Civil Litigation Update: 2019

March 13, 2019 - Philadelphia

Trial Practice Evidence

Daniel J. Anders

Judge, Court of Common Pleas of Philadelphia

Competency of Juror

- The U.S. Supreme Court held that, pursuant to the Sixth Amendment of the U.S. Constitution, there is a constitutional exception to the no-impeachment rule—the general rule of evidence followed in every state that generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict—for instances of racial bias.
- Here, following the defendant's jury trial and conviction in state court, two jurors came forward to counsel and the trial court and submitted affidavits describing another juror's alleged statements during deliberations that were "egregious and unmistakable in their reliance on racial bias." The juror not only "deploy[ed] a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis."
- *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017).

Competency of Juror (cont'd)

- The Supreme Court held "that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."
- In order to meet this initial threshold, the defendant must show "that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."
- The trial court is vested with the sound discretion to determine whether or not the defendant has satisfied this threshold showing "in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence."
- *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017).

Relevancy and Its Limits

- In a medical malpractice trial alleging only negligence and not informed consent, evidence that a patient agreed to go forward with an operation in spite of risks that she was informed is generally irrelevant and should be excluded.
- Using the low threshold for relevance in Pa.R.E. 401, the Pennsylvania Supreme Court rejected the Superior Court's bright line exclusionary rule that "all aspects of informed-consent information are always irrelevant in a medical malpractice case."
- Rather, the Supreme Court held that informed consent evidence could be relevant to a negligence claim if, for example, the standard of care required the doctor discuss certain risks with the patient.
- The Supreme Court further noted that there is no assumption-of-the-risk defense available to a defendant physician that would vitiate his duty to provide treatment according to the ordinary standard of care. But, since the malpractice complaint only asserted negligence, evidence of informed consent was irrelevant.
- *Brady v. Urbas*, 111 A.3d 1155 (Pa. 2015).

Evidence of Intoxication

Coughlin v. Massaquoi, 170 A.3d 399 (Pa. 2017)

- In a personal injury action, the Supreme Court "decline[d] to adopt a bright-line rule predicating admissibility on the existence of independent corroborating evidence of intoxication and, instead, held that the admissibility of BAC evidence is within the trial court's discretion based upon general rules governing the admissibility of evidence, see Pa.R.E. 401–403, and the court's related assessment of whether the evidence establishes the pedestrian's unfitness to cross the street." Based upon the evidence at trial, the Supreme Court found that the "trial court properly exercised its discretion in admitting the BAC evidence at issue in the instant case."
- The facts included that defendant struck and killed plaintiff, who was a pedestrian in a crosswalk. Defendant did not see plaintiff prior to striking him with his vehicle. Plaintiff's autopsy results included that plaintiff had a BAC of .313 as well as trace amounts of illegal substances in his blood. Notably, plaintiff's "whereabouts prior to the accident were unknown, no witnesses had observed his condition or behavior earlier that evening or immediately before the accident, and the police report for the incident did not indicate that he had appeared intoxicated or that intoxication had been a factor in causing the accident."

Evidence of Intoxication (cont'd)

Coughlin v. Massaquoi, 170 A.3d 399 (Pa. 2017)

- The Court rejected the standard "utilized by the Superior Court in *Ackerman* that required independent, corroborating evidence of intoxication before BAC evidence may be admitted." In doing so, it emphasized "that a pedestrian in a case such as this one is free to challenge such evidence by thorough cross-examination, or with testimony from his or her own expert." Thus, as with other evidence of the consumption of alcohol, the Court held "that BAC evidence is admissible if the trial court determines that it reasonably establishes a pedestrian's unfitness to cross the street.
- The Court noted that "Defendant's expert testified in detail regarding the significant impact a .313 BAC would have had on a person's coordination, judgment, and self-control, and he opined that a person with a .313 BAC would be unfit to cross the street. We find this evidence sufficient to establish Plaintiff's unfitness to cross the street."

Evidence of Intoxication – Part 2

- In *Partlow v. Gray,* 165 A.3d 1013 (Pa. Super. Ct. 2017), the Superior Court affirmed a $3.1 million jury verdict in a wrongful death and survival action following a fatal accident between a motorist and a motorcyclist.
- At trial, the lower court admitted circumstantial evidence related to defendant's intoxication and unfitness to drive at the time of the accident under Rules 401 and 403.
- The trial court also permitted videotaped evidence of motorcyclist-decedent's erratic riding throughout the city leading up to the accident under Rules 401 and 403, but limited defendant to introduce only 17 minutes of the 40-minute video.

