

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PATRICIA CUNEO,	:	No. 21-00717
Plaintiff	:	
vs.	:	CIVIL ACTION – LAW
	:	
UPMC et al.,	:	
Defendants	:	

OPINION AND ORDER

AND NOW, this 10th day of November 2022, after argument on 1) Plaintiff’s Motion for Reconsideration of this Court’s March 3, 2022 Opinion and Order; 2) Plaintiff’s Petition to Open Judgment of Non Pros; 3) the UPMC Defendants’¹ Motion for Reconsideration of this Court’s April 14, 2022 Order Striking Judgment of Non Pros; and 4) the UPMC Defendants’ Preliminary Objection to Plaintiff’s Second Amended Complaint, the Court enters the following OPINION and ORDER.

BACKGROUND

Plaintiff commenced this case by filing a Complaint on July 20, 2021.² The allegations in Plaintiff’s Original Complaint are summarized in this Court’s March 3, 2020 Opinion and Order on Defendants’ Preliminary Objections to Plaintiff’s Original Complaint. Essentially, Plaintiff alleges that while employed by UPMC, she sought counseling from UPMC’s Employee Assistance Program. The Employee Assistance

¹ The Defendants in this case are Sean T. MacMillen, UPMC (a/k/a University of Pittsburgh Medical Center), and various corporate entities associated with UPMC. This Opinion and Order refers to Sean T. MacMillen as “Defendant MacMillen” and all other Defendants collectively as the “UPMC Defendants.” Defendant MacMillen is represented by Michael Sosnowski, Esq.; the Corporate Defendants are represented by Brian Bluth, Esq., Joanne Ludwikowski, Esq. and Stephen Hartley, Esq. The claims presently at issue primarily concern the UPMC Defendants.

² Plaintiff has since filed a First Amended Complaint and a Second Amended Complaint, the latter of which is the operative pleading at this time. This Opinion will refer to the July 20, 2021 Complaint as the “Original Complaint.”

Program, she claims, referred her to Defendant MacMillen, also a UPMC employee, for treatment. Plaintiff alleges that Defendant MacMillen engaged in a series of inappropriate sexual encounters with her, leading to a deterioration of her mental health, and requiring inpatient treatment.

On August 19, 2021, the UPMC Defendants filed a Notice of Intention to Enter Judgment of Non Pros for Failure to File a Certificate of Merit pursuant to Pennsylvania Rules of Civil Procedure 1042.6 and 1042.7.^{3,4} On August 27, 2021, Plaintiff filed separate certificates of merit against Defendant MacMillen and the UPMC Defendants. In the certificate of merit filed as to Defendant MacMillen, counsel for Plaintiff certified that:

“an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised, or exhibited by this defendant in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm.”⁵

The certificate of merit filed as to the UPMC Defendants contained a different certification, namely that:

“the claim that this defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, and an appropriate licensed professional has supplied a written statement [stating that the other defendant’s conduct] fell outside acceptable professional standards....”⁶

³ This Opinion discusses the Rules of Civil Procedure governing professional liability actions and certificates of merit in detail *infra*.

⁴ Defendant MacMillen filed a similar notice four days later.

⁵ This language in the certificate of merit filed as to Defendant MacMillen matches the language of Rule 1042.3(a)(1).

⁶ This language in the certificate of merit filed as to the UPMC Defendants matches the language of Rule 1042.3(a)(2).

Both certificates of merit contained the following footnote:

“Counsel for the Plaintiff does not view this case as a medical malpractice case, but is filing this Certificate since the matter does involve an allegation that a licensed professional engaged in conduct that fell outside acceptable professional standards.”

Both Defendant MacMillen and the UPMC Defendants filed Preliminary Objections to Plaintiffs’ Original Complaint, and after briefing the Court heard argument on the Defendants’ Preliminary Objections on November 12, 2021. The resolution of the issues presently at hand requires analysis of the UPMC Defendants’ first Preliminary Objection to the Original Complaint, the Court’s March 3, 2022 Opinion and Order addressing the Defendants’ Preliminary Objections, and the parties’ myriad filings in the wake of that Opinion and Order.

A. UPMC Defendants’ First Preliminary Objection to the Original Complaint and the Court’s March 3, 2022 Opinion and Order

The UPMC Defendants raised three preliminary objections to the Original Complaint, the first of which touched upon issues presently before the Court. The UPMC Defendants’ first preliminary objection consisted of a request to strike portions of the Original Complaint or, alternatively, compel a more specific pleading. In this objection, the UPMC Defendants contended that a number of paragraphs in the Original Complaint were insufficiently specific to support a cause of action against them, providing insufficient information concerning the UPMC Defendants’ alleged “duty to monitor and control the conduct of MacMillen” and how and whether they “were reasonably aware or should have been aware of the need for such control.”

At argument, held on November 12, 2021, the UPMC Defendants raised the question of whether the allegations against them sounded in corporate negligence or vicarious liability. They explained that their uncertainty arose out of the incongruity between the Original Complaint’s language concerning a “duty to monitor and control,” which suggested corporate negligence, and Plaintiff’s certificate of merit, which certified that the claim against the UPMC Defendants “is based *solely* on allegations that *other* licensed professionals for whom [they] are responsible deviated from an acceptable professional standard.”⁷ When counsel for Plaintiff affirmed at argument that Plaintiff intended the claims against the UPMC Defendants to sound in corporate negligence, counsel for the UPMC Defendants made an oral motion for dismissal of the case against the UPMC Defendants.

In its March 3, 2022 Opinion and Order, the Court construed counsel’s oral motion for dismissal as a demurrer to all claims in the Original Complaint against the UPMC Defendants, on the grounds that the certificate of merit Plaintiff filed could support *only* claims only vicarious liability, but Plaintiff had admitted at argument that the Original Complaint did not contain *any* claims for vicarious liability. The Court agreed with the first of these propositions, determining that the certificate of merit against the UPMC Defendants utilizing the language of Rule 1042.3(a)(2) was insufficient to support claims other than those sounding in vicarious negligence. The Court held that it was inappropriate, however, to treat as conclusive the off-the-record statement of counsel that all claims in the Original Complaint sounded in corporate negligence, especially in light of the fact that the language in the Original

⁷ Emphasis added.

Complaint arguably supported some manner of a vicarious liability claim. The Court ultimately viewed counsel's oral motion for dismissal as expanding the UPMC Defendants' first preliminary objection into a demurrer to all corporate negligence claims premised on the failure of the certificate of merit to support such claims.⁸ The Court granted what it perceived to be the UPMC Defendants' request for a demurrer on this ground, and granted Plaintiff the opportunity to amend her Complaint to more specifically plead vicarious liability claims and remove all corporate negligence claims against the UPMC Defendants.

B. Subsequent Filings

On March 4, 2022, the day after the Court filed its Opinion and Order ruling on, *inter alia*, the UPMC Defendants' first Preliminary Objection to the Original Complaint, the UPMC Defendants filed a Praecipe for Entry of Judgment of Non Pros pursuant to Rule 1042.7 "as to only the corporate negligence/direct liability claims against" the UPMC Defendants. The Prothonotary entered the judgment of non pros on March 10, 2022.

On March 22, 2022, Plaintiff filed a First Amended Complaint, containing two counts: "Vicarious Liability – Negligence" against the UPMC Defendants, and "Negligence" against Defendant MacMillen.⁹ On that same day, Plaintiff filed a new certificate of merit¹⁰ certifying that a licensed professional had provided a written

⁸ As discussed below, subsequent filings have demonstrated that the Court misconstrued the nature of counsel's oral motion to dismiss all counts against the UPMC Defendants.

⁹ This is in contrast to the Original Complaint, which contained one count for "Negligence" against all defendants and one count for "Negligent Hiring, Retention and Supervision" against the UPMC Defendants.

¹⁰ This Opinion will refer to the March 22, 2022 certificate of merit as the "second UPMC certificate of merit." All references in this Opinion to the "certificate of merit" filed against the

statement that the UPMC Defendants 1) violated a duty owed directly to Plaintiff *and* 2) were vicariously liable for Defendant MacMillen's breach of his duty of care to Plaintiff. This second certificate of merit contained the same footnote as the original certificates of merit.

On March 31, 2022, Plaintiff filed a Motion for Reconsideration of this Court's March 3, 2022 Opinion and Order, essentially arguing that the Court impermissibly exceeded the scope of the issues presented when it opined upon the sufficiency of the certificate of merit and granted a preliminary objection for that reason. Plaintiff additionally contended that the Court's treatment of the issue deprived her of the opportunity to argue that the action against the UPMC Defendants does not require a certificate of merit at all.

On April 5, 2022, Plaintiff filed a Petition to Open the judgment of non pros entered on March 10, 2022. Plaintiff contended that the second UPMC certificate of merit supported both corporate negligence and vicarious liability and thus cured any deficiencies in the August 27, 2022 certificate of merit. Plaintiff additionally reiterated her position, expressed in the footnotes to the certificates of merit, that she had only filed the initial certificates of merit "out of an abundance of caution" despite believe them legally unnecessary.

On April 8, 2022, the UPMC Defendants filed Preliminary Objections to Plaintiff's Amended Complaint.

On April 14, 2022, the Court entered an Order containing the following language:

UPMC Defendants refer to the first certificate of merit, filed August 27, 2021 unless otherwise specified.

“Plaintiff’s Petition to Open the Judgment of Non Pros is GRANTED pending the resolution of Plaintiff’s Motion for Reconsideration filed March 31, 2022. The Judgment of Non Pros entered on March 10, 2022 as to Plaintiff’s corporate negligence/liability claims is hereby STRICKEN.”

The Court entered this Order to preserve the status quo until the Court could more fully resolve the parties’ various motions, and did not intend for this Order to materially alter or adjudicate any of the parties’ rights or claims. However, the Court’s inadvertent use of language both opening *and* striking the judgment of non pros has introduced a procedural discontinuity, as discussed below.

