

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RUTH V. FRY, Administratrix of the Estate of : No. 21-0566
John H. Van Buskirk, Jr., a/k/a John Harvey :
Van Buskirk, Jr., a/k/a John H. Van Buskirk, : CIVIL ACTION – LAW
Plaintiff :
vs. :
MUNCY VALLEY HOSPITAL, :
Defendant :

OPINION AND ORDER

AND NOW, after argument on Plaintiff’s Motion Seeking Determination of the Necessity of Filing a Certificate of Merit, the Court hereby issues the following Opinion and Order.

BACKGROUND

Plaintiff Ruth V. Fry (“Plaintiff), in her capacity as Administratrix of the Estate of John H. Van Buskirk, Jr. (“Mr. Van Buskirk”), commenced this action by filing a Complaint on June 14, 2021. Plaintiff avers that Mr. Van Buskirk suffered a stroke in March of 2019, and was thereafter a resident at the skilled nursing facility of Defendant Muncy Valley Hospital (“Defendant”)¹. Plaintiff alleges that on July 2, 2019, Defendant transported Mr. Van Buskirk from its facility to a doctor’s appointment in a van owned and operated by Defendant and its employees, and after the appointment transported him back to the facility in the van. Plaintiff alleges that during transport “[Mr.] Van Buskirk was in a wheelchair and securely locked....” Plaintiff alleges that, upon returning to Defendant’s facility, “an employee of

¹ Plaintiff’s Complaint initially named Defendant as “UPMC Susquehanna Muncy Skilled Nursing & Rehabilitation Center.” On July 1, 2021, Plaintiff filed an Amended Complaint naming Defendant as “Muncy Valley Hospital,” and Defendant filed a Consent to Amend Complaint under Rule of Civil Procedure 1033 concurring in the amendment.

Defendant unhooked the lock from Mr. Van Buskirk’s wheelchair and abandoned supervision and control over Mr. Van Buskirk in his wheelchair,” causing him to roll backwards down a ramp and crash, suffering serious injuries. Relevant to the instant Motion, Plaintiff filed this lawsuit as sounding in tort, rather than professional liability.²

On August 4, 2021, Defendant filed a Notice of Intention to Enter Judgment of Non Pros for Failure to File a Certificate of Merit.³ Plaintiff responded by filing a Motion Seeking Determination of the Necessity of Filing a Certificate of Merit on August 17, 2021.⁴ This Motion was briefed and argued on October 26, 2021, and is the sole matter before the Court.

ANALYSIS

Pleadings in general civil actions are governed by Pennsylvania Rules of Civil Procedure 1017 through 1034. Additional requirements are imposed, however, on civil cases that constitute “professional liability actions.” These requirements are detailed in Rules 1042.1 through 1042.12.

I. Rules of Civil Procedure 1042.1 through 1042.12

Rule 1042.1(a) defines a professional liability action as:

“[A] civil action in which a professional liability claim is asserted by or on behalf of a patient or client of the licensed professional against
(1) a licensed professional, and/or

² On the Civil Cover Sheet filed along with her Complaint, Plaintiff checked a box indicating the lawsuit was in the category of “Tort – Other” and wrote “Nursing Home Negligence” on the line to further describe the action. Plaintiff did not check any of the four subcategories of “Professional Liability” action, which are “Dental,” “Legal,” “Medical,” and “Other Professional.” The differences between the two actions are discussed in detail *infra*.

³ See Pa. R.C.P. 1042.6(a), discussed *infra*.

⁴ See Pa. R.C.P. 1042.6(c), discussed *infra*.

(2) a partnership, unincorporated association, corporation, or similar entity where the entity is responsible for a licensed professional who deviated from an acceptable professional standard....”

Rule 1042.1(c)(i) defines a “licensed professional” to include “any person who is licensed pursuant to an Act of Assembly as... a health care provider as defined by [the MCARE Act.]”⁵

Rule 1042.2 directs that “[a] complaint [in a professional liability action] shall identify each defendant against whom the plaintiff is asserting a professional liability claim.” Plaintiff’s Complaint does not indicate that she is asserting a professional liability claim against Defendant.

Rule 1042.3, adopted by the Supreme Court of Pennsylvania on January 27, 2003, created the requirement for 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... within sixty days after the filing of the complaint....”⁶ The requirement that plaintiffs file a certificate of merit in these cases was enacted “to weed out clearly nonmeritorious lawsuits early in the litigation process.”⁷ A certificate of merit must be signed by the attorney (or party) and indicate that either:

“(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

⁵ 40 P.S. § 1303.503. Neither party disputes that Defendant is “a... corporation... or similar entity... responsible for a licensed professional....”

⁶ Pa. R.C.P. 1042.3(a); *Warren v. Folk*, 886 A.2d 305, 307 (Pa. Super. 2005).

