Risk Management and Patient Safety annual conference in Orlando.

New Rules, New Risks: Florida's Latest Health Care Legislation Explained

By: Megan J. Nelson, Esq.

On July 1, 2025, the following laws were enacted and may affect health care providers in Florida. These legislative changes introduce updates to regulatory compliance, patient care protocols and provider responsibilities. This overview highlights key provisions and their practical implications for providers across the state.

HB 519 – Administration of Controlled Substances by Paramedics

The Florida Comprehensive Drug Abuse Prevention and Control Act (Chapter 893, *Fla. Stat.*) allowed for specific licensed practitioners to authorize the administration of a controlled substance by a licensed nurse or an intern practitioner. It did not expressly include paramedics. Under federal law, the Protecting Patient Access to Emergency Medications Act of 2017 (PPAEMA) created specific rules relevant to the EMS setting, allowing for a paramedic to administer controlled substances outside the physical presence of a medical director if the EMS agency was authorized to do so by state law, was registered with the DEA, and had a standing order or verbal order from a medical director.

What the changes mean:

A licensed practitioner may now authorize a certified paramedic to administer controlled substances in the course of providing emergency services.

HB 647 – Advanced Practice Registered Nurse Services (APRN)

Advanced practice registered nurses were not authorized to file a death certificate or complete a medical certification of cause of death, unless they were registered for autonomous practice.

What the changes mean:

An advanced practice registered nurse providing hospice care may certify the cause of death and file the certificate of death.

SB 958 – Type 1 Diabetes Early Detection Program

This bill created § 381.992, *Fla. Stat.*, and requires the Department of Health, in collaboration with school districts throughout the state, to develop Type 1 diabetes information material related to early detection for the parents and guardians of students. The material must include a description of Type 1 diabetes, the risk factors and warning signs associated with Type 1 diabetes, the process for screening students using a blood autoantibody test, and recommendations for further evaluation for students displaying warning signs or positive early detection screening results.

What the new law means:

Medical providers may see an increase in concerned parents wanting to discuss Type 1 diabetes. However, some parents may not be able to seek medical care due to financial and insurance reasons.

It may be beneficial for pediatricians to reach out to their local school districts and assist with providing additional education and/or workshops for parents.

HB 791 – Surrendered Infants

Section 383.50, *Fla. Stat.*, allows parents to safely surrender infants up to 30 days of life at an emergency medical services station, fire station, or hospital without civil or criminal liability. Existing provisions related to the presumption that the parent intended to surrender the infant, consented to appropriate medical treatment and care, and to the termination of parental rights; the care and custodial processing of an infant upon lawful surrender; and the parent's anonymity upon surrender remain in effect.

New additions to the law:

The new law extends the previous law to include the surrender of an infant using an infant safety device. An infant safety device is a device that is installed in a supporting wall of a hospital, an emergency medical services station, or a fire station and that has an exterior point of access allowing an individual to place an infant inside and an interior point of access allowing individuals inside the building to safely retrieve the infant.

The infant safety device must be:

- Physically part of the hospital, emergency medical services station, or fire station and be in a conspicuous and visible area to employees;
- Temperature controlled and ventilated;
- Equipped with a dual alarm system which automatically triggers an alarm inside the building when an infant is placed in the device, and the alarm must be tested at least once a week;
- Equipped with a surveillance system that allows for monitoring the inside of the device 24 hours a day; and
- Physically checked at least twice a day.

If the infant safety device is located at an emergency medical services station or fire station, the alarm must also immediately alert 911, and dispatch must send the nearest first responder to retrieve the infant.

HB 1089 – Newborn Screenings

Newborn screening is a preventive public health service provided in every state to identify, diagnose and manage newborns at risk for selected disorders that, without detection and treatment, can lead to permanent development and physical damage or death. The Florida Newborn Screening Program serves

to promote the screening of all newborns for metabolic, hereditary and congenital disorders known to result in significant impairment of health or intellect. The program currently screens for 37 core conditions and 23 secondary conditions, nearly all of which are screened for through the collection and testing of blood spots. Hearing screening, critical congenital heart disease and targeted testing for congenital cytomegalovirus are completed at the birthing facility through point of care testing.