Evidence of Intoxication (cont'd)

- The Court clarified the case law governing the admissibility of evidence of intoxication and unfitness to drive when a driver's reckless or careless driving is at issue in light of the recent decision in [*Rohe v. Vinson*, 158 A.3d 88 (Pa. Super. Ct. 2016)].
- In affirming the admission of the evidence at trial, the Court pointed to the following relevant evidence: "(1) evidence of [the defendant-motorist's] physical condition shortly after the accident; (2) evidence of [the defendant-motorist's] BAC; and (3) expert testimony regarding [the defendant-motorist's] BAC result with respect to his unfitness to drive."
- The Court concluded that, together, this provided sufficient circumstantial evidence to prove defendant's unfitness to drive, and the Court held that the trial court properly admitted this evidence at trial under Rules 401 and 403.

Partlow v. Gray, 165 A.3d 1013 (Pa. Super. Ct. 2017)

Evidence of Intoxication (cont'd)

- In the first Pennsylvania case addressing how courts should handle the admissibility of GoPro video recordings at trial, the Court concluded that the trial court properly exercised its discretion and applied traditional evidentiary rules, in particular Rules 401, 403, and 901.
- Although the original 40-minute video recording showed motorcyclist-decedent driving throughout the city, speeding, and driving recklessly, the trial court only permitted defendant-motorist to show 17 minutes of the recording to the jury at trial.
- Superior Court upheld the trial court's evidentiary ruling under Rules 401 and 403, concluding that the shortened recording, which included footage of decedent performing three wheelies in the half-mile leading up to the accident, "sufficiently demonstrated Decedent's purportedly aggressive and careless driving shortly before the accident."
- The Court held that the portions not shown were either not relevant (occurred long before accident) or were cumulative.

Partlow v. Gray, 165 A.3d 1013 (Pa. Super. Ct. 2017)

Rule 401 – Relevant Evidence

- In an appeal following defense verdicts in a medical negligence action after plaintiff's bowel was perforated during hysterectomy, Superior Court reversed trial court's evidentiary ruling permitting defendants to present testimony related to the general risks and complications of a laparoscopic hysterectomy.
- Although "evidence of risks and complications of a surgical procedure may be admissible to establish the relevant standard of care," Superior Court held that – under the facts of this case – risks/complications evidence was irrelevant under Rule 401 in determining whether defendant doctors acted within the applicable standard of care.

Mitchell v. Shikora, 161 A.3d 970 (Pa. Super. Ct. 2017).

Rule 401 – Relevant Evidence

- The Court emphasized that plaintiff did not allege informed-consent related claims, so assumption of risk was not a defense, and that, pursuant to Rule 403, "the evidence would tend to mislead and/or confuse the jury by leading it to believe that [plaintiff's] injuries were simply the result of the risks and complications of the surgery."
- Since the risks/complications evidence was immaterial to the standard of care issue, the evidence was inadmissible and the trial court abused its discretion in denying plaintiff's post-trial motion for a new trial. Thus, Superior Court reversed and remanded for a new trial without the risks and complications evidence.

Mitchell v. Shikora, 161 A.3d 970 (Pa. Super. Ct. 2017).

Rule 401 – Relevant Evidence

- In an appeal from a medical malpractice action, the Superior Court addressed a series of evidentiary issues following verdicts of $4.6 million and $538,000 for plaintiffs after injection treatment for acid burns caused necrosis, which required amputation of guitarist's fingers and surgery to remove necrotic portions of other plaintiff's finger.
- Superior Court affirmed trial court's decision to preclude evidence of plaintiff's marijuana use because it was not relevant to any fact of consequence in the underlying cause of action, and the probative value was outweighed by the unfair prejudice pursuant to Pa.R.E. 401-403.
- Similarly, the Court agreed that evidence of plaintiff's failure to pay child support was not relevant to proving or disproving whether plaintiff was working or capable of working and risked "inducing the jury to render a verdict based on emotion or contempt." As such, the trial court did not abuse its discretion in precluding this evidence under Rule 403.

Crespo v. Hughes, 167 A.3d 168 (Pa. Super. Ct. 2017).