⁷ *Warren*, 886 A.2d at 307.

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 this claim.”⁸

The failure to file a certificate of merit when one is required allows an adverse party to obtain a judgment of non pros.⁹ A party seeking to obtain such a judgment must file written notice of its intention to do so.¹⁰

Rule 1042.6(c) provides that “[u]pon the filing of a notice [of intention to file a praecipe for judgment of non pros for failure to file a certificate of merit], a plaintiff may file a motion seeking a determination by the court as to the necessity of filing a certificate of merit.”¹¹ The filing of a Rule 1042.6(c) motion tolls the time for filing a certificate of merit, and if the Court determines a certificate of merit is required the plaintiff will have the greater of 20 days after the entry of the order so ruling or the remainder of the original 60 day time period.¹²

⁸ Pa. R.C.P. 1042.3(a)(1)-(3).

⁹ Pa. R.C.P. 1042.7.

¹⁰ Pa. R.C.P. 1042.6(a).

¹¹ Pa. R.C.P. 1042.6(c).

¹² *Id.*

Here, Plaintiff filed an action naming as Defendant an organization responsible for licensed professionals. Plaintiff did not file a certificate of merit along with the Complaint, and did not file the Complaint as a professional liability action. Defendant filed written notice of its intention to file a praecipe for judgment of non pros for failure to file a certificate of merit pursuant to Rule 1042.6(a), and Plaintiff responded by filing a Rule 1042.6(c) motion seeking a court ruling on whether a certificate of merit is required. The sole question before the Court is whether this case is “[an] action based upon an allegation that a licensed professional deviated from an acceptable professional standard,” which would require Plaintiff to file a certificate of merit.

II. Case Law

It is well-established that the need for a certificate of merit depends on the nature of the action and not the identity or status of the defendant; a claim based on common law principles rather than the violation of a professional standard of care does not require a certificate of merit even if the defendant is a licensed professional.¹³ Rather, a certificate of merit is only required for claims of professional negligence, as opposed to ordinary negligence. The Superior Court of Pennsylvania explained the distinction between these two types of claims in *Merlini ex rel. Merlini v. Gallitzin Water Authority*:

“To prevail in any negligence action, the plaintiff must establish the following elements: the defendant owed him... a duty; the defendant breached the duty; the plaintiff suffered actual harm; and a causal relationship existed between the breach of duty and the harm. In a

¹³ See *Merlini ex rel. Merlini v. Gallitzin Water Authority*, 934 A.2d 100 (Pa. Super. 2007).

professional malpractice action, the determination of whether there was a breach of duty requires the plaintiff to additionally show that the defendant's conduct fell below the relevant standard of care applicable to the rendition of the professional services at issue. In most cases, such a determination requires expert testimony because the negligence of a professional encompasses matters not within the ordinary knowledge and experience of laypersons."¹⁴

In *Merlini*, the plaintiff alleged that a contractor working for the defendant water authority trespassed on her property and constructed a water line without any right to do so. The trial court granted a judgment of non pros for failure to file a certificate of merit. The plaintiff appealed, arguing that even though the defendant was a licensed professional, a certificate of merit was not required because "it is simply a basic rule of law that no one can come upon another's property and lay pipes without documentation authorizing the same...."¹⁵ The Superior Court of Pennsylvania agreed, holding that:

"The duty that [the plaintiff] alleges was breached was not a professional duty – that is, the allegations do not raise questions of professional judgment beyond the realm of common knowledge and experience. [The defendants] may have had professional duties to [the parties for whom they were installing the water line] to oversee the water line installation in accordance with appropriate engineering

¹⁴ *Merlini*, 934 A.2d at 104 (internal citations omitted).

¹⁵ *Id.* at 102.

standards of care (and if those duties were breached, they would give rise to a professional negligence action). The duty allegedly owed [the plaintiff], however, was not professional in nature [but]... is one which any third party would owe a property owner, and whether or not that duty was breached does not require a professional judgment....”¹⁶

Pennsylvania Courts have had numerous occasion to recount the difference between ordinary negligence and medical malpractice, and have consistently cited the description given by the Michigan Supreme Court:

“A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only within the course of a professional relationship. Second, claims of medical malpractice necessarily raise questions involving medical judgment. Claims of ordinary negligence, by contrast, raise issues that are within the common knowledge and experience of the [fact-finder]. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the

¹⁶ *Id.* at 105-06.

action is subject to the procedural and substantive requirements that govern medical malpractice actions.”¹⁷

III. Argument

Defendant contends that the certificate of merit requirement is very broad, as evidenced by the fact that the Rules of Civil Procedure require a certificate of merit even in those professional liability actions that will not require expert testimony. Defendant essentially argues that the professional liability nature of Plaintiff’s claims is self-evident on the face of the Complaint, which discusses that Mr. Van Buskirk “was in the care, custody and control of defendant, its agents, servants and/or employees” during his transport from a medical appointment back to Defendant’s skilled nursing facility.

