the Quarterly Dose

Your Health Care Litigation Prescription

MARSHALL DENNEHEY

Thank you to all who attended our 2026 seminar!

INSIDE THIS ISSUE

ALL RISE

Recent Victories and Success Stories

Justin Johnson, **Ryan Gannon**, and **Heather LaBombardi** (all Roseland) successfully obtained a no-cause jury verdict in a 13-day wrongful death trial. The decedent, a 59-year-old man, was admitted to the emergency room on February 15, 2019, with complaints of abdominal pain, decreased appetite, and constipation, despite the use of laxatives. The patient did not complain of any nausea, vomiting, or diarrhea. He had a significant medical history including diabetes, hypertension, prior coronary artery stenting, morbid obesity (with past gastric bypass surgery), longstanding ventral hernia, and back pain. A CT scan revealed multiple hernias and a potential closed-loop bowel obstruction, leading to a surgery consultation. Our client, an emergency general surgeon, interpreted that the patient did not have a closed loop or any significant obstruction and recommended non-surgical management. The patient was approved to have clear liquids, and had a vomiting incident shortly after, but our client was not notified. The patient was returned to NPO status, and after improving overnight, he was returned to "clears" and additional medical and renal consults were ordered. Our client did not receive any communications from the residents/nurses of any changes in the patient's condition. On February 18, 2019, two rapid responses were called due to increased heart rate and vomiting. It is believed that the vomiting resulted in aspiration, causing sepsis, ultimately leading to the patient's death. During the trial, the plaintiff's sole medical expert highlighted imaging on the wrong hernia, which called into question all of his opinions in the case. We made key objections related to the expert testimony, limiting what the allegations were and preventing new allegations from being made. After approximately two and a half hours of deliberating, the jury returned a no-cause verdict. The trial team was assisted by paralegal Elina Sheldon.

Lynne Nahmani (Mount Laurel) and **Justin Johnson** (Roseland) successfully had a directed verdict affirmed in Gloucester County Superior Court. The decedent, a 72 year-old man, was a resident at a rehabilitation center where he received treatment for encephalopathy, obesity, DM, HTN, UTI, respiratory failure, dysphagia, and needing assistance with activities of daily life, including eating. The plaintiffs alleged that the decedent's care plan was not met when he was eating alone in his room and choked, requiring emergency efforts. The patient never regained consciousness and passed away two days later in the hospital. A directed verdict for our client was entered on October 12, 2023. The plaintiff appealed and the appellate court affirmed the decision, opining on the requisite causation required under both negligence and the Resident Rights Act Statute in New Jersey. The trial team was assisted by **Walt Kawalec** on appeal and paralegal Dana Fiorelli.

Kimberly House (Philadelphia) achieved a significant appellate victory in the Pennsylvania Superior Court that reversed the trial court's decision and remanded the case for reinstatement of the jury verdict, which was originally won by **Gary Samms** (King of Prussia/Philadelphia). At trial, the jury returned a defense verdict finding that the defendant's negligence was not a cause of the plaintiff's injuries. The trial judge granted the plaintiff's post-trial motions and ordered a new trial solely on the issue of damages. The Superior Court found that the trial court abused its discretion in finding that causation was disputed and that the jury's finding of no causation was against the weight of the evidence. Kim authored the appellate brief and delivered the oral argument that secured the reversal. The underlying medical malpractice case involved claims seeking more than $5 million in damages, where Gary successfully demonstrated that the plaintiff's alleged serious eye injuries—including a detached retina and macular hole—were unrelated to the care provided by an orthopedic and physical therapy practice, exposing critical flaws in the plaintiff's case.

Gary Samms (King of Prussia/Philadelphia) successfully defended an anesthesiologist and pain management physician in a complex medical malpractice matter involving extra-articular facet joint injections which allegedly led to cauda equina syndrome, urinary and fecal incontinence, ED and other serious complications. After six days, a Delaware County jury found on behalf of the physicians. Experts in the case included anesthesiology, pain management, neurosurgery, neurology, neuroradiology, and urology experts. The defense verdict was dependent on successfully relaying the subtle and complex issues in the medical care and the nerves considering the patient's past medical history, as well as the medications used in the procedure. Plaintiffs were critical of ten different aspects of the doctor's procedure, but with expert testimony and cross examination, Gary and his team were able to prevail. Instrumental to the defense were **David McColloch** (King of Prussia) and **Nancy Farnen**.