Rule 701 – Lay Testimony

- In addressing two issues related to Pa.R.E. 701, the Superior Court held that the trial court properly admitted lay testimony by:
- (1) the doctor who amputated guitarist's fingers could clarify his own notes on medical records regarding the cause of the injuries (improper prior treatment) that he made when rendering treatment because his opinions regarding causation were made at the time rather than in anticipation of litigation; such technical expertise does not automatically convert a fact witness into an expert witness, and his fact testimony could include opinions and inferences that are rationally based on his perceptions and helpful to understanding the testimony; and
- (2) a vocalist and band leader who worked with plaintiff as professional guitarist and was familiar with fee arrangements, could testify under Pa.R.E. 701 about plaintiff's skill as a guitarist before and after injuries, and how that impacted fees he would have been paid as a guitarist, because these were personal observations based in fact rather than special expertise and were limited to his personal observations.

Crespo v. Hughes, 167 A.3d 168 (Pa. Super. Ct. 2017).

Rule 803(18) – Learned Treatise

- The Superior Court also discussed Pa.R.E. 803(18) regarding learned treatises, which may be used in impeachment and cross-examination to challenge the witness's credibility if the witness considers the treatise to be generally reliable, but may not be admitted as substantive evidence to prove the matters asserted because such materials constitute inadmissible hearsay.
- The Court held that the trial court erroneously applied the Federal Rule of Evidence and standard of authentication of learned treatises, but ultimately deemed this issue waived because the objecting party "failed to request any instruction to limit the jury's consideration of the treatise to the proper purpose for impeachment[.]"
- *Crespo v. Hughes*, 167 A.3d 168 (Pa. Super. Ct. 2017).

Rule 609 – Impeachment by criminal conviction

- Finally, the Superior Court addressed the trial court's decision to preclude cross-examination of the plaintiff regarding *crimen falsi* under Pa.R.E. 609(a).
- The Superior Court held that guitarist-plaintiff's negotiated guilty plea and conviction for receiving stolen property was *per se* admissible because crime involved dishonesty and occurred within past 10 years.
- Based upon this error, the Superior Court ordered a new trial on damages because the trial court's erroneous evidentiary ruling directly impacted plaintiff's damages claim.
- *Crespo v. Hughes*, 167 A.3d 168 (Pa. Super. Ct. 2017).

Motions for Mistrial

- In a personal injury appeal of a FELA action, the Superior Court held that the trial court abused its discretion in failing to grant a new trial in response to (1) violations of a pre-trial motion in limine that precluded evidence regarding inadequate manpower, and (2) an irrelevant and prejudicial remark by counsel about the death of two employees in an unrelated case.
- Relying upon *Mirabel v. Morales*, 57 A.3d 144 (Pa. Super. Ct. 2012) and *Poust v. Hylton*, 940 A.2d 380 (Pa. Super. Ct. 2007), the Superior Court held that when a party violates a pre-trial order, the only remedy is a new trial in order to promote fundamental fairness, to ensure professional respect for the rulings of the trial court, to guarantee the orderly administration of justice, and to preserve the sanctity of the rule of law.
- The Superior Court also noted that references to manpower and to the unrelated workplace deaths caused prejudice to defendants.

Buttaccio v. American Premier Underwriters, Inc., 175 A.3d 311 (Pa. Super. Ct. 2017).

Habit/Routine Evidence

- Superior Court affirmed a $1.9 million jury verdict in a medical malpractice action brought against a hospital and several doctors. Decedent went to the emergency room for chest pains and shortness of breath, and a radiologist who reviewed decedent's chest x-ray noted a 2.3 centimeter lung nodule and recommended a CT scan. Doctors later discharged decedent after an overnight stay, but they failed to advise decedent of the lung nodule or the need for a CT scan. 20 months later, decedent was diagnosed with Stage IV lung cancer and the malignant lung nodule was now 8 centimeters and had metastasized to her brain. Decedent's estate brought the instant action against the hospital and doctors.

- After a complicated procedural history and two trials, a jury found in favor of the estate and awarded $1.9 million in damages with the hospital and two doctors each equally liable. Among other rulings, the trial court precluded testimony from a treating physician about "his experience in dealing with his father's lung cancer" in order to show "that he would not have ignored the test results[] because his own life experience sensitized him to lung cancer." Physician claimed this evidence was relevant and admissible under Pa.R.E. 406 "to show his customary and habitual decision[-]making process in treating patients with [d]ecedent's symptoms."

- *Sutch v. Roxborough Memorial Hospital*, 151 A.3d 241 (Pa. Super. Ct. 2016).