Defendant cites *Ditch v. Waynesboro*¹⁸ and *Silverman v. Life Star Companies*¹⁹ as supporting their contention that a certificate of merit is required in the instant case. In *Ditch*, the decedent suffered a stroke and was taken to the emergency department at the defendant hospital.²⁰ Once there, “[w]hile being moved from the emergency department to a hospital room, [the decedent] fell from her hospital bed striking her head on the floor,” suffering injuries which ultimately proved fatal.²¹ The plaintiff argued decedent’s death “was caused by the negligence and carelessness of [the defendant], acting through its employees and agents. Specifically, [the plaintiff] averred that [the defendant] was negligent in failing to

¹⁷ *Bryant v. Oakpointe Villa Nursing Centre*, 684 N.W.2d 864, 871 (Mich. 2004); see, e.g., *Ditch v. Waynesboro Hosp.*, 917 A.2d 317 (Pa. Super. 2007).

¹⁸ *Ditch*, 917 A.2d 317.

¹⁹ *Silverman v. Life Star Companies*, 2017 WL 3839551 (Phila. Ct. Com. Pl. 2017).

²⁰ *Ditch*, 917 A.2d at 319.

²¹ *Id.*

properly restrain [the decedent], failing to properly train the staff with regard to proper procedures in transporting patients, and in leaving [the decedent] alone while she was being transported.”²² The plaintiff did not file a certificate of merit, and a judgment of *non pros* was ultimately entered for this reason.²³

On appeal, the Superior Court of Pennsylvania agreed with the trial court that the case sounded in medical malpractice and thus required a certificate of merit.²⁴ The Court rejected the plaintiff’s contention that the case was akin to a “slip and fall” claim that did not raise professional negligence, noting that the decedent:

“was at the hospital to receive medical treatment for her stroke... It was during the course of treatment that someone in the emergency room with medical knowledge made the decision to transport [the decedent] to a regular hospital room. Furthermore, the decision was made to transport [the decedent] without restraints.... These decisions and actions were an integral part of providing medical treatment and, on some level, implicate medical judgments.”²⁵

The Court further held that the question of whether the defendant hospital properly transported the decedent was “a complex medical determination which requires expert testimony to educate juries as to the proper standard of care,” providing further support for the case being classified as sounding in medical malpractice.²⁶

²² *Id.*

²³ *Id.* at 319-20.

²⁴ *Id.* at 324.

²⁵ *Id.* at 323.

²⁶ *Id.*

Defendant also cites *Silverman*, a non-precedential case from the Philadelphia Court of Common Pleas, as persuasive and highly relevant. In *Silverman*, the plaintiff “aver[red] that the negligence of [the defendants] caused a stretcher carrying [the plaintiff] to collapse in a parking lot outside.. a geriatric medical care facility... during [the plaintiff’s] transportation from Thomas Jefferson University Hospital to [the facility].”²⁷ The Court held that the plaintiff’s claim sounded in medical professional liability, because it “[arose] from medical treatment,” and at the time of the injury the plaintiff “was under the care of [the defendants] acting as medical providers.”²⁸ Citing *Ditch*, the Court found relevant that “a medical expert will be required to testify regarding the standard of care for transporting a patient with [the plaintiff’s] particular maladies.”²⁹

Plaintiff argues here that although the injury clearly occurred within the scope of a professional relationship with Defendant, the Complaint does not raise questions of medical judgment beyond the common knowledge of laypersons. Thus, Plaintiff argues, this case is one of ordinary negligence consisting of a breach of a general duty of care, rather than a professional duty of care. Plaintiff notes that, in *Ditch*, the decedent was “receiving medical care at the time of her injury,” and distinguishes that from Mr. Van Buskirk’s injury. Plaintiff argues “Mr. Van Buskirk was not receiving medical treatment from Defendant when the incident occurred. He was coming back from having received medical services from an outside physician. More importantly,

²⁷ *Silverman*, 2017 WL 3839551 at *1.

²⁸ *Id.* at *2. The Court in *Silverman* was not presented with an issue concerning the need for a certificate of merit, but confronted whether the plaintiff’s claim constituted a professional negligence claim for purposes of determining proper venue.