What the changes mean:

Duchenne Muscular Dystrophy (DMD) will be added to the Newborn Screening beginning January 1, 2027. DMD is a rare genetic condition, but it is also the most common childhood-onset form of muscular dystrophy. It affects approximately one in every 3,300–5,000 live male births. DMD is an X-linked inherited neuromuscular disorder that can be carried by females, but typically only presents symptomatically in boys. DMD is considered a lethal condition for which there is no curative treatment. However, early diagnoses and a multidisciplinary approach can slow the progression of the disease, prolong the survival rate and maintain a quality of life.

SB 1156 – Home Health Aide for Medically Fragile Children Program

The Home Health Aide for Medically Fragile Children (HHAMFC) Program was created in 2023 in response to the national health care provider shortage and its impact on medically fragile children and their family caregivers to provide an opportunity for family caregivers to receive training and gainful employment. Other Medicaid programs exist that pay a family member to provide home health services to a Medicaid enrollee, but the HHAMFC Program is the only one that pays a family member who is not a licensed nurse for the provision of home health services to a medically fragile child. The program allows a family caregiver to be reimbursed by Medicaid as an HHAMFC once they have completed an approved training program or graduated from an accredited pre-licensure nursing education program and are waiting to take the state licensing exam.

What the changes mean:

The HHAMFC must complete an approved training program, and the employing home health agency must provide validation of the HHAMFC prior to the aide providing services to an eligible relative. The employing home health agency must also provide training on HIV/AIDS and ensure that the HHAMFC holds and maintains a CPR certification.

The training program must consist of at least 76 total hours of training with at least 40 hours of home health aide training, 20 hours of skills training tailored to the needs of the child, 16 hours of clinical training related to the child's needs, and training on HIV infections and CPR.

Increased the Medicaid utilization cap from eight hours per day to 12 hours per day.

Requires the home health agency to report an adverse incident within 48 hours of the incident.

HB 1195 – Fentanyl Testing

The bill created § 395.1042, Fla. Stat., and requires a hospital or hospital-based off-campus emergency department treating patients for possible drug overdose or poisoning to include testing for fentanyl in the urine drug screening. If the urine test is positive for fentanyl, a second analytical confirmation test must be performed. The results of the urine drug test and confirmation test must be retained as part of the patient's medical record for the period of time required by the hospital's current practice.

What the new law means:

Providers must include testing for fentanyl when a patient is suspected of a possible drug overdose or poisoning.

The addition of testing for fentanyl should not be limited to patients who are suspected of a possible drug overdose or poisoning. As fentanyl overdoses are becoming more common in patients who unknowingly take a substance that contains fentanyl, emergency medical providers should include testing for fentanyl when ordering any urine drug screening, including for patients who are disoriented or unconscious for unknown reasons.

HB 1353 – Home Health Care Services

What the changes mean:

An administrator may now manage up to five home health agencies that have the same controlling interest, regardless of where they are located in the state.

The initial admission visit, all service evaluation visits, and the discharge visit that a home health agency must provide may now be performed by a registered nurse who is contracted but not a direct employee of the home health agency.

HB 1421 – Improving Screening for and Treatment of Blood Clots

This bill aims to improve the screening for and treatment of venous thromboembolism or deep vein thrombosis (blood clots).

New additions to the law:

Every hospital with an emergency department and every ambulatory surgical center must develop and implement policies and procedures for the rendering of appropriate medical attention for patients at risk of forming blood clots.

- All non-physician personnel must be trained on the policies and procedures annually. A certified nursing assistant (CNA) employed by a nursing home must undergo in-service training which includes recognizing the signs and symptoms of a blood clot and techniques for providing an emergency response.
- A CNA wishing to administer medication, as delegated by a registered nurse, must complete training on identifying signs and symptoms of a blood clot and response protocols to assist a patient with a blood clot as part of the 34-hour training course on medication administration.

Assisted living facilities must provide a pamphlet to residents upon admission which contains information about risk factors for, and recognizing signs and symptoms of, a blood clot.

SB 1768 – Stem Cell Therapy

The new law, §§ 458.3245 and 459.0127, *Fla. Stat.*, authorizes physicians to perform stem cell therapies that have not been approved by the FDA when used for orthopedic conditions, wound care or pain management. It sets forth standards for the retrieval, manufacture, storage and use of stem cells, ensuring the stem cells used are obtained from facilities that meet rigorous regulatory and accreditation requirements. Before administering any stem cell therapy, a physician must provide written notice to the patient that the therapy is not approved by the FDA and must obtain signed informed consent clearly informing the patient of

the nature and purpose of the proposed treatment prior to initiation of therapy. Any advertisements must include clearly legible writing indicating the stem cell therapy is not approved by the FDA.