On April 25, 2022, Plaintiff filed a Second Amended Complaint.¹¹ Like the First Amended Complaint, the Second Amended Complaint contains a sole count of “Vicarious Liability – Negligence” against the UPMC Defendants. In addition to the allegations in prior pleadings, the Second Amended Complaint identifies certain named individuals who Plaintiff alleges were agents or employees of the UPMC Defendants, and alleges that the UPMC Defendants are liable for certain wrongful actions of these individuals and other unnamed agents or employees.

On April 26, 2022, the UPMC Defendants filed a Motion for Reconsideration of this Court’s April 14, 2022 Order both opening and striking the judgment of non pros. The UPMC Defendants asserted that, regardless of the Court’s resolution of the other issues before it, the judgment of non pros was properly entered and therefore the Court should ultimately reinstate the judgment of non pros after full consideration of the parties’ arguments.

¹¹ Pa. R.C.P. 1028(c)(1) provides that “[a] party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections.”

On May 10, 2022, the UPMC Defendants filed a single Preliminary Objection to the Second Amended Complaint, seeking to strike a portion of the Second Amended Complaint which they argue still uses language indicative of corporate negligence rather than vicarious liability. On May 26, 2022, Plaintiff filed an Answer to the Preliminary Objection.

The Court heard argument on all of these outstanding filings on June 6, 2022.

ARGUMENT

At argument, counsel for the UPMC Defendants asserted that the parties' various filings – both prior to the March 3, 2022 Order and at present – essentially rest on two *non-overlapping* issues: 1) the sufficiency of the certificate of merit and the propriety of the judgment of non pros, and 2) the sufficiency of pleadings and the merits of preliminary objections. Counsel politely suggested that the Court's blending of these two issues exacerbated the procedural complications that had arisen. Turning to the various motions, the parties first addressed the UPMC Defendant's Preliminary Objection to the Second Amended Complaint before discussing the various motions related to the certificate of merit issue and the March 10, 2022 judgment of non pros.

A. UPMC Defendants' Preliminary Objection to Plaintiff's Second Amended Complaint

The UPMC Defendants raised a single preliminary objection to Plaintiff's Second Amended Complaint averring that Paragraph 93(i) sounds in corporate negligence despite being located in a count alleging only vicarious liability, and should thus be stricken. The UPMC Defendants stress that this preliminary objection is independent of any determination concerning the certificates of merit;

rather, the UPMC Defendants base their objection on the directive of Rule of Civil Procedure 1020(a) that parties must raise different causes of action (such as corporate negligence and vicarious liability) in separate counts.

Plaintiff responded that Paragraph 93(i) details the failure of various individual agents and employees of the UPMC Defendants to appropriately supervise Defendant MacMillen and ensure that he ceased to treat Plaintiff when they learned of his inappropriate behavior. This claim, Plaintiff asserts, rests upon the UPMC Defendants' responsibility for these individuals' failures to satisfy their duties to Plaintiff, rather than any duties the UPMC Defendants allegedly owed directly to Plaintiff. Thus, Plaintiffs argue, Paragraph 93(i) is a typical vicarious liability claim.

The UPMC Defendants suggest that although such a claim would resolve the preliminary objection, it is inconsistent with the actual language of the Second Amended Complaint.

B. Plaintiff's Petition to Open Judgment of Non Pros and UPMC Defendants' Motion for Reconsideration of Order Striking Judgment of Non Pros

The parties next addressed the two motions concerning the judgment of non pros. Regarding their Motion for Reconsideration of this Court's April 14, 2022 Order both opening and striking the judgment of non pros, the UPMC Defendants highlighted that a court may open judgments of non pros on procedural and equitable grounds but may only strike a judgment of non pros to remedy a defect appearing on the face of the record. The UPMC Defendants suggested that the Court had not acted inappropriately by opening the judgment of non pros pending the resolution of Plaintiff's Motion for Reconsideration of the March 3, 2022 Order,

but argued that no defect justifying the Court's striking of the judgment appeared on the face of the record. The UPMC Defendants ultimately argued that after addressing the merits of the various filings, the Court should reinstate the March 10, 2022 judgment of non pros because its entry was procedurally proper and Plaintiff could not demonstrate grounds for opening it.

Specifically, the UPMC Defendants note that Rule of Civil Procedure 3051 requires a party seeking to open a judgment of non pros to establish, *inter alia*, a "reasonable explanation or legitimate excuse for the conduct that gave rise to" its entry.¹² The UPMC Defendants argued that Plaintiff could not demonstrate such a reasonable explanation or legitimate excuse in light of the following facts:

- Rule of Civil Procedure 1042.3 requires a plaintiff to file an appropriate certificate of merit within sixty days after filing the complaint.
- Rule 1042.6 allows a defendant to obtain a judgment of non pros for the plaintiff's failure to satisfy the certificate of merit requirement, but only after filing a written notice of the intention to seek the entry of the judgment and waiting thirty days.¹³
- The UPMC Defendants filed a Notice of Intention to Enter Judgment of Non Pros for Failure to File a Certificate of Merit on August 19, 2021.
- Plaintiff filed a certificate of merit on August 27, 2021, containing language supporting a claim for vicarious liability only.¹⁴ Plaintiff did not file a certificate of merit supporting a corporate negligence claim.
- At argument on November 12, 2021, counsel for the UPMC Defendants clearly expressed the position that the certificate of merit was insufficient to support any corporate negligence

¹² This Opinion discusses Rule 3051 more fully *infra*.

¹³ Rule 1042.6 contains certain exceptions to the notice requirement that do not apply here.

¹⁴ Instead of filing this certificate of merit, Plaintiff could have filed "a motion seeking a determination by the court as to the necessity of filing a certificate of merit" pursuant to Rule 1042.6(c). The Opinion discusses Plaintiff's choice not to do so *infra*.

claims against the UPMC Defendants. Despite this, Plaintiff did not file a new certificate of merit, seek leave to amend their certificate of merit, or file a motion seeking a determination of the necessity of filing a certificate of merit. Even when the UPMC Defendants filed their praecipe to enter a judgment of non pros on March 4, 2022, Plaintiff still did not take any action of record prior to the entry of the judgment on March 10, 2022.

- The first time Plaintiff acted to rectify the insufficiency of her certificate of merit was on March 22, 2022, when she filed the second UPMC certificate of merit alongside her First Amended Complaint.
- Plaintiff had seven-and-a-half months between the filing of her Complaint on July 20, 2021 and the entry of the judgment of non pros on March 10, 2022, yet took no action to remedy the fact that she never filed a certificate of merit sufficient to support corporate negligence claims. Plaintiff failed to file the required certificate of merit despite the fact that she was on notice that this would be a significant issue in the case. Thus, the inexplicable failure to address this issue until more than a week after the entry of judgment of non pros strongly suggests she does not have a “reasonable explanation or legitimate excuse” for the conduct giving rise to the entry of the judgment.

The UPMC Defendants did note that, although they were permitted to seek the entry of a judgment of non pros at any time after the sixty day period for filing a certificate of merit had passed, they chose not to do so until after they believed the statute of limitations regarding certain claims had expired.

In response, counsel for Plaintiff first suggested that striking the judgment of non pros would be proper if this Court granted Plaintiff’s Motion for Reconsideration of the March 3, 2022 Order, because then the record would contain a defect.

Plaintiff next argued, more fundamentally, that the claims in the Original Complaint did not require a certificate of merit at all because they were in essence claims of workplace sexual assault that did not touch upon the medical or professional judgments of the parties. Plaintiff highlighted the footnote in each

certificate of merit, and again suggested that the Court's March 3, 2022 Opinion and Order deprived them of the opportunity to file a motion to determine the necessity for a certificate of merit pursuant to Rule 1042.6(c). Plaintiff argued that because the claims in this case do not require a certificate of merit, the failure to file a certificate of merit cannot support the entry of judgment of non pros on any claim.¹⁵

Finally, Plaintiff argued that even if a certificate of merit was required and the one they filed was insufficient to support corporate negligence claims, their filing of the defective certificate of merit constituted substantial compliance with the Rules of Civil Procedure and is thus excusable under Rule 126.¹⁶ Plaintiff ultimately contended that the dismissal of her corporate negligence claims would be contrary to the purpose of the Rules regarding certificates of merit, which are intended to "help eliminate frivolous claims of professional negligence" and not "to artificially limit the theories of liability against a defendant that is brought into court and belongs there...."

¹⁵ The UPMC Defendants suggested that Plaintiff's account constituted a "revisionist" procedural history, and argued that the footnotes in the certificates of merit were insufficient to preserve the argument that no certificate of merit was required as to any claim.

¹⁶ Plaintiff raises the "substantial compliance" argument in her Petition to Open the Judgment of Non Pros, and appears to argue that her substantial compliance with the certificate of merit requirement satisfies the "reasonable explanation or legitimate excuse" prong of Rule 3051. In *Womer v. Hilliker*, however, the Supreme Court of Pennsylvania treated the question of substantial compliance for the purposes of Rule 126 as conceptually distinct from the concept of "reasonable explanation or legitimate excuse" in Rule 3051. *Womer v. Hilliker*, 908 A.2d 269, 278-79 (Pa. 2006). In *Womer*, the Court first held that Rule 126 did not excuse the failure of a plaintiff to file any certificate of merit, and then explained that a petition to open judgment of non pros under Rule 3051 was an alternative avenue by which a plaintiff could seek relief from a judgment of non pros for failure to file a certificate of merit, with different considerations and standards of review. This Opinion discusses *Womer infra*.