Habit/Routine Evidence (cont'd)

- On appeal, Superior Court concluded that the trial court properly excluded the evidence because it was "well outside the boundaries of Pa.R.E. 406" because "the manner in which [the doctor] treated patients with [d]ecedent's symptoms was not reflexive, instinctive, semi-automatic[,] or mundane in nature." Even assuming the evidence was relevant, Superior Court also opined that the trial court properly excluded it under Pa.R.E. 403 because "the injection of testimony about [the doctor's] father's cancer was a transparent ploy to generate sympathy for [the doctor's] personal travails and divert the jury's attention from the core issue of whether he met the standard of care in his treatment of [d]ecedent."
- [*Sutch v. Roxborough Memorial Hospital*, 151 A.3d 241 (Pa. Super. Ct. 2016)]. *See* § 403.10; § 406.06[2]; § 406.07[3][b].

Rule 411 – Liability Insurance

- Superior Court vacated a $1.8 million jury verdict in a negligence action brought against a convenience store after plaintiff was shot while attempting to deescalate an argument in the store late at night between another patron and the store's female employees. At trial during his direct examination, plaintiff mentioned that he did not seek much treatment after he left the hospital because he did not have any insurance. Defendant objected and requested a mistrial; the trial court directed that the response be stricken, but did not grant the request for a mistrial.
- On appeal, defendant complained that such testimony violated Pa.R.E. 411 and the prohibition against the mention of insurance. Superior Court rejected defendant's argument, opining that Rule 411 "generally applies to a defendant's possession of liability insurance[,]" not a plaintiff's purported inability to pay for medical treatment due to lack of insurance. To the extent this passing mention could have been construed as an attempt to appeal to the jury's emotions, the trial court specifically instructed the jury that it should not be influenced by such emotional appeals and should instead focus on the law and the evidence.
- *Stapas v. Giant Eagle, Inc.*, 153 A.3d 353 (Pa. Super. Ct. 2016).

Rule 702 – Basis for Expert Opinion

- In an appeal from the grant of summary judgment in a wrongful death and survival action, the Superior Court held that the trial court erred in the manner in which it conducted a *Frye* inquiry and in precluding expert testimony pursuant to Pa.R.E. 702 because plaintiff's expert opinions were not based on a novel methodology.

- Decedent, a golf course superintendent and groundskeeper for forty years, applied numerous pesticides on the golf courses during his career and kept diligent notes about his interaction with the chemicals in a diary. Decedent was eventually diagnosed with Acute Myelogenous Leukemia and later died. Executor of decedent's estate brought this wrongful death and survival action against the manufacturers of various pesticides. Defendants challenged Executor's experts pursuant to *Frye*, asserting "that this case involved novel science, and the methodologies used by these experts were not generally accepted or conventionally applied in the relevant scientific communities." After ordering depositions, briefs, and argument, the trial court granted defendants' motions and precluded the expert testimony. Since executor could not prove causation without this expert testimony, the parties stipulated to the entry of summary judgment and preserved the right to appeal the *Frye* determination.

- *Walsh v. BASF Corp.*, ___ A.3d ___, 2018 PA Super 174, 2018 Pa. Super. LEXIS 686 (Pa. Super. Ct. 2018).

Rule 702 – Basis for Expert Opinion

- Superior Court vacated the trial court's order precluding executor's expert testimony, and remanded for further proceedings. The Court found "considerable support for Executor's position that the link between pesticides and cancer has crossed the threshold from novel to general acceptance." Still, the trial court did not abuse its discretion in conducting a *Frye* inquiry because the definition of "novel" is reasonably broad and defendants presented expert testimony that plaintiff's experts did not apply a particular methodology in a generally accepted manner.

- Most importantly, the trial court erred by impermissibly setting "itself up as a super expert in the field of medicine[,]" applying its own views of what studies were acceptable to support the opinions of Executor's experts. Significantly, the Court rejected and criticized the trial court's overly expansive *Frye* inquiry as gatekeeper, which scrutinized particular studies the experts cited to determine if they "stood for what [the expert] said they did," assessed their scientific relevance and validity, and reached particular conclusions about whether the expert's reliance on those studies was scientifically acceptable. The trial court failed to identify the particular methodology at issue and examined the experts' conclusions, which is an issue regarding the weight rather than the admissibility of the evidence. The Court concluded that an "expert's ability to opine with a reasonable degree of scientific or medical certainty that exposure to a particular defective product substantially caused or contributed to the injury goes to the legal sufficiency of the expert testimony, not to whether the science is generally accepted. Summary judgment, not *Frye*, is the appropriate vehicle for addressing that question."