Gary Samms, **Adam Fulginiti** (Philadelphia), and **Ryan Harvie** (Philadelphia) successfully obtained a defense verdict during arbitration in a medical malpractice case. Our client performed major reconstructive surgery for a patient with a highly complex and longstanding history of severe right foot problems. The surgery included bunion repair to straighten the right big toe, along with the fusion of multiple tarsometatarsal joints and resection of bone wedge to re-align the foot. Additionally, the procedure included correction of bone that previously healed incorrectly from a prior fracture, along with the shortening of another bone to reduce pressure. To facilitate healing, the surgery required taking bone from the right heel to support multiple areas of reconstruction, as well as inserting a metal pin in the joint to keep it straight. The plaintiffs alleged that our client failed to properly evaluate the patient and perform the surgery at issue, resulting in the misalignment of the forefoot, altering the patient's weightbearing forms, causing increased pressure. The plaintiff argued that these complications required three additional surgeries to correct. We emphasized that the plaintiff presented to our client with a long history of severe foot problems that not only hindered his functional capacity, but manifested in other complications, particularly with his knees and back, which required him to undergo multiple surgeries in those areas long before the time at issue. Given the severity of

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Recent Victories and Success Stories

the plaintiff's presenting foot problems, surgical treatment required a highly complex procedure with significant risks and potential complications. Our client discussed all of these issues with the plaintiff, who understood them and elected to proceed. Thereafter, our client's operative note, along with the intraoperative fluoroscopy imaging, demonstrated he performed the surgery at issue appropriately and consistent with the standard of care. The plaintiff's postoperative course, including the clinical manifestations that developed and the subsequent surgeries he received, constituted a series of known complications/outcomes regarding the complex surgery he underwent. An arbitration verdict was made in favor of our client. The trial team was assisted by paralegal Nancy Farnen.

Jessica Wachstein and **Dylan Trochtenberg** (both of Mount Laurel) successfully obtained a motion to dismiss for failure to serve an appropriate affidavit of merit in a medical malpractice case. The plaintiff's decedent was a resident of our client, a nursing home, from May 19, 2023, through May 28, 2023. The plaintiff alleged that, as a result of the negligent care provided by our client and the co-defendant, the decedent developed wounds and ultimately passed away on September 13, 2023. The plaintiff made claims of medical malpractice and wrongful death against all defendants. We had previously filed a motion to dismiss the malpractice claims due to failing to file within the statute of limitations, which was granted on January 16, 2026. At that time, only the wrongful death claim persisted. The plaintiff provided only an affidavit of merit from a geriatric physician and failed to serve any AOMs from experts in the field of nursing standard of care or nursing home administration, even after the Ferreira Conference. We moved to dismiss due to failure to serve the appropriate or required AOMs, which was ultimately granted on April 10, 2026.

Jessica and **Dylan** also had a Motion for Summary Judgment granted in a personal injury and negligence matter. The plaintiff nurse filed suit after suffering a fall while transferring a resident at our client's facility. He alleged injuries to his neck and nose, which required a cervical epidural injection and a septoplasty procedure. The plaintiff subsequently filed a worker's compensation claim and settled same prior to filing suit in this instant action. After taking the deposition of the plaintiff, we filed a Motion for Summary Judgment, stating that his claims should be barred by the Workers' Compensation Act. After oral argument, our motion was granted and all clients were dismissed, with prejudice.