Who does the law not apply to:

Physicians who have obtained FDA approval for an investigational new drug or device for the use of human cells, tissues, or cellular or tissue-based products.

Physicians who perform stem cell therapy under an employment or other contract on behalf of an institution that is certified to perform stem cell therapy or has expertise in stem cell therapy as determined by the Department of Health.

Violations of the law:

A violation may subject the physician to disciplinary action by their regulating board.

A physician who willfully performs, or actively participates in, treatment or research using human cells or tissues derived from a fetus or embryo after abortion commits a felony of the third degree.

A physician who willfully performs, or actively participates in, the sale, manufacture or distribution of computer products created using human cells, tissues or cellular tissue-based products commits a felony of the third degree.

SB 1808 – Refund of Overpayments Made by Patients

This bill requires anyone who accepts payment from a patient's insurance for services rendered by a health care practitioner and determines that a patient has overpaid for said services to refund the overpayment within 30 days. If a health care practitioner fails to timely refund the overpayment, the failure will constitute grounds for disciplinary action. If a facility or provider licensed by the Agency for Health Care Administration fails to timely refund an overpayment, the agency may impose an administrative penalty of up to $500 on the license.

HB 597 – Diabetes Management in Schools

Public schools may acquire and maintain a supply of undesignated glucagon for use on students with diabetes experiencing hypoglycemic emergencies. Public schools are authorized to obtain the glucagon through a prescription from a county health department or authorized healthcare practitioner, or through arrangements with manufacturers or suppliers. This will help decrease the delay in treatment as students with diabetes experiencing a hypoglycemic emergency can now be treated with glucagon even if they don't have their own medication at school.

SB 1514 – Anaphylaxis in Public and Charter Schools

Schools may maintain a supply of epinephrine auto-injectors (epi-pens), accessible to trained school personnel or authorized students. They must adopt a physician-developed protocol for school personnel, medical and non-medical, who are trained to recognize an anaphylactic reaction and to administer an injection of epinephrine via auto-injection during emergencies. This will help decrease the delay in treatment as students who are experiencing an anaphylactic emergency can receive an injection of epinephrine via an auto-injector by a school nurse or other trained school employee, even if they don't have their own epi-pen with them. ◆

Proposed Expert's Qualification to Proffer Standard of Care Opinions Must Be Evaluated Under the Entirety of Section 512 of the MCARE Act

By: Tyler R. Price, Esq.

An alleged failure to assess a patient via non-surgical interventions prior to performing a surgical procedure may result in a breach of the standard of care. A recent trial court opinion addressed the proper analysis of an expert's qualification to proffer standard of care opinions as instructed by the MCARE Act. The Pennsylvania Superior Court, in *McAleer v. Geisinger Medical Center*, 332 A.3d 38 (Pa. Super. 2025), reversed and remanded the trial court's decision to grant summary judgment in favor of the health care defendants. The Superior Court directed the lower court to revisit the standard of care expert's qualifications to determine if he is qualified to offer such testimony.

Facts

A colonoscopy revealed the patient had a large polyp that was unable to be completely removed due to its size and the patient's anatomy. The patient was referred by the primary care physician to a colorectal surgeon for evaluation of either a possible partial colectomy or a repeat colonoscopy under full anesthesia.

At the initial evaluation with the colorectal surgeon, the surgeon discussed laparoscopic, possible open right hemicolectomy, possible ostomy, and the risks of each procedure. Of note, these were all surgical interventions, and the assessment prior to surgery—a colonoscopy—was never discussed. The colorectal surgeon performed a laparoscopic right hemicolectomy, and the patient was discharged two days later.

Six days after surgery, the patient presented to the emergency department with abdominal complaints. Post-surgical complications, including a blood clot and tissue death, resulted in the patient undergoing several surgical procedures to remove the damaged tissue.

The patient filed a lawsuit alleging negligence and claiming the colorectal surgeon recommended and performed a procedure that was counter-indicated for the patient's condition.

Standard of Care Includes Proper Assessment and Discussions of Assessment Procedures Prior to Surgery

In order to set forth a cause of action in negligence, a plaintiff is required to plead sufficient facts which

would establish that: (1) the doctor owed them a duty of care; (2) the doctor breached that duty; (3) the patient was injured; and (4) the injuries were proximately caused by the doctor's breach of duty.