- *Walsh v. BASF Corp.*, ___ A.3d ___, 2018 PA Super 174, 2018 Pa. Super. LEXIS 686 (Pa. Super. Ct. 2018)

Rule 702 – Basis for Expert Opinion

- In a dissent, a judge disagreed with the Majority's conclusion that the trial court conducted an "overly expansive" *Frye* inquiry when it "looked behind the generally accepted methodologies that [plaintiffs'] experts purported to employ, and review[ed] the studies on which they relied in applying their methodologies."
- The dissenting judge "believe[d] such screening is necessary to prevent experts from 'evad[ing] a reasoned *Frye* inquiry merely by making references to accepted methods in the abstract.'" According to the dissenting judge, plaintiffs' "experts' opinions required supporting research regarding the specific products and specific disease at issue."
- *Walsh v. BASF Corp.*, ___ A.3d ___, 2018 PA Super 174, 2018 Pa. Super. LEXIS 686 (Pa. Super. Ct. 2018).

Rule 702 – Basis for Expert Opinion

- In this civil appeal following the grant of summary judgment, Superior Court addressed the preclusion of an expert's proffered testimony and report under Pa.R.E. 702. The personal injury action involved injuries sustained when plaintiff/appellant's office chair snapped at the base and fell to the floor.
- Plaintiff, a Philadelphia police corporal, "was at his office desk when the chair on which he was sitting snapped at the base and fell to the floor." Plaintiff hit his head while falling and injured his neck, back, and shoulder. Plaintiff photographed the broken chair ten minutes after he fell, but another employee disposed of the chair several days later.
- The chair was purchased in 2008, but there was no documentation or receipt memorializing the purchase, and there was no evidence about the specifications of the chair. Plaintiff filed this personal injury action against Staples and alleged that the chair, allegedly purchased from Staples, was defective.

Nobles v. Staples, Inc., 150 A.3d 110 (Pa. Super. Ct. 2016).

Rule 702 – Basis for Expert Opinion (cont'd)

- Staples twice moved for summary judgment, arguing that plaintiff could not prove the chair was purchased from Staples. Both of these motions were denied. Staples also filed a motion in limine seeking to bar testimony from plaintiff's liability expert.
- The trial court concluded that the expert's report "was based on little more than guess and conjecture and was insufficient to meet the standards for expert evidence."
- The trial court granted Staples' motion and precluded the expert's testimony. Since plaintiff required expert testimony to prove its case, the trial court also granted Staples' motion to dismiss. Plaintiff appealed.

Nobles v. Staples, Inc., 150 A.3d 110 (Pa. Super. Ct. 2016).

Rule 702 – Basis for Expert Opinion (cont'd)

- On appeal, Superior Court held that the trial court properly excluded the expert's testimony and report under Pa.R.E. 702 because
  - (1) the expert report "provide[d] no reliable scientific basis" for its conclusions;
  - (2) the expert failed to apply "any scientific expertise to reach his conclusion that the chair was defective" in his report since he did not inspect the chair or an exemplar or conduct any testing;
  - (3) the expert failed to state in his report "even in general terms, what the defect is or how the chair broke, reporting only (on the basis of the post-accident photograph) that the chair broke at the connection of the bell and post column[;]" and
  - (4) the expert essentially relied on circular reasoning appropriately characterized as "res ipsa loquitur dressed up as expert opinion."
- As a result, Superior Court concluded that the trial court did not abuse its discretion and affirmed.

Nobles v. Staples, Inc., 150 A.3d 110 (Pa. Super. Ct. 2016).

Rule 702 – expert testimony

- In a civil matter involving claims of negligence, product liability, and fraud related to plaintiff's use of risperidone, an atypical antipsychotic drug, the Superior Court held that trial court erred in allowing a physician's assistant, who treated plaintiff from 2005 until 2013, to testify as to the cause of plaintiff's gynecomastia. Plaintiff contended the physician assistant's testimony constituted improper expert testimony, as she was not qualified as an expert witness pursuant to Pa.R.E. 702 or designated as one pursuant to Pennsylvania Rule of Civil Procedure 4003.5, prior to trial. The trial court concluded that her testimony did not cross over into expert testimony, and as such, it was properly admitted as lay testimony of a fact witness pursuant to Pa.R.E. 701 because it was rationally based upon her perception of plaintiff during treatment.