C. Plaintiff's Motion for Reconsideration of March 3, 2022 Opinion and Order

Finally, Plaintiff addressed her Motion for Reconsideration of this Court's March 3, 2022 Opinion and Order. Plaintiff first argued that inasmuch as the UPMC Defendants' first preliminary objection to the Original Complaint sought only the striking or revising of three specific paragraphs, this Court erred when it augmented the relief requested based on the UPMC Defendants' oral motion and dismissed an entire family of claims. Plaintiff argued that even if it was not *per se* improper for a party to expand upon preliminary objections via oral motion, under Pennsylvania law preliminary objections are not an appropriate vehicle for striking claims based on an inadequate certificate of merit.¹⁷ Plaintiff once again highlighted her contention that the March 3, 2022 Order "denied Plaintiff the ability to seek a ruling on whether this action even sounded in professional liability, prior to [the UPMC Defendants] filing a praecipe for judgment of non pros." Ultimately, Plaintiff requested that the Court "vacate the portion of its March 3, 2022 Order specifically ruling that Plaintiff is precluded from asserting a corporate negligence cause of action."

The UPMC Defendants responded that Plaintiff's Motion for Reconsideration is moot in light of the March 10, 2022 judgment of non pros, because the judgment rests entirely upon procedural grounds distinct from the analysis in the Court's March 3, 2022 Opinion and Order. The UPMC Defendants did agree with Plaintiff that their first preliminary objection to the Original Complaint had not sought the

¹⁷ Plaintiff cited *White v. Behlke*, 69 Pa. D. & C.4th 353, 366 (Lackawanna Cty. 2004) for this proposition. As noted *infra*, neither party contests this assertion and the Court agrees that its ruling was erroneous.

wholesale preclusion of corporate negligence claims on grounds related to the certificate of merit.

ANALYSIS

There are four filings presently before the Court: 1) Plaintiff's Motion for Reconsideration of the March 3, 2022 Opinion and Order; 2) Plaintiff's Petition to Open the March 10, 2022 Judgment of Non Pros; 3) the UPMC Defendants' Motion for Reconsideration of the April 14, 2022 Order Striking the Judgment of Non Pros; and 4) the UPMC Defendants' Preliminary Objection to the Second Amended Complaint.

The UPMC Defendants contend that Plaintiff's Motion for Reconsideration of the March 3, 2022 Opinion and Order is moot, because the March 10, 2022 judgment of non pros independently bars Plaintiff from asserting any direct liability claims against them. This is only true, however, if the judgment of non pros remains in effect; if it is open or stricken, then the March 3, 2022 Opinion and Order will be the only impediment to Plaintiff's corporate negligence claims, and the Motion to reconsider that Opinion and Order will not be moot. Therefore, the Court will address Plaintiff's Petition to Open the March 10, 2022 Judgment of Non Pros and the UPMC Defendants' Motion for Reconsideration of the April 14, 2022 Order Striking the Judgment of Non Pros prior to addressing her Motion for Reconsideration.

Finally, after determining the status of the judgment of non pros and, if necessary, the March 3, 2022 Opinion and Order, the Court will address the UPMC Defendants' Preliminary Objection to Plaintiff's Second Amended Complaint.

A. UPMC Defendants' Motion for Reconsideration of April 14, 2022 Order Striking Judgment of Non Pros

As discussed above, the Court intended its April 14, 2022 Order to preserve the status quo and ensure the March 10, 2022 entry of judgment of non pros would not materially affect the parties rights while the Court addressed the various pending motions. The Order noted that it was temporary, removing the judgment of non pros only until the Court resolved Plaintiff's March 31, 2022 Motion for Reconsideration. This clearly indicated to the parties that if the Court determined the Motion for Reconsideration (or some other future development) did not undermine the judgment, it would be reinstated following the resolution of all pending issues.

In the Order, however, the Court inadvertently used language not only temporarily *opening* the judgment of non pros but also *striking* it. The UPMC Defendants have tacitly suggested that it was not improper for the Court to temporarily open the judgment, but they explicitly argue that the striking of the judgment was improper here as there is no defect on the face of the record.¹⁸

The Court agrees with the UPMC Defendants that no grounds existed to strike the judgment of non pros. Here, no party filed a motion to strike the judgment; rather, the Court inadvertently utilized language purporting to strike the judgment in addition to the intended result of temporarily opening it. Although Plaintiff contends that this Court's determinations may ultimately demonstrate a defect in the record, there was none facially apparent as of April 14, 2022, and the Court did not intend its

¹⁸ "It is well-established that a motion to strike off a judgment of non pros challenges only defects appearing on the face of the record and that such a motion may not be granted if the record is self-sustaining." *Varner v. Classic Communities Corp.*, 890 A.2d 1068, 1072 (Pa. Super. 2006).

Order to reflect any determination regarding the sufficiency of the record to support the judgment. Therefore, the Court will grant the UPMC Defendants' Motion for Reconsideration of this Court's April 14, 2022 Order. The portion of that Order striking the judgment of non pros shall itself be stricken. The portion of the Order temporarily granting Plaintiff's Petition to Open the Judgment of Non Pros is not stricken; however, this Opinion and Order supersedes it.

B. Plaintiff's Petition to Open the Judgment of Non Pros

Pennsylvania Rule of Civil Procedure 3051 provides that a party wishing to open a judgment of non pros must demonstrate that "(1) the petition is timely filed, (2) there is a reasonable explanation or legitimate excuse for the conduct that gave rise to the entry of judgment of non pros, and (3) there is a meritorious cause of action." Only the second of the requirements is before the Court.¹⁹

In support of her Petition, Plaintiff proffers two theories to satisfy the requirement that she provide a reasonable explanation or legitimate excuse for the conduct giving rise to the entry of judgment of non pros. Initially, she argues that the claims she raises against the UPMC Defendants have never required a certificate of merit, and that the Court deprived her of the opportunity to file a motion to determine the necessity of a certificate of merit. Alternatively, Plaintiff contends that the certificate of merit she did file as to the UPMC Defendants, even if defective, constituted "substantial compliance," for the purposes of Rule 126, with the Rules of Civil Procedure governing certificates of merit.

¹⁹ For the purposes of the resolution of Plaintiff's Petition, the UPMC Defendants conceded *arguendo* the timely filing of the petition and the meritorious cause of action.

In the remainder of this section, the Court will first summarize the Rules of Civil Procedure governing professional liability actions and certificates of merit. The Court will then analyze whether Plaintiff's claims even require a certificate of merit; in doing so, the Court will address two threshold issues: 1) whether the Court denied Plaintiff the opportunity to file a motion to determine the necessity of a certificate of merit, and 2) whether the Rules permit Plaintiff to contest the necessity of a certificate of merit following the entry of judgment of non pros. Finally, if necessary, the Court will analyze whether Plaintiff has provided a reasonable explanation or legitimate excuse for the conduct leading to the entry of the judgment of non pros, as well as whether Plaintiff has substantially complied with the Rules relating to certificates of merit.

1. **Rules Governing Professional Liability Actions and Certificates of Merit**

Pennsylvania Rules of Civil Procedure 1042.1 through 1042.12 govern “civil action[s] in which a professional liability claim is asserted by... a patient or client of the licensed professional against (1) a licensed professional, and/or (2) a... corporation or similar entity where the entity is responsible for a licensed professional who deviated from an acceptable professional standard....”²⁰ A subset of those Rules govern certificates of merit.

Rule 1042.3 requires a plaintiff to file a certificate of merit “[i]n any action based upon an allegation that a licensed professional deviated from an acceptable

²⁰ A claim involving a breach of an “acceptable professional standard” differs from ordinary negligence in that it requires the factfinder to address questions involving professional judgment, as opposed to questions of judgment “within the common knowledge and experience of the factfinder.” *Smith v. Friends Hosp.*, 928 A.2d 1072, 1075 (Pa. Super. 2007).

professional standard....” There are no exceptions to this requirement; even in cases which do not require expert testimony, the plaintiff must file a certificate of merit asserting as much. Rule 1042.3 requires an attorney or pro se plaintiff to certify that one of the following three circumstances is true:

“(a)(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.”

The language of Rule 1042.3(a)(1) deals with situations in which a defendant, whether an individual or an entity, harmed the plaintiff by deviating from acceptable professional standards. Conversely, the language of Rule 1042.3(a)(2) plainly specifies that it refers solely to allegations that the defendant is liable for *other* licensed professionals who deviated from acceptable professional standards – in other words, vicarious liability. Accordingly, the note to Rule 1042.3(a)(2) states that “[t]he purpose of this subdivision is to ensure that a claim of vicarious liability made against a defendant is supported by a certificate of merit.” Rule 1042.3(b)(2) further provides:

“If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file

(i) a separate certificate of merit as to each claim raised, or

(ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2).”

Prior to 2008, the Rules of Civil Procedure “permit[ted] the entry of a judgment of non pros [even when] a plaintiff may believe that the rules governing certificates of merit do not apply and... provide[d] for the entry of a judgment of non pros [without] notice of intent to enter such a judgment.”²¹ To address these concerns, the Supreme Court of Pennsylvania adopted Rules 1042.6 and 1042.7 to create a scheme by which the court could determine the need for a certificate of merit when the parties disagreed on that matter.

As discussed above, Rule 1042.6(a) requires written notice of the intention to file a praecipe for judgment of non pros for failure to file a certificate of merit. Rule 1042.6(b) lists certain situations, not applicable here, in which notice is not required. Rule 1042.6(c) states in its entirety:

“Upon the filing of a notice [of intention to file a praecipe for judgment of non pros], a plaintiff may file a motion seeking a determination by the court as to the necessity of filing a certificate of merit. The filing of the motion tolls the time period within which a certificate of merit must be filed until the court rules upon the motion. If it is determined that a certificate of merit is required, the plaintiff must file the certificate within twenty days of entry of the court order on the docket or the original time period, whichever is later.”