Here, the patient claimed the colorectal surgeon recommended and performed the wrong procedure without properly assessing the patient prior to performing the surgery to remove the polyp. The patient's experts opined: the colorectal surgeon breached the standard of care by failing to properly assess the patient; had the colorectal surgeon properly assessed the patient, then a colonoscopy would have been performed; and, consequently, the patient would not have suffered post-surgical complications. Further, the court noted there was no evidence that the patient would have refused the colonoscopy under general anesthesia or an endoscopic procedure. Both procedures are non-surgical assessments performed prior to surgery.

The court concluded that the patient was not given any option within the standard of care. Thus, the patient did not have the opportunity to even choose or reject an assessment option within the standard of care.

Qualifications to Offer Expert Testimony Requires Analysis Beyond Proposed Expert's Board Certification

Through discovery, the patient submitted the expert report of a physician who was board certified in internal medicine and gastroenterology. The gastroenterologist concluded that the colorectal surgeon failed to fully assess the patient prior to surgical intervention, violating the standard of care. The trial court disqualified the gastroenterologist from offering standard of care opinions of a colorectal surgeon based solely on his curriculum vitae and for failing to practice in the same subspecialty as the colorectal surgeon. The appellate court disagreed.

The Superior Court recognized that the trial court failed to consider expert qualifications under the MCARE Act as a whole. Specifically, the trial court made no determination of whether the gastroenterologist and the colorectal surgeon had substantially similar standards of care for the specific care at issue. Furthermore, the trial court made no determination as to whether the gastroenterologist possessed sufficient training, experience, and knowledge to provide testimony as a result of his involvement in a related field of medicine.

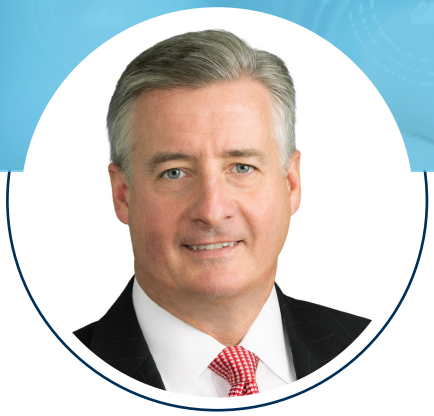
In reversing the judgment and remanding for a new trial, the Superior Court held that it was improper to disqualify the gastroenterologist's opinions based solely on his certification and curriculum vitae.

Implications and Conclusions

The Superior Court's decision in this case highlights the critical balance between the standard of care at every step in patient care and when experts may be qualified to offer opinions as to each standard of care. This case highlights the importance of physicians consistently advocating for their patients throughout every stage of care and ensuring that all alternatives to surgical intervention are thoroughly explained, in alignment with the appropriate standard of care.

The Superior Court's ruling emphasizes the need to analyze an expert's qualifications to render standard of care opinion beyond the same specialty analysis and said expert's curriculum vitae. The court's decision reminds us that we must expand our analysis of an expert's qualifications to consider the MCARE Act entirely, including whether a proposed expert possesses sufficient training, experience, and knowledge to provide testimony as a result of involvement in a related field of medicine.

This case was remanded to the trial court with instructions to revisit its decision regarding the gastroenterologist's qualifications to offer standard of care opinions against a colorectal surgeon. ◆



Behavioral Health Risk & Liability

Defending clients in behavioral health litigation requires a careful balance between legal rigor and sensitivity to the nuances of mental health care. We understand that these cases involve delicate fact patterns and significant emotional overlay. Clients rely on our experience, judgment and analytical skills to help guide these complex matters through trial or to resolution.

We counsel and defend behavioral health facilities and associated entities, social workers, nurses, administrators, case managers, technicians, aides, therapists, psychiatrists, psychologists and other mental health professionals in matters involving negligence claims; civil action claims for neglect and abuse of children in foster care, residential treatment facilities and community placement facilities; administrative law, legislative and state licensing revocation hearings; HIPAA/HITECH compliance and notifications; fraud and abuse claims; and guardianship appointments in mental health facilities.

According to **Paul Laughlin**, Chair of our Behavioral Health Risk & Liability Practice Group, “The behavioral health milieu presents one of the more challenging and unpredictable environments in health care, and providers are among the most patient and caring. We strive to represent these dedicated professionals in a way that incorporates an understanding of the challenges they face in context with a knowledge of the applicable practice standards.”