Suzanne Utke, with the assistance of **Tyler Price** (both of Philadelphia), received a defense verdict for her client, an addiction medicine psychiatrist, after a 12-day trial in Philadelphia involving the death of a 26-year-old who overdosed on illicit substances. The plaintiffs' decedent, a 26-year-old man, had a long history of major spinal surgeries and subsequently went to the codefendants' pain management group for relief, allegedly becoming addicted to Nucynta, an opioid. The plaintiffs' decedent was then referred to our client for detox and rehabilitation to "get off" Nucynta, but failed to disclose his use of other illegal substances. After a period of a "cold turkey" detox from Nucynta, the client scheduled him to receive Vivitrol, a maintenance medication meant to facilitate long-term rehabilitation. A few days before he was to receive the Vivitrol, he was found dead by his father in the bedroom of his apartment with drug paraphernalia present. The medical examiner's toxicology screen was positive for heroin, morphine, Fentanyl, Tranq, Valium, and Nucynta. The trial was 12 days in the Philadelphia Court of Common Pleas, with the defense verdict requiring two days of deliberation. The client was found not negligent. The co-defendant physician and the plaintiffs' decedent were both found negligent with causation, but the comparative negligence apportionment of liability was 65% attributable to plaintiffs' decedent, so no recovery was awarded.

Megan Nelson (Orlando) secured multiple favorable rulings granting Florida Rule 5.900 petitions for expedited judicial intervention concerning medical treatment procedures, enabling hospitals to safely discharge medically cleared patients despite significant resistance from guardians and family decision-makers. Across several matters, Megan successfully addressed situations where guardians, health care surrogates, or family members refused to consent to appropriate discharge plans, declined to provide necessary financial documentation for ICP Medicaid evaluations, or failed to cooperate with case management teams—often causing prolonged, unnecessary hospital stays. Through emergency and evidentiary hearings, courts consistently granted relief, ordering patient transfers to skilled nursing facilities or assisted living facilities, requiring the production of financial records, mandating Medicaid application compliance, and, in one case, appointing an emergency temporary co-guardian to facilitate discharge. As a result of these efforts, patients were promptly and appropriately discharged—sometimes within 24 hours of court orders—demonstrating Megan's effective advocacy in resolving complex guardianship and discharge disputes to ensure proper patient care and hospital throughput. ◆

New Leverage for Defendants: *Burckhardt's* Impact on New Jersey Nursing Home Act Litigation

By: Georgette L. Reid and Lynne N. Nahmani

In a unanimous, unpublished opinion issued on February 24, 2026, the New Jersey Superior Court, Appellate Division, affirmed the dismissal of claims against a rehabilitation facility based on the plaintiffs' failure to prove proximate causation—an essential element of negligence claims as well as claims brought under New Jersey's Nursing Home Act (NHA). Although unpublished, *Burckhardt v. Advanced Subacute Rehabilitation Center at Sewell, LLC* provides important guidance for defendants facing nursing home malpractice and Resident-Rights Act litigation.

Background of the Case

The decedent, Burckhardt, was a 72-year-old resident at Advanced Subacute Rehabilitation Center at Sewell (Advanced). He had numerous medical conditions, including encephalopathy, diabetes mellitus, hypertension, urinary tract infection, respiratory failure, dysphagia, and required assistance with activities of daily living, including eating.

The plaintiffs alleged that Advanced failed to follow Burckhardt's care plan by leaving him alone in his room while eating and failing to follow his care plan. During that time, he choked and required emergency medical intervention and was hospitalized. Burckhardt suffered cardiac arrest and died two days later. His children, the Estate representatives, filed suit against Advanced, alleging negligence and violations of the NHA based on the alleged failure to appropriately "monitor" him during meals as care planned for.

Trial Court's Ruling

After five days of testimony, the trial court granted a directed verdict in favor of Advanced, dismissing all claims. The court concluded that the plaintiffs failed to present sufficient evidence of proximate causation. Specifically, Advanced argued, previously via summary judgment and again at trial, that neither of the plaintiffs' medical experts offered sufficient testimony establishing that the alleged lack of staff presence was a "but-for" or "substantial factor" cause of Burckhardt's injuries and death, as required under New Jersey law.

The trial court agreed. It emphasized that the plaintiffs' nursing expert, Bonnie Tadrick, testified only as to the applicable standard of care and an alleged failure to monitor, but admittedly did not offer an opinion on causation. The plaintiffs' physician expert, Dr. Hood, testified about the mechanics of choking and identified choking as the cause of death. However, Dr. Hood failed to opine that any conduct by the Advanced staff caused, increased the risk or worsened the choking episode. Without expert testimony linking the alleged breach of care to the outcome, the court found the plaintiffs' proofs legally insufficient and dismissed the case.