The note following Rule 1042.6(c) states: “The motion may be filed at any time prior to the entry of a judgment of non pros. Once the judgment of non pros is

²¹ Pa. R.C.P. 1042.6, *explanatory comment* – 2008.

entered, a party cannot raise the claim that the filing of a certificate of merit was not required.”

Taken together, the various parts of Rule 1042.6 create a defined procedural method for parties and courts to efficiently determine whether a certificate of merit is necessary in any given case. First, a plaintiff files a complaint, and has sixty days to file a certificate of merit if required. If the plaintiff does not file a certificate of merit, a defendant who believes one is required may provide the plaintiff with notice that it intends to seek a judgment of non pros should the plaintiff fail to file a certificate of merit within the next thirty days. If the plaintiff agrees that a certificate of merit is required, the plaintiff either files one or risks the entry of judgment of non pros. If the plaintiff does not believe a certificate of merit is required, the plaintiff may 1) file a certificate of merit anyway; 2) file a motion seeking a determination by the court as to the necessity of a certificate of merit; or 3) do nothing, and await the potential entry of a judgment of non pros. The note to Rule 1042.6(c) explicitly notes that a plaintiff who chooses this third option, and in doing so suffers the entry of a judgment of non pros, waives the right to challenge the necessity of the certificate of merit.

Rule 1042.7 governs the entry of judgment of non pros for failure to file a certificate of merit, stating that the prothonotary “shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit” as long as the following four conditions are met:

“(1) there is no pending motion for determination that the filing of a certificate is not required or no pending timely filed motion seeking to extend the time to file the certificate,

(2) no certificate of merit has been filed,

(3) except as provided by Rule 1042.6(b), the defendant has attached to the praecipe a certificate of service of the notice of intention to enter the judgment of non pros, and

(4) except as provided by Rule 1042.6(b), the praecipe is filed no less than thirty days after the date of the filing of the notice of intention to enter the judgment of non pros.”

2. Requirement for Certificate of Merit and Related Issues

One of Plaintiff’s primary arguments is that the claims she raised in the Original Complaint against the UPMC Defendants did not require a certificate of merit at all, and therefore the failure to file one cannot serve as grounds for the entry of a judgment of non pros. As part of this broader claim, Plaintiff argues that this Court’s March 3, 2022 Opinion and Order deprived her of the opportunity to seek a determination of the necessity of a certificate of merit.

The Court will address this threshold argument first, because if the Court improperly deprived her of a procedurally guaranteed opportunity to argue that a certificate of merit is unnecessary she is entitled, at the very least, to an opportunity to present that argument fully.²² If the Court’s ruling did not deprive Plaintiff of her opportunity to raise the issue, the Court must next consider, in light of the note to Rule 1042.6(c), whether the Rules permit her to do so now. Finally, if necessary, the Court will address the merits of Plaintiff’s argument.

²² Although the parties have touched on the question of whether Plaintiff’s claims require a certificate of merit, they have not fully briefed or argued the issue.

a. **Plaintiff's Opportunity to File a Motion to Determine the Necessity of Filing a Certificate of Merit**

Plaintiff filed her Original Complaint on July 20, 2021, alleging, *inter alia*, that Defendant MacMillen violated the Pennsylvania Code of Ethical Practice and Professional Conduct for licensed counselors as well as other duties licensed mental health professionals owe to their patients. Plaintiff also alleged that the UPMC Defendants are “corporation[s] or similar entities” who were responsible for Defendant MacMillen. The claims against the UPMC Defendants in the Original Complaint used language that could support both vicarious liability and corporate negligence claims.²³ In response to these allegations, the UPMC Defendants filed a notice of intent to enter a judgment of non pros, stating “[t]he judgment of non pros will be entered as to all claims against [the UPMC Defendants].”²⁴

At this point, the Rules of Civil Procedure provided Plaintiff – who did not believe a certificate of merit was required – three choices: 1) file a certificate of merit as to all claims regardless of her belief that a certificate of merit was not required; 2) file a motion to determine the necessity of a certificate of merit pursuant to Rule 1042.6(c); or 3) do nothing. The Rules do not contemplate what Plaintiff here did: file a certificate of merit sufficient to support some, but not all of the claims she intended to bring, while simultaneously noting in a footnote that she believed a

²³ As noted by Plaintiff in her response to the UPMC Defendants’ Preliminary Objection to the Second Amended Complaint, discussed *infra*, “[w]here a corporation is concerned, the ready distinction between direct and vicarious liability is somewhat obscured because... a corporation acts through its officers, employees, and other agents... [and also] assumes the risk of individual agents’ negligence.” *Scampone v. Highland Park Care Center, LLC*, 57 A.3d 582, 597 (Pa. 2012).

²⁴ Emphasis in original.

certificate of merit was not required. Plaintiff's certificate of merit, using only the language of Rule 1042.3(a)(2), certified that "the claim that [the UPMC Defendants] deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for who this defendant is responsible deviated from an acceptable professional standard....." This language "is to be used only when the defendant has 'solely' a vicarious liability claim," and is thus insufficient to satisfy the certificate of merit requirement with respect to corporate negligence claims.²⁵

The Rules of Civil Procedure provide a single method by which a party may lodge a contention that a certificate of merit is not required, and that method is not by written footnote on the face of the certificate. Rather, it is a motion to determine the necessity of a certificate of merit under Rule 1042.6(c). Such a motion "may be filed at any time prior to the entry of a judgment of non pros." Plaintiff learned on August 19, 2021, when the UPMC Defendants filed their notice of intent, that the UPMC Defendants believed a certificate of merit was necessary to support "all claims" against them. It was on this date, when Plaintiff learned there was a disagreement about the necessity of a certificate of merit, that she first had an opportunity to file a motion to determine the necessity of a certificate of merit, more than six months before the entry of the Court's March 3, 2022 Opinion and Order.

Eight days after the UPMC Defendants filed their notice of intention to seek a judgment of non pros, Plaintiff filed the certificate of merit with vicarious liability language only and a footnote indicating that she did not believe the certificate of merit was necessary. Assuming *arguendo* that Plaintiff did not then realize that the

²⁵ *Kennedy v. Butler Memorial Hosp.*, 901 A.2d 1042, 1046 (Pa. Super. 2006).

UPMC Defendants believed the certificate of merit was sufficient to support vicarious liability claims but not corporate negligence claims, it is possible that Plaintiff may have overlooked the opportunity to file a Rule 1042.6(c) motion as to the corporate negligence claims only. This is true even though Plaintiff was responsible for the certificate of merit's language, and she has still offered no explanation for why she included Rule 1042.3(a)(2) language but not Rule 1042.3(a)(1) language in the certificate of merit. In any case, the very latest that Plaintiff can claim she learned of the UPMC Defendants' belief that the certificate of merit did not support corporate negligence claims is November 12, 2021, when the parties thoroughly discussed that issue at the argument on the UPMC Defendant's Preliminary Objections to the Original Complaint.

From November 12, 2021 until March 3, 2022, Plaintiff believed that her corporate negligence claims required no certificate of merit, yet knew that the UPMC Defendants had 1) provided notice they may seek the entry of judgment of non pros as to any claim not supported by a certificate of merit, and 2) believed that Plaintiff's corporate negligence claims were not supported by a certificate of merit. Plaintiff had the opportunity to file a Rule 1042.6(c) motion at any time during this period. Even after the Court entered its March 3, 2022 Opinion and Order dismissing the corporate negligence claims and the UPMC Defendants filed a praecipe for the entry of judgment of non pros on March 4, 2022, Plaintiff *still had six days* in which she could have filed a Rule 1042.6(c) motion, as the Rule permits such a motion to be filed "at any time prior to the *entry* of a judgment of non pros," which did not take

place here until March 10, 2022. The Court can think of no clearer invitation to file such a motion than the UPMC Defendants' praecipe.

In light of Plaintiff's numerous opportunities to file a Rule 1042.6(c) motion, and her refusal to do so in the face of multiple indications that it would be to her benefit, the Court is baffled by her assertion that the March 3, 2022 Opinion and Order denied her the opportunity to seek a determination as to the necessity of a certificate of merit. She had the opportunity to seek such a determination for more than six months prior to the entry of the March 3, 2022 Opinion and Order. She had notice that she failed to do so at her own peril for nearly four months prior to the Opinion and Order. Ultimately, for the six days following the entry of the Opinion and Order, she had explicit notice that unless she filed a Rule 1042.6(c) motion, a judgment of non pros *would be entered against her*. The first action Plaintiff took to attempt to address the issue, however, was to file a purportedly curative certificate of merit, while still maintaining via footnote that it was not necessary to do so, more than a week after the Prothonotary entered the judgment of non pros.

The Court can only surmise that Plaintiff is asserting she is entitled to an opportunity to file a Rule 1042.6(c) motion after learning that *the Court* believes a certificate of merit is necessary – but this cannot be the case, as the Court's belief in this regard is exactly what the filing of Rule 1042.6(c) is meant to reveal. Rather, the Rules clearly provide only the opportunity to file a Rule 1042.6(c) motion after learning that *the defendant* believes a certificate of merit is necessary.

For the foregoing reasons, the Court finds that Plaintiff was not deprived of the opportunity to file a motion to determine the necessity of a certificate of merit.

b. Plaintiff's Ability to File a Certificate of Merit at this Stage

As explained above, the note to Rule 1042.6(c) provides that a motion to determine whether a certificate of merit is necessary “may be filed at any time prior to the entry of a judgment of non pros,” but “[o]nce the judgment of non pros is entered, a party cannot raise the claim that the filing of a certificate of merit was not required.” Here, a judgment of non pros was entered on March 10, 2022, and therefore Plaintiff is precluded from raising the claim that a certificate of merit is not required after that date. Thus, the only way Plaintiff may now assert that a certificate of merit is not required is if she somehow “raise[d] the claim” prior to the entry of judgment of non pros.