Our trial lawyers and appellate team have deep knowledge and understanding of the intricacies of state mental health statutes, the Affordable Care Act, and the Emergency Medical Treatment and Active Labor Act, and CMS and HIPAA requirements. We also provide counseling in risk management, offering personalized educational discussions aimed at eliminating and minimizing legal exposure related to behavioral health staff interaction with residents and adherence to state and federal regulations. ◆

LEGAL ROUNDUP

Case Law Updates

Florida

By: Megan J. Nelson, Esq.

Duty Owed to Substance Abuse and Suicidal Patients: New Court Ruling Lays Out a Duty Providers Have to a Patient Prior to Discharge Related to Treatments After Discharge

Robert C. Burley, Personal Representative for the Estate of Anthony Burley v. The Village South, Inc., 407 So.3d 572 (Fla. 3d DCA 2025)

The Third District Court of Appeal recently reversed an order granting summary judgment in favor of an addiction treatment facility, holding the facility did not have a duty to prevent the decedent's suicide after discharge but it did have a duty to attempt to assist the patient in securing more appropriate services in a setting more responsive to the patient's needs.

Anthony Burley had been involuntarily committed to The Village South, Inc., an addiction facility, following his third overdose and initiation of a Marchman Act. Upon his admission, Mr. Burley tested negative for controlled substances. Ten days later, he tested positive for cocaine, a violation of the facility's rules. Thirteen days later, he was formally discharged from the facility to a homeless shelter with a two-week supply of Suboxone and a list of doctors to contact for medication maintenance.

Forty-eight days later, Mr. Burley overdosed and died of acute combined drug toxicity. His estate filed a lawsuit for medical negligence, alleging that The Village South negligently provided substance abuse care and treatment to Mr. Burley and failed to provide him with an adequate discharge from the facility.

The Third District Court of Appeal determined that The Village South had a duty arising from Florida Statute 397.6751, which states that when an involuntary patient's behavior necessitates discharge from a facility, the facility's provider must discharge the individual and attempt to assist the individual in securing more appropriate services in a setting more responsive to that individual's needs.

In addition, the Third District Court of Appeal determined that The Village South had a duty arising from the general facts of the case as it created a "foreseeable zone of risk" when it provided Mr. Burley with Suboxone, but no follow-up medical appointment, and referred him to a homeless shelter rather than a rehabilitation center.

The court made it clear that The Village South did not have a duty to prevent the suicide from occurring, nor did it have a duty to follow up with Mr. Burley after his discharge to ensure he went to a doctor or sought further substance abuse treatments.

Although this matter was related to an involuntary substance abuse patient, the same ruling could apply to a voluntary substance abuse patient or even a suicidal patient being discharged from the hospital. This ruling means that providers should no longer recommend a follow-up timeframe but, rather, schedule the follow-up appointment, ensure the patient is aware of the appointment having been made, and ensure the patient has a way to get to the appointment, all before the patient is discharged.

Claims for a Hospital's Negligent Credentialing Must Be Addressed With Sufficient Facts in a Corroborating Expert Affidavit During the Presuit Investigation Period

Angel Tomas v. Dmitry Sandler, DPM, et. al., 406 So.3d 1089 (Fla. 3d DCA 2025)

The Third District Court of Appeal recently affirmed a motion to dismiss related to a negligent credentialing claim on the basis that the presuit corroborating expert affidavit was deficient.

The plaintiff sustained a left ankle fracture and was referred to a board-certified foot and ankle surgeon, Dimitry Sandler, DPM, who recommended undergoing a total ankle replacement surgery. The surgery was performed at Mariners Hospital, Inc. Following the surgery, the plaintiff experienced loss of ankle function, wound dehiscence, osteomyelitis and chronic infections.

The plaintiff served a notice of intent on Dr. Sandler and Mariners Hospital. Included with the notice of intent was the corroborating expert affidavit by a board-certified foot and ankle surgeon, Matthew Sorenson, DPM. Dr. Sorenson's opinions related to Dr. Sandler's negligence were listed in the affidavit. In addition, Dr. Sorenson opined that:

> "Mariners Hospital, Inc. fell below applicable standards of care for credentialing surgeons in credentialing and authorizing Dr. Sandler to perform a total ankle replacement procedure. It is therefore my opinion within reasonable medical probability that Mariners Hospital, Inc. fell below applicable standards of care in their supervision and credentialing of Dr. Sandler and was therefore negligent, and that this negligence resulted in injury to Mr. Tomas as summarized above."