- In reversing the trial court, the Superior Court determined the physician's assistant was required to draw upon specialized medical knowledge concerning causation in order to opine that plaintiff's breast growth was caused by weight gain. The effect of Risperdal on a hormone such as prolactin was clearly a subject that required specialized knowledge. This testimony clearly required the use of scientific, technical, or other specialized knowledge within the scope of Rule 702. Thus, the trial court erred in determining that physician's assistant's testimony did not constitute expert testimony.

W.C. v. Janssen Pharma., Inc. (In re Risperdal Litigation), 174 A.3d 1110 (Pa. Super. Ct. 2017).

Rule 702 – expert testimony (cont'd)

- The Superior Court recognized that a licensed physician's assistant could have qualifications that could have met the standard for an expert witness. However, because the trial court believed her testimony did not amount to expert testimony, the trial court failed to determine if she was qualified as an expert witness. Further, the trial court, believing her testimony to be fact testimony, did not ensure that the jury was able to separate her expert testimony from her lay testimony. As such, the trial court abused its discretion and erred as a matter of law in permitting a lay witness to offer an expert opinion at trial.
- The Superior Court also held that trial court did not err in allowing defense experts to testify beyond the four corners of their expert reports because, although neither expert opined about the ability of a medical provider to detect breast tissue in their expert reports, both of the contested opinions were offered directly in response to plaintiff's expert testimony that a typical chest examination would miss the existence of tennis ball-sized breasts. Thus, it did not need to be in their expert reports in order to be properly admitted.

W.C. v. Janssen Pharma., Inc. (In re Risperdal Litigation), 174 A.3d 1110 (Pa. Super. Ct. 2017).

When Expert Testimony Permitted; Expert Testimony on Witness Credibility Prohibited

- In asbestos-related litigation, expert testimony under Pa.R.E. 702 regarding the "complex intricacies of refreshing human recollection" was properly precluded.
- Plaintiff identified Cranite, a sheet gasket material, as being present in his workplace 40 years earlier. The Superior Court held that an assessment of the credibility and reliability of a witness who is recalling events that occurred more than 40 years ago is well within the average juror's knowledge and experience and that admission of such expert testimony would have infringed on the jury's basic function of assessing credibility.
- The court noted that the Pennsylvania Supreme Court's recent decision in *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014) overruled a per se ban on expert testimony on eyewitness testimony, but also noted that the Supreme Court limited its ruling to eyewitness testimony in criminal cases.
- *Amato v. Bell & Gossett*, 116 A.3d 607 (Pa. Super. Ct. 2015).

Testimony by Expert Witnesses MCARE Act Qualifications

- The Pennsylvania Supreme Court upheld trial court's prohibition of a nurse to offer expert testimony under Pa.R.E. 702 on causation in a medical negligence action against doctors and nurses. The court recognized that its decision in *Freed* permits a nurse to provide causation testimony as it relates to substandard nursing procedures.
- The instant case, however, involved negligence claims related to a course of conduct by ***both nurses and doctors***. As a result, the trial court did not abuse its discretion in determining that ***causation*** testimony by a nursing expert had the ***potential to confuse*** the jury if the nurse offered causation testimony as to nurses but not physicians (which he was not qualified to do). The nurse expert was not precluded from offering expert testimony regarding the ***quality of care*** by the nurses that treated the decedent.
- The court also rejected the argument that the MCARE Act mandates the admission of an expert's testimony. Rather, the admission of expert testimony is left to the trial court's discretion.
- *Green v. Pa. Hosp.*, 123 A.3d 310 (Pa. 2015).

Testimony by Expert Witnesses—Qualifications of Expert—MCARE Act Qualifications

- In a medical malpractice claim, Superior Court affirmed trial court's qualification of a hematologist under Sections 501(c) and 512(e) of MCARE Act because he was sufficiently familiar with the standard of care of an interventional cardiologist and had sufficient training, experience, and knowledge in that field of medicine. Thus, admissible under Pa.R.E. 702.
- The expert appropriately limited his testimony to the administration of anticoagulation medication prior to surgery, which was within his expertise of clotting, coagulation, bleeding and thrombosis.
- *Frey v. Potorski*, 145 A.3d 1171 (Pa. Super. Ct. 2016).