It is clear, however, that the reference to “rais[ing] the claim that the filing of a certificate of merit [is] not required” refers specifically to filing a motion seeking a determination of the necessity of a certificate of merit. First, the note to Rule 1042.6(c) directly follows a subdivision discussing such a motion. More importantly, as discussed above, Rule 1042.6 creates a comprehensive procedural scheme for addressing a disagreement between the parties regarding whether a certificate of merit is required. This scheme benefits both parties: it provides the plaintiff with multiple warnings and opportunities to address certificate of merit issues before claims are lost, and it provides the defendant with the opportunity to obtain clarity and finality with respect to whether a certificate of merit is required relatively early in litigation. This procedural scheme mentions only one way to “raise the issue”: the filing of a Rule 1042.6(c) motion.

This interpretation is buttressed by Rule 1042.7, which lists four requirements that must be met before the prothonotary may enter a judgment of non pros for failure to file a certificate of merit. One of these requirements is that “there is no pending motion for determination that the filing of a certificate of merit is not required....” There is no similar requirement that there is no pending claim that a certificate of merit is not necessary, asserted by a party in some manner other than a Rule 1042.6(c) motion.

Ultimately, Rule 1042.6 makes clear that a plaintiff who believes a certificate of merit is not necessary, and wishes to contest a defendant’s assertion that a certificate of merit is necessary, *must* file a Rule 1042.6(c) motion prior to the entry of the judgment of non pros or forever lose the right to contest the assertion. Here, Plaintiff did not file a Rule 1042.6(c) motion prior to the March 10, 2022 entry of judgment of non pros. Therefore, she has lost the right to contest the UPMC Defendants’ assertion that a certificate of merit was necessary to support her claims against them, including claims for corporate negligence.

c. Necessity for Certificate of Merit

Although the Court has concluded that Plaintiff may not now argue her claims do not require a certificate of merit, the Court will briefly explain in the alternative why it believes Plaintiff’s argument would likely fail even if it were permissible at this stage.²⁶

First, the footnote Plaintiff included in each certificate of merit reads:

“Counsel for the Plaintiff does not view this case as a medical malpractice case, but is filing this Certificate since the matter does

²⁶ See footnote 23 *supra*.

involve an allegation that a licensed professional engaged in conduct that fell outside acceptable professional standards.”

Thus, Plaintiff admits that this matter “involves an allegation that a licensed professional engaged in conduct that fell outside acceptable professional standards.” As explained above, Rule 1042.3 requires a plaintiff to file a certificate of merit “[i]n any action based upon an allegation that a licensed professional deviated from an acceptable professional standard.” Thus, the footnote appears to admit that Rule 1042.3 clearly requires certificates of merit in this case.

Second, although Plaintiff accurately notes that she “filed [this case] as a tort for sexual abuse,” it does not necessarily follow that this case does not “raise[] questions of professional judgment beyond the realm of common knowledge and experience....”

The Superior Court of Pennsylvania addressed the need for a certificate of merit for claims of physical and sexual assault in a hospital setting in *Smith v. Friends Hospital*.²⁷ In *Smith*, the plaintiff “alleg[ed] that she sustained injuries during a hospitalization... when she was sexually assaulted by [one hospital employee] and ‘physically assaulted and beaten’ by [multiple hospital employees].”²⁸ The Superior Court held that the plaintiff was not required to file a certificate of merit against the hospital, because the issues raised were within “the realm of common knowledge and experience” of the factfinder and did not allege that the hospital “deviated from

²⁷ *Smith*, 928 A.2d 1072.

²⁸ *Id.* at 1073-74.

an acceptable professional standard....”²⁹ Crucial to that holding, however, was the Court’s determination that:

“[the plaintiff’s] cause of action is based **only** on her allegations that while hospitalized, she was sexually assaulted and beaten. [The plaintiff’s] allegations against the [defendant hospital] center **only** around claims that the [defendant hospital] failed to properly employ and supervised the individual [defendants], who allegedly perpetrated the sexual and physical assaults on [the plaintiff], and that the [defendant hospital] failed to create an environment where such acts could not occur.

Thus, although [the plaintiff’s] claims pertain to an action that occurred within the course of a professional relationship, they clearly do not raise questions involving medical judgment beyond the realm of common knowledge and experience. In fact, they do not raise questions of medical judgment at all. Nothing in [the plaintiff’s] complaint is predicated upon substandard medical treatment, that is, acts involving ‘diagnosis, care and treatment by licensed professionals.’ Therefore, [the plaintiff’s] complaint does not allege professional negligence or a deviation from an acceptable **professional** standard.”³⁰

The instant case is distinguishable from *Smith* in a manner that suggests the need for a certificate of merit. In *Smith*, the plaintiff alleged that the hospital employees committed torts against her, but none of these torts depended upon the tortfeasors’ status as a hospital employee. That is, the plaintiff did not claim that the hospital employees’ assaults were wrongful because they breached *the professional standards governing hospital employees*; rather, her “cause of action [was] based **only** on her allegations... [that did] not raise questions involving medical judgment beyond the realm of common knowledge and experience.”

²⁹ *Id.* at 1075-76. The Superior Court decided *Smith* prior to the enactment of Rule 1042.6, and thus the plaintiff did not have an opportunity to seek a determination of whether a certificate of merit was necessary prior to the entry of a judgment of non pros at the hospital defendant’s behest.

³⁰ *Id.* at 1076 (emphasis in original).

Here, the claims against Defendant MacMillen rest at least partially upon allegations that he violated various requirements of the Pennsylvania Code related to Licensed Professional Counselors, including:

- “a. To act as an ordinary, reasonable licensee under the same or similar circumstances.
- b. To not physically or verbally abuse or threaten clients or patients.
- c. To not undertake or continue a professional relationship with a client or patient, when the objectivity or competency of the licensee is, or could reasonably be expected to be, impaired due to mental, emotional, physiological, pharmacological or substance abuse conditions.
- d. To not engage in sexual intimacies with a current client or patient.”

The Complaint further alleges that MacMillen was negligent by:

- “a. Engaging in behavior that is inappropriate for licensed mental health professionals;
- b. Endangering Plaintiff’s mental and emotional health by engaging in a sexual relationship with her while she was under his care;
- c. Threatening to report Plaintiff’s mental health condition to the Pennsylvania Department of State if she told anyone about their sexual relationship; [and]
- d. Causing Plaintiff to suffer physical and emotional injuries as a result of MacMillen’s behavior.”

With regard to the UPMC Defendants, Plaintiff alleges they breached duties owed to Plaintiff by:

- “a. Placing MacMillen in a position of trust and authority;
- b. Failing to prevent MacMillen from using his position as counselor to sexually abuse Plaintiff;
- c. Failing to prevent MacMillen from committing sexually abusive acts upon Plaintiff on UPMC premises;

- d. Failing to provide a safe environment where patients are not subject to sexual abuse;
- e. Failing to properly investigate the actions of agents, servants, and/or employees to ensure that patients were subjected to safe and appropriate health care professionals;
- f. Failing to institute, implement and ensure compliance with policies to ensure the safety of patients being treated on their premises;
- g. Failing to institute, implement, and ensure compliance with policies that regulated and monitored one-on-one interactions and that could result in foreseeable sexual abuse;
- h. Failing to sufficiently monitor MacMillen while he was on hospital property and thereby prevent him from acting in a dangerous manner; and
- i. Other negligent actions and omissions that may be disclosed through the course of discovery.”

These allegations, based as they are on standards applicable to licensed counselors only, are consistent with Plaintiff's apparent admission that this case involves a deviation from an acceptable professional standard. The Court does not view questions of how “an ordinary, reasonable [licensed counselor] under the same or similar circumstances” would act as within the “realm of common knowledge and experience.” Similarly, issues touching upon sexual interactions between a licensed counselor and a patient involve “[a]cceptable professional standards” that are not “within the common knowledge and experience” or a layperson. Plaintiff alleges not only that MacMillen sexually assaulted her, but that he breached a professional duty “[t]o not engage in sexual intimacies with a current client or patient.” These allegations are not coterminous; Plaintiff could still prevail at trial by showing that MacMillen breached his professional duty not to engage in sexual intimacy with her even if the factfinder does not ultimately conclude that what occurred constituted

“sexual assault” independent of the counselor-client relationship. In short, it appears that Plaintiff’s claims raise quintessential questions of “professional standards,” which require certificates of merit without exception.

d. Summary of Necessity of Certificate of Merit Issue

First, the Court concludes that it did not deprive Plaintiff of the opportunity to seek a determination as to whether any of her claims required a certificate of merit. On the contrary, Plaintiff had uncommon opportunity to seek such a determination and ample notice that the failure to do so could forever waive her right to do so. Plaintiff did indeed lose her right to seek that determination through her failure to file a Rule 1042.6(c) motion prior to the entry of judgment of non pros on March 10, 2022. Finally, even if Plaintiff were permitted to now argue that her claims do not require a certificate of merit, the Court finds this contention dubious.

For the foregoing reasons, the Court finds that Plaintiff’s failure to file either a certificate of merit with respect to her corporate negligence claims or a Rule 1042.6(c) motion concerning those claims means that the entry of the judgment of non pros was procedurally sound. The Court must now consider Plaintiff’s arguments that she is entitled to the opening of the judgment of non pros under the “substantial compliance” standard of Rule 126 or the “reasonable explanation or legitimate excuse” standard of Rule 3051.

3. Rule 126 and Rule 3051

Pennsylvania Rule of Civil Procedure 126 reads, in its entirety, as follows:

“The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or

proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.”