A corroborating expert affidavit must sufficiently indicate the manner in which the defendant allegedly deviated from the standard of care and must provide adequate information for the defendant to evaluate the merits of the claim. In addition, Florida Statute 766.102(7) provides the requirements for expert witnesses testifying on the standard of care as to a hospital, health care facility or medical facility. An expert who provides opinions based on the standard of care as to administrative and other non-clinical issues must have substantial knowledge, through training and experience, concerning the standard of care for the type of facility the expert is providing opinions on.

The Third District Court of Appeal determined that the corroborating expert affidavit was devoid of detail as to the administrative standard of care relating to credentialing. The court affirmed the finding that the affidavit was deficient, stating, "To conclude otherwise would allow every plaintiff to automatically transform any individual medical malpractice claim against a physician with credentials or privileges into an administrative claim without complying with the safeguards of section 766.102(7)."

Defendants should analyze any counts related to agency theories to determine if any administrative or non-clinical issues have been alleged or insinuated (i.e., negligent credentialing, negligent hiring, etc.). A plaintiff can still allege vicarious liability related to the medical negligence. However, any additional administrative claims will need to have been addressed in the corroborating expert affidavit by a qualified expert. If they were not, a motion to dismiss for failure to presuit should be filed. ◆

LEGAL ROUNDUP

Case Law Updates

New Jersey

By: Georgette L. Reid, Esq.

Medical Malpractice Suit Dismissed for Inadequate Affidavit of Merit in Wrongful Death Following Kidney Biopsy

Sovelove v. Shirazi, A-1540-23, Jun. 17, 2025

The decedent had undergone an elective kidney biopsy and suffered a large retroperitoneal bleed, resulting in her death. The plaintiff, individually and as the estate executor, appealed the trial court's dismissal of her medical malpractice complaint based on the failure to provide a sufficient affidavit of merit.

The defendant doctor argued that the affidavit of merit doctor did not share the same specialty or subspecialty; therefore, the affidavit of merit was non-compliant. The trial court found that the affidavit of merit was insufficient. The plaintiff argued there was no distinction in the level of expertise between the doctors' certifications.

The court noted that the defendant specialized in internal medicine and subspecialized in pulmonology and critical care medicine, while the affidavit of merit affiant specialized in general and vascular surgery with a subspecialty in surgical critical care. The court concluded that the plaintiff's contention that the expert satisfied the requirements of the affidavit of merit statute, because of his subspecialty in surgical critical care, were unpersuasive.

Appellate Court Revives Nursing Home Rights Claim, Rejects Limitation to Current Residents Under NHA

Salters v. South Mountain Rehab. Ctr., LLC., A-1790-23, Jun. 17, 2025

The plaintiff fell in his room at the defendants' nursing facility. Because the plaintiff was taken to the hospital the next morning, September 16, 2019, he was discharged from the nursing facility that day. The plaintiff was re-admitted to the nursing facility for rehabilitation after hip surgery. On November 9, 2019, he was discharged from the defendants' nursing facility and subsequently lived with his family.

In 2020, the decedent filed suit against the defendants for corporate and facility negligence and violation of his rights under the New Jersey Nursing Home Responsibilities and Rights of Residents Act (NHA).

After the plaintiff died in 2023, his son was permitted to substitute as plaintiff.

The trial court found that the estate could not pursue a claim for violation of the NHA because the decedent was not a resident of the defendants' facility when he filed his complaint. The decedent's estate appealed an order an granting the defendants' summary judgment motions.

The appellate court disagreed with trial judge's conclusion that the decedent was not a "person" under the NHA and noted that restricting NHA claims to current residents would frustrate the act's remedial intent. ◆

LEGAL ROUNDUP

Case Law Updates

Ohio

By: Gabriella M. Wittbrod, Esq.

Appeals Court Reverses Arbitration Ruling, Citing Improper Credibility Determination by Successor Judge

Metzger v. Strongsville Care Group, LLC (8th Dist.), 2025-Ohio-1732

On May 15, 2025, the Ohio 8th District Court of Appeals held that when a judge takes over a case for another judge, the successor judge cannot rely on a hearing transcript in their ruling when the credibility of witnesses is at issue.