Peer Review Proceedings; Attorney-Client Privilege

- In a medical malpractice action, the Pennsylvania Supreme Court held that the peer review privilege did not apply to a performance file of a physician that had been prepared by another physician who was the director of the hospital's emergency department and supervisor of the physician at issue. Both physicians were employed by a contractor who provided staffing and administrative services for the hospital's emergency room.
- *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018)

Peer Review Proceedings; Attorney-Client Privilege (cont'd)

- First, the contractor could not claim the privilege because it was not a "professional health care provider" as defined by the Peer Review Privilege Act (PRPA). Although the contractor was an organization comprised of hundreds of professional health care providers (namely physicians), it was not itself a "professional health care provider" because it was not approved, licensed, or regulated to practice or operate in the healthcare field under the laws of Pennsylvania.
- Relying on [*Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. Ct. 2015)], the fact that one of the contractor's employees conducted an evaluation of another employee does not transform the contractor into a professional health care provider under the PRPA. Finally, the Supreme Court noted that there was no evidence of record that the hospital contracted with the contractor to conduct a peer review on behalf of the hospital including the performance file that was at issue.
- *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018)

Peer Review Proceedings; Attorney-Client Privilege (cont'd)

- Second, the hospital could not claim the privilege because the performance file at issue was not generated or maintained by the hospital's peer review committee.
- Although the medical director of the hospital's emergency department performed a performance review of another physician's work (in fact, someone she supervised), the Supreme Court held that—according to the plain language of the PRPA—the peer review privilege is reserved only for "proceedings and documents of a review committee," not individuals.
- Although individuals may be part of a "review organization," they cannot—by themselves as individuals—constitute a "review committee."
- *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018)

Peer Review Proceedings; Attorney-Client Privilege

- Plaintiff filed a medical malpractice suit after patient-plaintiff contracted hepatitis C following a kidney transplant at UPMC. UPMC claimed the peer review privilege applied to documents submitted by UPMC to Pennsylvania Department of Health in response to a DOH investigation of the hospital.
- The Superior Court held that such documents are not protected by the confidentiality provisions of the Peer Review Act.
- The Peer Review Act contains a confidentiality provision to facilitate self-policing in the health care industry and to encourage potentially critical evaluations of medical professionals by peers.
- *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. Ct. 2015).

Peer Review Proceedings; Attorney-Client Privilege (cont'd)

- In finding that the UPMC documents were not protected by the privilege, the court determined that the purpose of the DOH investigation was to determine whether, inter alia, UPMC had complied with conditions and requirements
  - (1) to operate as a transplant center under applicable federal guidelines, and
  - (2) such that the transplant center could continue to participate in Medicare/Medicaid programs.
- As such, the DOH investigation did not constitute a peer review as contemplated by the statute, i.e., the investigation was not for the purpose of self-policing its programs.
- The court further noted that the DOH was not a professional health care provider as defined by the Peer Review Act.
- *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. Ct. 2015).

Peer Review Proceedings; Attorney-Client Privilege (cont'd)

- UPMC also claimed the peer review privilege applied to UPMC board meeting materials including information that an executive vice-president presented to the board about missed test results and failures in protocol related to the transplant program.
- The court held that a board of directors of a professional health care provider can conduct a peer review.
- The Superior Court remanded the case so the trial court could conduct an in camera review of the requested information as required to determine if the privilege applied.
- *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. Ct. 2015).

Peer Review Proceedings; Attorney-Client Privilege (cont'd)

- The Superior Court rejected UPMC's argument that any document—such as an incident report—submitted in connection with a peer review process would be confidential.
- The court reaffirmed its decisions in *Dodson v. DeLeo*, 872 A.2d 1237, 2005 PA Super. 137 (Pa. Super. Ct. 2005) and *Atkins v. Pottstown Memorial Med. Center*, 634 A.2d 258, 430 Pa. Super. 279 (Pa. Super. Ct. 1993), which hold that the Peer Review Act does not protect non-peer review business records such as an incident report, even if those records eventually are used by the peer review committee.
- To be protected, a document must be derived from or be part of an evaluation or review by a peer review committee.
- *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. Ct. 2015).

Peer Review Proceedings; Attorney-Client Privilege (cont'd)

- Finally, UPMC claimed the attorney client privilege applied to UPMC board meeting materials including information that an executive vice-president presented to the board about missed test results and failures in protocol related to the transplant program.
- The court held that the attorney-client privilege can apply when the governing board of an organization meets with counsel for advice on behalf of the organization.
- The Superior Court remanded the case so the trial court could conduct an in camera review of the requested information as required to determine if the privilege applied.
- *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. Ct. 2015).