The first of the two sentences in Rule 126 is mandatory, directing that the Rules of Civil Procedure *shall* be construed to secure the just, speedy and inexpensive determination of civil actions. The second of the sentences is discretionary: it generally “does not *require* the trial court to disregard procedural defects; rather, it *permits* the trial court, in the exercise of its discretion, to do so where the substantive rights of the opposing party have not been prejudiced.”³¹ There are, however, situations in which a court’s refusal to excuse a procedural error or defect runs afoul of the directive in the first sentence of Rule 126 or some other provision of law, constituting an abuse of discretion.³²

Rule 3051 governs relief from judgments of non pros and provides that:

“if the relief sought includes the opening of the judgment, the petition shall allege facts showing that

- (1) the petition is timely filed,
- (2) there is a reasonable explanation or legitimate excuse for the conduct that gave rise to the entry of judgment of non pros, and
- (3) there is a meritorious cause of action.”

³¹ *Slaughter v. Allied Heating*, 636 A.2d 1121, 1125 (Pa. Super. 1993) (emphasis in original).

³² For instance, in *Anthony Biddle Contractors, Inc. v. Preet Allied American Street, LP*, 28 A.3d 916 (Pa. Super. 2011), a defendant filed its answer on March 1, 2010, a mere thirty-five days before the initial discovery deadline of April 5, 2010. The plaintiff served discovery requests on March 4, 2010, and when it had not received full responses by April 13, 2010 the plaintiff moved to extend the discovery deadlines. The trial court denied this request without explanation. The Superior Court reversed, holding that although the plaintiff should have filed its motion to extend prior to the April 5, 2010 discovery deadline, such a minor issue was “precisely the type of procedural defect that Pa. R.C.P. 126 contemplates” and the plaintiff’s April 13, 2010 filing demonstrated substantial compliance with the Rules of Civil Procedure. The Superior Court ultimately deemed the trial court’s denial of the motion to extend deadlines to be in the nature of a discovery sanction, and found the trial court’s harsh sanction “unjustifiable in light of the minor nature of [the plaintiff’s] violation.”

Courts analyzing whether a party has provided a sufficient “reasonable explanation or legitimate excuse” generally analyze the specific factual circumstances raised.³³

The seminal case discussing the application of Rules 126 and 3051 to certificate of merit requirements is *Womer v. Hilliker*. A recent unpublished Superior Court memorandum opinion,³⁴ *Monger v. Encompass Health Rehabilitation Hospital of Reading, LLC*,³⁵ discusses the application of *Womer* to factual circumstances similar to those at hand.

a. Womer v. Hilliker

The Supreme Court of Pennsylvania discussed the application of Rules 126 and 3051 to certificate of merit procedures in *Womer v. Hilliker*. Addressing Rule 126 first, the Court explained that Rule’s purpose as follows:

“[O]ur Rules of Civil Procedure are essential to the orderly administration and efficient functioning of the courts. Accordingly, we expect litigants will adhere to procedural rules as they are written, and take a dim view of litigants who flout them. That said, we have always understood that procedural rules are not ends in themselves, and that the rigid application of our rules does not always serve the interests of fairness and justice. It is for this reason that we adopted Rule 126... [which] incorporated equitable considerations in the form of a doctrine of substantial compliance... giving the trial courts the latitude to overlook any ‘procedural defect’ that does not prejudice a party’s rights. Thus, while we look for full compliance with the terms of our rules, we provide a limited exception under Rule 126 to those who commit a misstep when attempting to do what any particular rule

³³ See, e.g., *Sabo v. Worrall*, 959 A.2d 347 (Pa. Super. 2008).

³⁴ Superior Court I.O.P. 65.37 provides that “unpublished, non-precedential, memorandum decision[s] of the Superior Court filed after May 1, 2019... may be cited for their persuasive value” in parties’ citations of authorities in filings in Superior Court filings. This Court cites such opinions to the extent their reasoning may be helpful to the Court’s analysis and the parties’ understanding of the issues, both now and during any eventual appeal.

³⁵ *Monger v. Encompass Health Rehabilitation Hospital of Reading, LLC*, 273 A.3d 1042 (Table), 2022 WL 402949 (Pa. Super. Feb. 10, 2022).

requires... at every stage of any action or proceeding to which the civil procedural rules apply.”³⁶

The Court explained the bounds of “substantial compliance” by comparing two cases. First, in *Pomerantz v. Goldstein*, the defendant filed a motion for new trial rather than exceptions as required by the Rules of Civil Procedure; the only defect in the filing was the heading, and “the defendant [asserted] that but for the title on his pleading, he complied with [the relevant] rule.”³⁷ The Supreme Court of Pennsylvania “observed that the defendant’s pleading was filed in a timely fashion; that the objections it contained were set forth just as the rule required; and that had the pleading been properly titled, it would have been disposed of on the merits, rather than upon the erroneous caption.”³⁸ Thus, the Supreme Court directed the trial court “to consider the defendant’s motion as properly-filed exceptions,” as the defendant “had substantially complied with the requirements of [the] rule and no prejudice would result” from overlooking the defect.³⁹

By contrast, in *Sahutsky v. H.H. Knoebel Sons*, the plaintiffs directly appealed from the entry of a judgment of non pros without first filing a Rule 3051 motion as the Rules required.⁴⁰ The Supreme Court determined that “the plaintiffs failed to file even a procedurally flawed petition,” and “reiterated that [Rule 126] was not meant to excuse non-compliance with [the Rules of Civil Procedure] when a party had made no attempt to conform.”⁴¹

³⁶ *Womer*, 908 A.2d at 276 (emphasis in original; internal citations omitted).

³⁷ *Id.* at 276-77 (citing *Pomerantz v. Goldstein*, 387 A.2d 1280 (Pa. 1978)).

³⁸ *Id.* at 277 (citing *Pomerantz*, 387 A.2d at 1281).

³⁹ *Id.* (citing *Pomerantz*, 387 A.2d at 1282).

⁴⁰ *Id.* at 277 (citing *Sahutsky v. H.H. Knoebel Sons*, 782 A.2d 996 (Pa. 2001)).

⁴¹ *Id.* (citing *Sahutsky*, 782 A.2d at 1000-01).

The Court then addressed the application of Rule 126 to a failure to file a certificate of merit. The plaintiff in *Womer* had filed a complaint alleging that an ophthalmologist damaged his vision by negligently performing surgery.⁴² The plaintiff filed neither a certificate of merit nor a motion to extend the time for filing a certificate of merit;⁴³ rather, he provided the defendant with an expert report that he alleged “included all of the information that [Rule 1042.3] requires.”⁴⁴ The plaintiff further averred that:

“his failure to file the required [certificate of merit] was due to his counsel’s oversight or mistake; ... that [the defendant] would not be prejudiced by [opening the judgment]; that the purpose of [Rule 1042.3] had been served; that he promptly took steps to open the judgment upon learning of its entry; and that he possessed a meritorious case.”⁴⁵

At the outset, the Supreme Court held that “Rule 126 is available in professional liability actions and may be applied to [Rule 1042.3] as long as its requirements... are met.”⁴⁶ The Court determined, however, that because the plaintiff “took no steps to comply with” Rule 1042.3 by filing the required certificate of merit, his failure constituted “a wholesale failure to take [an] action[] that [a Rule of Civil Procedure] requires” and was therefore not excusable under Rule 126. The Court emphasized that Rule 126 does not protect “a party who does nothing that a rule requires, but whose actions are consistent with the objectives he believes the rule serves,” and explained that Rule 126 is not available to “a party who disregards

⁴² *Id.* at 272.

⁴³ *Womer* took place before the enactment of current Rule 1042.6(c) allowing a plaintiff to file a motion to determine the necessity of a certificate of merit.

⁴⁴ *Id.* at 272-73.

⁴⁵ *Id.* at 273.

⁴⁶ *Id.* at 276.

the terms of a rule in their entirety and determines for himself the steps he can take to satisfy the procedure that we have adopted to enhance the functioning of the trial courts.”⁴⁷

The Court next addressed the availability of relief under Rule 3051, governing the opening of judgments of non pros. The Court first explained that Rule 3051, which requires a party to demonstrate a “reasonable explanation or legitimate excuse,” provides an alternate avenue for relief separate from Rule 126 and its “substantial compliance” standard.⁴⁸ In light of the plaintiff’s conduct, however, the Court rejected the plaintiff’s argument that his “honestly held” belief that he had complied with the purposes of Rule 1042.3 constituted a “reasonable explanation or legitimate excuse” for his failure to file a certificate of merit.⁴⁹

b. **Monger v. Encompass Health Rehabilitation Hospital of Reading, LLC**

On February 10, 2022, a panel of the Superior Court issued an unpublished, non-precedential, memorandum decision in *Monger v. Encompass Health Rehabilitation Hospital of Reading, LLC*.⁵⁰ In *Monger*, the plaintiff filed a complaint asserting claims of both direct and vicarious liability against various defendant hospitals; the plaintiff timely filed certificates of merit.⁵¹ Although “the heading of each certificate of merit asserted that claims were raised pursuant to both paragraphs (a)(1) and (a)(2) under Rule 1042.3,” the text of the certificates “completely omitted the confirmatory language required by Rule 1042.3(a)(1) and

⁴⁷ *Id.* at 278.

⁴⁸ *Id.* at 279.

⁴⁹ *Id.* at 280.

⁵⁰ *Monger*, 2022 WL 402949.

⁵¹ *Id.* at *1.