²⁹ *Id.*

Mr. Van Buskirk was in a wheelchair, meaning his medical provider used their medical judgment to determine that a wheelchair was needed to transport him to his doctor's appointment. As such, any medical decision regarding his transportation had already been made."³⁰

Plaintiff further argues that no expert testimony is needed, because the case "involves common sense knowledge. More specifically, knowing to apply the brakes and/or lock to a wheelchair that is left on an incline. This is clearly within the common knowledge of a layperson."³¹

Plaintiff cites *Smith v. Friends Hospital*³² in support of her claim that a certificate of merit is not needed. In *Smith*, the plaintiff sued the defendant hospital for, *inter alia*, negligent supervision of employees after she was sexually assaulted by a number of the hospital's employees while a patient there.³³ The trial court refused to open a judgment of non pros entered for failure to file a certificate of merit.³⁴ The plaintiff appealed, arguing that "the filing of a certificate of merit was not required because her action against the [defendant] did not allege that the [defendant's] actions fell below a **professional** or medical standard; rather, the complaint alleged that the [defendant] had... engaged in negligent supervision of its employees who were engaged in nonprofessional activities."³⁵

³⁰ Plaintiff's Brief, p.4.

³¹ *Id.*

³² *Smith v. Friends Hosp.*, 928 A.2d 1072 (Pa. Super. 2007).

³³ *Id.* at 1073-74.

³⁴ *Id.* at 1074.

³⁵ *Id.* at 1075 (emphasis in original).

The Superior Court reversed the trial court's decision, agreeing with the plaintiff that no certificate of merit was required.³⁶ Citing *Ditch*, the Superior Court emphasized that "claims of medical malpractice necessarily raise questions involving medical judgment," whereas "[c]laims of ordinary negligence... raise issues that are within the common knowledge and experience of the fact-finder."³⁷ The Court emphasized that, to be "subject to the procedural and substantive requirements that govern medical malpractice actions," the claim must "pertain[] to an action that occurred within the course of a professional relationship" and "raise[] questions of medical judgment beyond the realm of common knowledge and experience."³⁸

IV. Discussion

Plaintiff conflates what it contends is clear or obvious negligence with ordinary negligence. The parties agree that Plaintiff's claim "pertains to an action that occurred within the course of a professional relationship." Therefore, the sole question before the Court is "whether [Plaintiff's] claim raises questions of medical judgment beyond the realm of common knowledge and experience." Because Plaintiff's claim implicates questions of the proper transportation and restraint of a person suffering the effects of a stroke and receiving treatment in a skilled nursing facility, matters outside of "the realm of common knowledge and experience," a certificate of merit is required under Pennsylvania law.

The instant case is controlled by *Ditch*. In *Ditch*, the Superior Court emphasized that "[a] layperson's lack of understanding of the effects of a stroke, the

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1075-76.

procedures in treating a stroke victim, as well as moving and monitoring them would necessitate expert testimony....” Here, Mr. Van Buskirk was returning from a medical appointment and was at Defendant’s facility because he was suffering the effects of a stroke. Defendant’s transport of Mr. Van Buskirk in a wheelchair – as opposed to a bed, stretcher, or other means of conveyance – necessarily implicated a medical judgment on some level.

As in *Ditch*, this case cannot be analogized to a “slip and fall,” or, perhaps more pertinently, a case in which a private busing company allows a passenger to fall and sustain injury. A layperson will have some understanding of the pitfalls of public transportation generally; the specific concerns associated with transporting wheelchair-bound patients whose medical conditions require care at a residential facility, however, is far more specialized. Plaintiff’s argument that any layperson can understand the peril likely to result from leaving a wheelchair unsecured on an incline is unavailing, inasmuch as the specific perils involved will depend in large part upon the specific medical conditions and treatment needs of the patient.

Further, Plaintiff’s argument that expert testimony will not be needed does not change this Court’s calculus. Rule 1042.3 contemplates that some medical malpractice claims will not require medical testimony, yet still imposes a requirement to file a certificate of merit in those instances.

CONCLUSION

For the foregoing reasons, the Court finds that a certificate of merit is required. Pursuant to Rule 1042.6, Plaintiff must file a certificate of merit within twenty (20) days of the filing of this Opinion and Order.³⁹

IT IS SO ORDERED this 2nd day of February 2022.

By the Court,

Eric R. Linhardt, Judge

ERL/jcr

cc: Robert Elion, Esq.
Richard Schluter, Esq.
Gary Weber, Esq. (Lycoming Reporter)

³⁹ Rule 1042.6(c) states “[i]f 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.” Here, Plaintiff’s Complaint was filed on June 14, 2021, meaning the “original time period” of sixty days following the filing of the Complaint expired August 14, 2021. This period was not tolled, as Plaintiff’s Motion Seeking Determination of the Necessity of Filing a Certificate of Merit – while timely filed prior to the entry of a judgment of non pros – was not filed until August 17, 2021, after the expiration of the original time period. Therefore, the later of the two dates mentioned in Rule 1042.6(c) is twenty days from the date of the Opinion and Order.