The defendants moved the trial court to enforce an arbitration agreement. The trial court held a hearing on the matter where the key issue was whether or not the signatory actually signed the arbitration agreement. The defendant's executive director testified that she witnessed the signatory sign the agreement. The signatory testified that she did not sign the agreement. After the hearing and prior to the decision, a different judge was assigned to the case, replacing the previous trial judge. The successor judge relied on the hearing transcript to issue the ruling that this case should be stayed pending enforcement of the arbitration agreement.

The plaintiff appealed, arguing that the trial court erred procedurally when the successor judge rendered judgment based on the transcript when credibility was a factor. The 8th District Court of Appeals held that the transcript of the hearing contained conflicting testimony, which would be difficult to evaluate without physical observation of the witnesses. Thus, credibility is implicit within the analysis of whether the signatory signed the arbitration agreement, and the successor judge cannot rely on the transcript when making that determination. The District Court remanded the case for a new hearing on the motion to stay and enforce the arbitration agreement. ◆

LEGAL ROUNDUP

Case Law Updates

PENNSYLVANIA

By: Bobbi R. Lewis, Esq.

Pennsylvania Supreme Court: Mental Health Facilities May Be Liable for Gross Negligence in Denying Voluntary Admission

Matos v. Geisinger Med. Ctr., 334 A.3d 288 (Pa. 2025)

An individual with an extensive mental health history sought admission to two different mental health facilities for inpatient psychiatric care. However, both facilities denied his request. Shortly after, he killed his girlfriend. The estate of the victim brought suit against the facilities, alleging their denials met the threshold for gross negligence or willful misconduct pursuant to the voluntary-care provisions of the Mental Health Procedures Act (MHPA).

The Pennsylvania Supreme Court found that written consent to voluntary admission into a mental health care facility for inpatient treatment was not a prerequisite to impose liability against health care providers under the MHPA. For involuntary commitment, prior cases, such as *Leight*, have held that no liability arises unless a formal written application is completed. However, for voluntary admission, the court reasoned that the act of seeking treatment itself is sufficient to trigger the facility's duty to evaluate and respond reasonably. However, liability attaches only when the denial of voluntary admission constitutes gross negligence.

Hospital Owed Duty of Care Through Pre-Transfer Involvement, Pennsylvania Court Affirms

Munoz v. Children's Hosp. of Philadelphia, No. 1388 EDA 2024, 2025 WL 1504354 (Pa. Super. Ct. May 27, 2025)

The Superior Court of Pennsylvania affirmed the judgment entered by the Court of Common Pleas of Philadelphia County, which found that CHOP had undertaken and provided health care services to a minor decedent and, therefore, owed him a duty of care.

The plaintiffs, the parents of the minor decedent, brought suit against Einstein Medical Center and CHOP. The decedent was treated at Einstein Medical Center, who contacted CHOP for assistance. CHOP opened a chart for the decedent and dispatched a transport team to Einstein. Upon arrival, the decedent deteriorated rapidly, and CHOP nurses provided treatment to the decedent, guided by a CHOP physician who was providing instructions over the phone. However, the decedent suffered cardiac arrest and passed away before transfer to CHOP.

The Superior Court affirmed that CHOP assumed a patient relationship by advising on treatment, opening a chart, dispatching a transfer team and providing emergency care. As such, they created a duty to exercise reasonable care.

Hospitals may assume liability when they become involved in the care and treatment of a patient, even if it is indirectly through telephone guidance and dispatch of staff. CHOP entered a physician-patient relationship with the decedent fortreatment purposes because of CHOP's active participation in the care of decedent prior to the transport team arrived at Einstein, and the continued services provided by the CHOP team upon arrival.

Superior Court Reverses Nonsuit, Holds Trial Court Bound by Prior Ruling on Expert Qualification