'contained only language under paragraph (a)(2) but repeated that language two times."⁵² "Thus," the Superior Court noted, "no certificate of merit was filed to support [the plaintiff's] claims for direct liability."⁵³

More than two years after the filing of the certificates of merit, the defendant hospitals filed petitions for judgments of non pros as to direct liability, alleging that the certificates of merit were defective.⁵⁴ The plaintiff argued that the certificates of merit were sufficient, did not acknowledge any errors, did not request leave to amend them, and did not provide any excuse for their failure to contain language supporting corporate liability.⁵⁵ After argument, the trial court entered judgments of non pros on the corporate negligence claims and denied the plaintiff's subsequent petitions to open the judgments.⁵⁶

On appeal, the plaintiff argued that Rules 126 and 3051 each functioned to provide her relief, because she "offered a reasonable explanation for failure to file a correctly worded certificate of merit and... substantially complied with the certificate of merit rule."⁵⁷ Thus, the plaintiff averred, the trial court committed an abuse of discretion or error of law when it refused to open the judgment of non pros or permit her to file an amended certificate of merit.⁵⁸ Ultimately, the plaintiff argued that the text of the certificates was a clerical error, as clearly demonstrated by the repetition of the (a)(2) language. Thus, she argued, the Court should excuse this error, as

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at *2,

⁵⁸ *Id.*

“cases about the certificate of merit rule establish that judgments of non pros entered as a result of an attorney’s oversight, as opposed to a deliberate disregard of the rules, should ordinarily be opened.”⁵⁹

The Superior Court first recounted the basis for the trial court’s determination:

“[The plaintiff] was put on notice of the defects on the certificates of merit from all four [defendant hospitals]. Their petitions [requesting the entry of judgment of non pros] provided all the necessary information to correct the deficient certificates of merit prior to filing any response to the petitions, prior to oral argument, and prior to the entry of the judgments. There is no excuse for why [the plaintiff] did not discover any defects earlier; instead, [the plaintiff] simply denied all four petitions that stated identical problems by alleging that the certificates of merit were correct. Thus, [the plaintiff] did not make any effort to determine whether the allegations in [the four] petitions [for entry of judgment of non pros] were true. [The plaintiff] simply labeled [the] allegations as being ‘misguided.’”⁶⁰

The Superior Court concluded from this explanation that the trial court had not denied the plaintiff’s petitions merely because they were defective, but also because the plaintiff received “ample notice regarding deficiencies in the certificates” yet “refused to take corrective action....”⁶¹ The Superior Court also noted the trial court’s rejection of the plaintiff’s claim of a scrivener’s error, finding the suggestion that local counsel “would retype forwarded certificates of merit for electronic filing” implausible.⁶²

In light of the trial court’s reasoning, the Superior Court agreed that the plaintiff had not provided a reasonable explanation or legitimate excuse for the conduct giving rise to the entry of judgment of non pros, and was thus not entitled to

⁵⁹ *Id.*

⁶⁰ *Id.* at *4.

⁶¹ *Id.*

⁶² *Id.*

open that judgment under Rule 3051.⁶³ The Superior Court noted that between the first petition filed by a defendant on November 27, 2019 and the argument on the petitions on January 28, 2020, the plaintiff had more than sixty days to take action to cure any defect in the certificates of merit.⁶⁴ Instead, the Court noted, the first action the plaintiff took regarding the certificates of merit was the February 27, 2020 filing of a petition to open the judgments of non pros, three months after she received notice of the alleged deficiencies.⁶⁵

The Superior Court explained that cases involving “courts [that] have excused clerical errors and procedural missteps regarding certificates of merit” were readily distinguishable, because:

“In those decisions, missing and/or defective certificates of merit were discovered only **after** the entry of judgment *non pros* and counsel had no opportunity to take corrective action before the entry of judgment. In contrast, [the plaintiff] learned of the errors in her certificates of merit well **before** the entry of judgment of *non pros*, over two months before oral argument and the trial court entered judgments. [The plaintiff] did nothing to correct the error, causing the litigation to halt and prompting entry of judgments of *non pros*.”⁶⁶

The plaintiff’s course of action, the Superior Court held, did not support a finding of a reasonable explanation or legitimate excuse for the conduct leading to the entry of judgment of non pros, “even if an alleged scrivener’s error was initially a legitimate excuse for the defects....”⁶⁷

The Superior Court similarly dismissed the plaintiff’s contention that Rule 126 entitled her to relief because she had substantially complied with the requirements of

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at *5.

⁶⁷ *Id.*

Rule 1042.3.⁶⁸ The Court held that the plaintiff “made no attempt to conform with Rule 1042(a)(1) despite clear, advance notice of procedural defects.”⁶⁹ Thus, the Superior Court concluded, “there was simply no compliance with Rule 1042(a)(1).”⁷⁰

c. Application to Instant Case

The facts of record here are similar, though not identical, to those in *Monger*. Like in *Monger*, Plaintiff filed certificates of merit that contained language supporting only vicarious liability claims under Rule 1042.3(a)(2) and omitting the language of Rule 1042.3(a)(1) supporting corporate negligence claims. Like in *Monger*, Plaintiff was put on notice many months before the entry of the judgment of non pros that the certificate of merit she filed was at least potentially deficient regarding corporate negligence claims. Like in *Monger*, Plaintiff took no action to remedy the defective certificate of merit – or even to seek a determination whether it was, in fact, deficient by filing a motion pursuant to Rule 1042.6(c) – until after the filing of the judgment of non pros. Like in *Monger*, Plaintiff contends that the filing of a Rule 1042.3(a)(2) certificate of merit is sufficient to establish substantial compliance with the requirements of Rule 1042.1 to file a certificate of merit with respect to corporate negligence claims. Ultimately, like in *Monger*, with regard to corporate negligence claims, Plaintiff simply did not file a certificate of merit and thus did not comply with Rule 1042.3(a)(1) at all.

Certainly, there are a number of differences between the instant case and *Monger*. Here, Plaintiff does not attribute the failure to file a certificate of merit

⁶⁸ *Id.* at *6.

⁶⁹ *Id.*

⁷⁰ *Id.*

containing Rule 1042.3(a)(1) language to a scrivener's error or counsel's oversight; rather, Plaintiff contends that a certificate is not necessary. For the reasons discussed above, however, Plaintiff brings that claim too late, and she does not otherwise provide an explanation for why the certificate of merit contained only Rule 1042.3(a)(2) language when Plaintiff intended to bring claims for corporate negligence). Unlike the plaintiff in *Monger*, Plaintiff does attempt to explain why she took action regarding the certificates of merit when she did, more than a week after the entry of the judgment of non pros: she was awaiting a suggestion by *the court* that her certificate of merit was deficient. As explained above, however, the Rules of Civil Procedure do not entitle her to such a determination. Plaintiff had ample notice of the fact that the UPMC Defendants considered her certificate of merit deficient as to the corporate negligence claims, and it is this notice that let Plaintiff know she could file a Rule 1042.6(c) motion and would risk losing certain claims and defenses if she did not do so.

Ultimately, the similarities between the instant case and *Monger* are far more significant than the differences. Plaintiff has not provided a reasonable explanation or legitimate excuse for why her first action to rectify the deficient certificate of merit occurred on March 22, 2022, and she has not demonstrated reasonable compliance with the requirement to file a certificate of merit as to any corporate negligence claims she wished to assert. Plaintiff argues:

“The purpose of a certificate of merit is to ‘help eliminate frivolous claims of professional negligence and, possibly to help hasten prosecution of the same.’⁷¹ Conversely, ‘the absence from the record of a COM signals to the parties and the trial court that none of this is so and that nothing further should transpire in the action, except for the

⁷¹ *Almes v. Burket*, 881 A.2d 861, 866 (Pa. Super. 2005).

lawsuit's termination.⁷² Here, Plaintiff, by and through counsel, in fact filed a Certificate of Merit in this matter prior to the entry of Judgment of Non Pros. Additionally, since the time of the Court's Order, Plaintiff immediately took action to remedy the defect.

The certificate of merit procedure was not created to artificially limit the theories of liability against a defendant that is brought into court and belongs there, and to deny Plaintiff the opportunity to cure the defect in this case, would be contrary to the purpose of the intent behind the rule.”

Contrary to Plaintiff's argument, however, when the Prothonotary entered the judgment of non pros on March 10, 2022, there was an absence from the record of any certificate of merit *as to corporate negligence claims*. That absence *did signal to the UPMC Defendants* that no such claims existed. The UPMC Defendants' Counsel's surprise when counsel for Plaintiff stated at the November 12, 2021 argument that Plaintiff did in fact intend to bring such claims demonstrated that they had relied on the plain language in the certificate of merit asserting that Plaintiff's claims sounded “solely” in vicarious liability.⁷³ As detailed above, there were multiple actions Plaintiff could have taken after receiving notice of the issue at the November 12, 2021 argument. She did not take any of these actions.

For these reasons, the Court finds that Plaintiff is not entitled to relief from the judgment of non pros under either Rule 3051 or Rule 126.

4. Petition to Open Judgment of Non Pros and Plaintiff's Motion for Reconsideration

Ultimately, Plaintiff's failure to file a certificate of merit sufficient to support corporate negligence claims led to the entry of judgment of non pros on all such

⁷² *Womer*, 908 A.2d at 275-76.

⁷³ This strongly suggests that the failure to include Rule 1042.3(a)(1) language in the certificate of merit was not an “error or defect of procedure” of the sort that Rule 126 excuses, but was rather an error or defect of substance.

claims against the UPMC Defendants. Plaintiff's procedural arguments concerning the necessity of a certificate of merit are unavailing. Plaintiff has not demonstrated a "reasonable explanation or legitimate excuse" for the course of action she led to the entry of the judgment of non pros, and thus Rule 3051 does not entitle her to relief from the judgment of non pros. Furthermore, because she took no action until after the entry of the judgment of non pros, despite months of notice that the UPMC Defendants believed a certificate of merit was required, Plaintiff did not substantially comply with Rule 1042.3(a)(1). Therefore, she is not entitled to this Court's discretionary relief for procedural errors under Rule 126.

For these reasons, the Court will deny Plaintiff's Petition to Open the Judgment of Non Pros. The March 10, 2022 judgment of non pros is reinstated and shall remain in effect.