Authentication – social media

- In a criminal appeal of an assault conviction, Superior Court held that the trial court properly denied Commonwealth's motion *in limine* to introduce social media posts and messages on Facebook that were allegedly written by defendant. The Court determined that the social media posts and messages were not sufficiently authenticated under Pa.R.E. 901 because testimony from an expert in computer forensics did not corroborate—with a reasonable degree of certainty—that defendant was the creator of the account, the sender of the communications, or that he posted the photograph.
- The mere fact that the Facebook account bore defendant's name, hometown, and high school was insufficient. Additionally, there were no contextual clues in the Facebook chat messages that identified defendant as the sender of the messages. Thus, Superior Court held that the Commonwealth failed to introduce sufficient direct or circumstantial evidence that defendant had authored the messages in question.
- *Commonwealth v. Mangel*, 181 A.3d 1154 (Pa. Super. Ct. 2018).

Attorney-Client privilege

- In a legal action against the Archdiocese of Philadelphia for alleged sexual abuse by clergy, Superior Court held that the notes and summaries of witness interviews compiled by a private investigator hired by defense counsel for the Archdiocese for that express purpose were not protected by work-product doctrine, and therefore discoverable.
- The Superior Court rejected the Archdiocese's argument that an investigator hired by defense counsel should be considered an "agent of the attorney" as opposed to a "party representative." The court held such an argument would "impermissibly expand Rule 4003.3." The court noted that the emphasis of work-product doctrine "has traditionally been on whether the document was the work product of an attorney." Thus, because the investigator was not an attorney, the work-product doctrine did not apply.
- *McIlmail v. Archdiocese of Philadelphia*, ___ A.3d ___, 2018 PA Super 157, 2018 Pa. Super. LEXIS 620 (Pa. Super. Ct. June 7, 2018).

Authentication – social media (cont'd)

- In affirming the trial court, Superior Court noted that social media evidence presents challenges because of the great ease with which a social media account maybe falsified, or a legitimate account may be accessed by an imposter from any computer or smart phone with the appropriate user identification and password. The Court held that social media records and communications can be properly authenticated similar to the manner in which text messages and instant messages can be authenticated. Thus, authentication of social media evidence should be evaluated on a case-by-case basis to determine whether or not there has been an adequate foundational showing of its relevance and authenticity.
- Further, the proponent of social media evidence must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question, such as testimony from the person who sent or received the communication, or contextual clues in the communication tending to reveal the identity of the sender. Finally, the Court noted that other state courts that examined the authentication of social media records have ruled that the mere fact that an electronic communication, on its face, purports to originate from a certain person's social network account is generally insufficient, standing alone, to authenticate that person as the author of the communication.
- *Commonwealth v. Mangel*, 181 A.3d 1154 (Pa. Super. Ct. 2018).

Authentication – IP address

- In a criminal appeal of a conviction for unlawful use of a computer, the Superior Court held that the trial court erred by admitting into evidence an unsigned letter from Comcast that linked defendant to the IP address allegedly used to "hack" into the victim's account.
- The Comcast letter did not qualify as a business record because the Commonwealth did not present testimony from a records custodian at Comcast or another qualified witness. Further, the letter was not self-authenticating under Pa.R.E. 902(11) because the purportedly authenticating document was executed nineteen months after the Comcast letter was dated and was a single-page letter with boiler-plate language with no additional documents attached.
- Superior Court held that admission of the letter was not harmless because the Comcast letter was the only direct evidence of defendant's connection to the IP address used to hack into the victim's account.
- *Commonwealth v. Manivannan*, 186 A.3d 472 (Pa. Super. Ct. 2018).

Authentication – IP address (cont'd)

- Superior Court also held that the trial court abused its discretion by permitting three lay witnesses to "draw conclusions from the information in [the victim's] email account settings that depicted multiple instances of disparate IP addresses accessing her account from approximate geographic locations."
- Superior Court noted that this was an issue of first impression in Pennsylvania, and noted several other jurisdictions require expert testimony regarding the connection between IP addresses and real-world locations. As such, admission of the lay testimony was improper, and the Superior Court ordered a new trial because it was not harmless error.
- *Commonwealth v. Manivannan*, 186 A.3d 472 (Pa. Super. Ct. 2018).