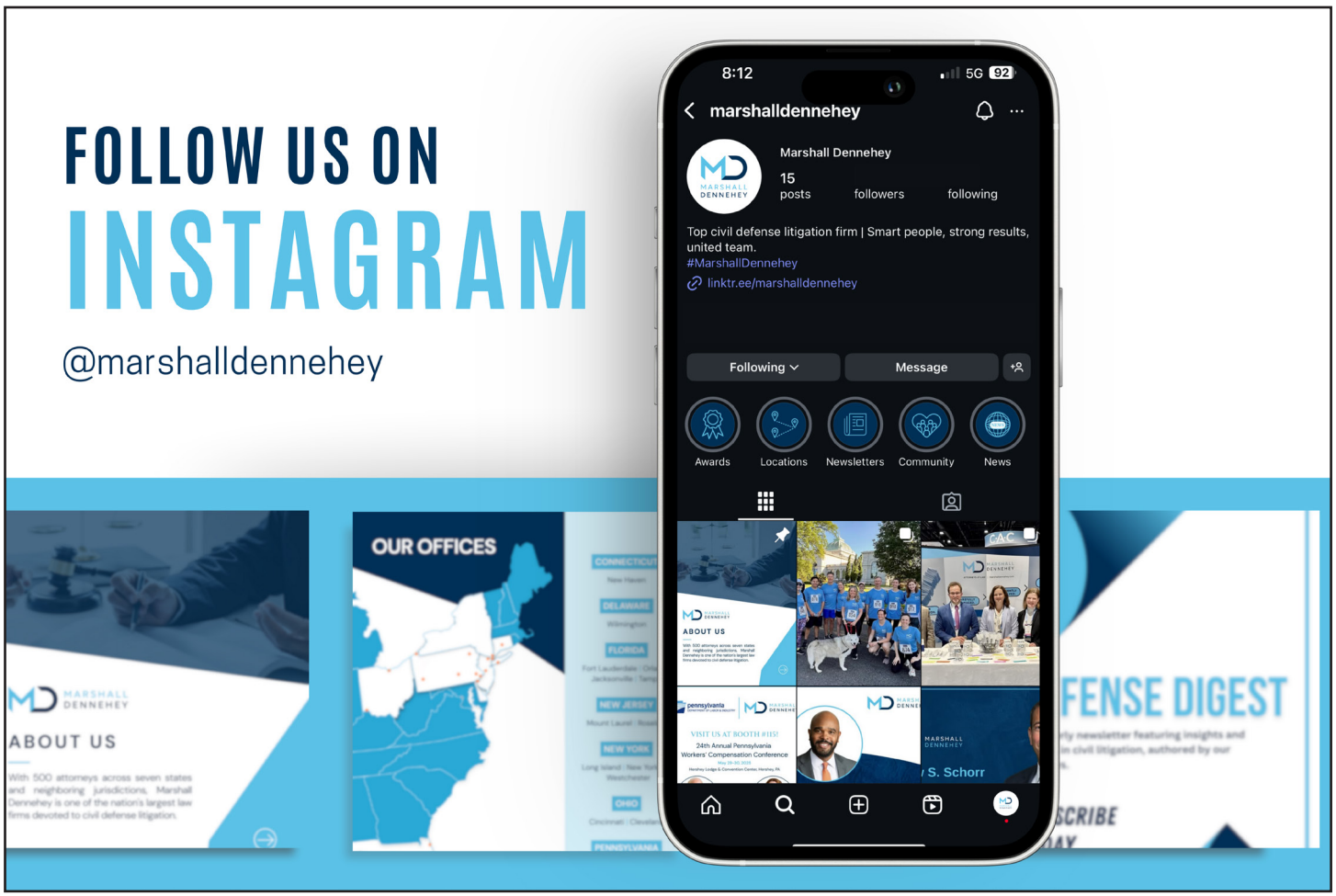
*Joyner v. Thomas Jefferson Univ. Hosps., Inc., No. 534 EDA 2024, 2025 WL 933175, at *1 (Pa. Super. Ct. Mar. 26, 2025), reargument denied (May 29, 2025)*

In her suit, the pro se plaintiff alleged negligent placement of leg restraints during gall bladder surgery. As she alleged a deviation from the professional standard of care, she was required to file a certificate of merit pursuant to Rule 1042.3.

The appellate court previously ruled that the plaintiff's expert was an "appropriate licensed professional" under Rule 1042.3(e). Prior to trial, the defendant moved to exclude the plaintiff's expert testimony regarding the standard of care, and the trial court limited his testimony solely to causation. The trial court granted a compulsory nonsuit, finding that the plaintiff lacked a duty breach.

The Superior Court reversed the nonsuit, finding that once the court accepted the plaintiff's expert as a qualified expert, the trial court was bound to that determination.

This decision highlights issue preclusion; once an appellate court determines an expert is qualified, lower courts cannot re-litigate this issue. ◆



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