With regard to Plaintiff's Motion for Reconsideration of this Court's March 3, 2022 Opinion and Order, the parties agree that the Court erred when it granted the UPMC Defendants' First Preliminary Objection to the Original Complaint on the grounds of the inadequacy of the certificate of merit, as the objection had not raised that issue. However, the March 10, 2022 judgment of non pros was entered because the four requirements of Rule 1042.7 were satisfied; thus, the grounds upon which the judgment of non pros was entered were entirely independent of the Court's March 3, 2022 Opinion and Order. Similarly, the valid judgment of non pros as to all claims for corporate negligence bars such claims independent of the March 3, 2022 Opinion and Order. For these reasons, the Court agrees with the UPMC

Defendants that Plaintiff's Motion for Reconsideration of the March 3, 2022 Opinion and Order is moot.

C. UPMC Defendants' Preliminary Objections to Second Amended Complaint

The final matter remaining for consideration is the UPMC Defendants' Preliminary Objection to Plaintiff's Second Amended Complaint. This Preliminary Objection concerns Paragraph 93(i) of the Second Amended Complaint, which reads as follows:

"93. [T]he UPMC Defendants by and through their employees, representatives, agents, ostensible agents, servants and/or representatives, including MacMillen [and various named and unnamed employees] breached their duties and were negligent, both generally and in the following specific respects:

...

i. The failure of Dr. Stayton, as MacMillen's supervisor, as well as other Behavioral Health personnel with supervisory authority over MacMillen:

i. to ensure that MacMillen stopped treating Plaintiff, when based upon the reports made against MacMillen, coupled with the investigation into his conduct, and his alcohol arrests, that he lacked the requisite judgment and stability to treat patients;

ii. to ensure that MacMillen was not unsupervised in his office with Plaintiff after receiving reports of his sexual misconduct with Plaintiff;

iii. to ensure that MacMillen complied with protocols regulating his interactions with clients, particularly those that could result in foreseeable sexual misconduct;

iv. to ensure that MacMillen was properly supervised in his treatment of patients, particularly female patients, following an investigation into a relationship with a client;

v. to ensure that MacMillen was being appropriately monitored in his treatment of patients, particularly Plaintiff."

The UPMC Defendants contend that although Paragraph 93(i) is contained within the only count against them in the Second Amended Complaint, titled “Vicarious Liability – Negligence,” Paragraph 93(i) sounds in corporate negligence, thus blending causes of action in a manner forbidden by Rule 1020(a).

Rule 1020(a) provides: “The plaintiff may state in the complaint more than one cause of action cognizable in a civil action against the same defendant. Each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief.” Each of these separate counts must be “self-sufficient” and “include[] averments of facts pertaining to the particular claim and relief sought.”⁷⁴ The Superior Court has explained that, typically, “a separate cause of action requests different relief for different harms.”⁷⁵

In *Thompson v. Nason Hosp.*, the Supreme Court of Pennsylvania embraced the doctrine of corporate negligence as available to Pennsylvania litigants, separate from vicarious liability.⁷⁶ Whereas vicarious liability is a theory by which a hospital (or other employer) may be “liable for the negligent acts of its staff,” a corporate negligence claim alleges that a hospital “is directly liable for its own negligence” in violating duties of care it owes to a patient directly.⁷⁷ The duties a hospital owes to its patients directly can be broken down into four categories:

“(1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice

⁷⁴ *Com. v. Parisi*, 873 A.2d 3, 9 (Pa. Cmwlth. 2005).

⁷⁵ *Trackers Raceway, Inc. v. Comstock Agency, Inc.*, 583 A.2d 1193, 1196 (Pa. Super. 1990). This is as opposed to “[a]lternate theories of recovery,” which “are different means for obtaining the same relief for the same harm caused by the same party.” *Id.*

⁷⁶ *Thompson*, 591 A.2d 703.

⁷⁷ See *Welsh v. Bulger*, 698 A.2d 581, 583 (Pa. 1997).

medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules.”⁷⁸

The UPMC Defendants contend that Paragraph 93(i) of the Second Amended Complaint implicates the “duty to oversee all persons who practice medicine within [their] walls,” and is thus a corporate negligence claim embedded within a vicarious liability count. Ultimately, the UPMC Defendants argue that “[t]he allegations of paragraph 93(i) fit squarely within a corporate negligence theory... Simply stated, a duty owed by a hospital to a patient in the context of a medical professional liability action (supported by Certificates of Merit) could only be brought as a corporate negligence claim.”

Plaintiff responds that Paragraph 93(i) is concerned not with any duty the UPMC Defendants owed to Plaintiff *directly*; rather, it is premised on the UPMC Defendants’ vicarious liability for various *employees’ or agents’* breaches of duties that those employees and agents owed to Plaintiff. Plaintiff argues that the allegations in Paragraph 93(i) “specifically delineate the duties breached by Dr. Stayton and other currently unnamed Behavioral Health personnel,” and are grounded on factual averments in the Second Amended Complaint detailing “Dr. Stayton’s direct involvement in overseeing Plaintiff’s care, through her supervision of MacMillen, and her inadequate oversight of the care provided to Plaintiff.” Plaintiff disagrees with the UPMC Defendants’ assertion that allegations of the type brought by Paragraph 93(i) can *only* be brought under a corporate negligence theory, arguing that “vicarious liability can encompass an employee’s breach of their duty to

⁷⁸ *Thompson*, 591 A.2d at 707.

supervise others rendering care.”⁷⁹ Ultimately, Plaintiff argues that the possibility of formulating certain claims as corporate negligence does not preclude a claim for vicarious liability, noting the Supreme Court of Pennsylvania has explained “[w]here a corporation is concerned, the ready distinction between direct and vicarious liability is somewhat obscured because... a corporation acts through its officers, employees, and other agents... [and] assumes the risk of individuals agents’ negligence.”⁸⁰

The Court agrees with Plaintiff that the allegations in Paragraph 93(i), when read in the context of the entire Second Amended Complaint, are appropriately grounded in vicarious liability rather than corporate negligence. Specifically, the central legal theory of Paragraph 93(i) is not that the UPMC Defendants owed a duty directly to Plaintiff, but that various individual agents of the UPMC Defendants owed duties to Plaintiff individually, and the UPMC Defendants are vicariously liable for their individual agents’ breaches of those duties.

The UPMC Defendants argue that the language of the Second Amended Complaint does not support this determination, but the Court finds the language sufficient in this regard. As Plaintiff explains, the Second Amended Complaint avers that agents of the UPMC Defendant received notice of MacMillen’s sexual misconduct but did not act to stop it for many months, and were similarly aware of other behavioral issues that should have alerted them that MacMillen was not fit to

⁷⁹ Plaintiff cites *Scampone v. Grane Healthcare Co.*, 11 A.3d 967 (Pa. Super. 2010), for this proposition. In *Scampone*, the Superior Court held that the defendant corporation was “subject to vicarious liability for the acts and omissions of its agents regarding the quality of care rendered to patients” when those agents “failed to supervise the staff properly because the staff failed to ensure that [the decedent] had proper fluids, nourishment and medication in the days leading up to her death.”

⁸⁰ *Scampone v. Highland Park Care Center, LLC*, 57 A.3d 582, 597 (Pa. 2012).

render services as a licensed counselor. Paragraphs 72 through 80 of the Second Amended Complaint, comprising a section titled “The Failure to Protect Plaintiff,” detail specific alleged failures to act by named and unnamed agents of the UPMC Defendants, each of which Plaintiff contends harmed her by allowing MacMillen’s behavior to continue. Although the Second Amended Complaint would have been more clear had it explicitly stated that each of these failures violated duties those individual agents owed to Plaintiff, the various averments and allegations in the Second Amended Complaint as a whole sufficiently ground Paragraph 93(i) in vicarious liability.

Furthermore, at argument, Plaintiff affirmed that the allegations against the UPMC Defendants in the Second Amended Complaint sound solely in vicarious liability. The heading of Count I specifies that it brings a claim of “Vicarious Liability – Negligence.” The final paragraph of Count I, Paragraph 95, consistently avers that Plaintiff would not have suffered harm “[b]ut for the actions and/or omissions of the aforementioned UPMC Defendants’ agents, servants, ostensible agents, and/or employees....” This Paragraph does not contend that the UPMC Defendants’ own breaches, such as a breach of their duty to oversee all persons practicing within their walls, caused Plaintiff’s harm. Thus, Paragraph 93(i), and Count I when read as a whole, contain language that confines Plaintiff’s claims to vicarious liability and does not risk allowing Plaintiff to inject corporate negligence claims at a future date.

For these reasons, the Court will overrule the UPMC Defendants’ Preliminary Objection to Plaintiff’s Second Amended Complaint.

ORDER

AND NOW, for the foregoing reasons, the Court hereby ORDERS as follows:

- The UPMC Defendants' Motion for Reconsideration of this Court's April 14, 2022 Order is GRANTED. The second sentence of that Order, striking the March 10, 2022 judgment of non pros, is STRICKEN from the Order. The portion of the Order granting the Petition to *open* the judgment of non pros remains as originally written, and is superseded by this Opinion and Order entered November 10, 2022.
- Plaintiff's Petition to Open the Judgment of Non Pros is DENIED.
- The March 10, 2022 judgment of non pros as to Plaintiff's corporate negligence claims against the UPMC Defendants is REINSTATED and shall remain in effect.
- Plaintiff's Motion for Reconsideration of this Court's March 3, 2022 Opinion and Order is DISMISSED AS MOOT.
- The UPMC Defendants' Preliminary Objection to Plaintiff's Second Amended Complaint are OVERRULED. The UPMC Defendants shall file an Answer to the Second Amended Complaint within twenty (20) days of this Order.

IT IS SO ORDERED.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/jcr

cc: Richard Serbin, Esq.

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