Appellate Division's Analysis

The Appellate Division affirmed, carefully analyzing the causation requirements for both negligence and NHA claims. The court held that the Estate failed to establish the essential causal link between any alleged lapse in care and Burckhardt's injury.

With respect to Nurse Tadrick, the court noted that while she testified about the standard of care and the need for monitoring, she admitted she was not offering a causation opinion—and could not do so under New Jersey law, which prohibits nurses from testifying about medical causation. Her testimony did not explain how staff presence in the room would have prevented the choking, altered its severity or the ultimate outcome.

As to Dr. Hood, the Appellate Division acknowledged that he was qualified to testify on causation but found his testimony inadequate. Although he explained how choking occurs and identified it as the cause of death, he never testified that the alleged absence ▶

of staff caused the choking or was a substantial factor in producing the injury. He also never opined that the staff failed to timely respond to the alleged incident.

The court stressed that to reach a jury, plaintiffs were required to present evidence from which a jury could reasonably conclude that the absence of staff increased the risk of harm and that earlier intervention would likely have changed the outcome. In this case, the plaintiffs failed to meet that minimal threshold.

Nursing Home Act Claims and Causation

The Appellate Division also squarely addressed whether NHA claims require proof of causation. The Estate argued they did not. The court rejected that argument, holding that causation is required even though the NHA does not explicitly use the word. The court reasoned that damages are, by definition, compensation for harm, and recovery without a causal connection would make little sense.

The court further held that the NHA claims failed for an additional reason: the Estate did not establish a separate or distinct injury attributable to the alleged resident-rights violation. Even if causation had been established, the absence of proof that the alleged NHA violation resulted in an independent injury was fatal to the claim.

Significance of *Burckhardt*

Although unpublished, *Burckhardt* is a meaningful decision for defendants in nursing home litigation. The Appellate Division's clear statement that NHA claims require proof of proximate causation—and an identifiable injury tied to the alleged statutory violation—provides defendants with a powerful basis for early motion practice. The decision supports dispositive motions at the summary judgment stage where plaintiffs' experts fail to connect alleged care deficiencies to a specific injury. It also serves as a lesson to defense counsel to renew the dispositive motion grounds at the end of a plaintiff's case, where appropriate. ◆

Practice Spotlight

Dental Malpractice

For health care providers and insurers navigating the complexities of dental malpractice risk, Marshall Dennehey delivers a disciplined, end-to-end defense built on deep clinical understanding and litigation experience. Our health care litigators routinely represent general dentists, oral and maxillofacial surgeons, prosthodontists, periodontists, and endodontists at every stage of a claim—from early risk assessment and pre-suit strategy through trial and appeal—helping clients manage exposure while protecting professional reputations.

With a strong command of applicable standards of care across both routine and advanced procedures, our team is well positioned to address high-severity allegations such as surgical complications, permanent nerve injury, infection, missed oral cancer diagnoses, and jaw fractures. We also guide providers through licensing board matters, offering measured, practical counsel aligned with clinical realities.

"Our priority is to give providers and their insurers clarity and control from day one," said Robin Snyder, director of our Health Care Department. "By combining early expert insight with a practical understanding of clinical decision-making, we are able to defend claims effectively while helping clients achieve timely, favorable outcomes." ◆

From Bedside to Bar

This series spotlights attorneys who began their careers in medicine before bringing their clinical insight into the courtroom. Their firsthand experience in patient care gives them a unique perspective—and a powerful advantage—in defending health care providers.

Tyler R. Price, Esq.

Former Nationally Registered Paramedic

Working in emergency medicine demanded sharp critical thinking — recognizing life-threatening conditions, delivering timely interventions, uncovering relevant medical history, and shaping a treatment plan that aligned with a patient's ultimate needs. I was taught to always "bring a shovel" to every encounter, because careful digging almost always revealed the details that mattered most. As an attorney, I still bring that shovel. Thorough investigation and deliberate "digging" into the facts of each case are essential to understanding potential theories of liability, assessing exposure, and evaluating every viable defense. Examining a case from multiple angles and points in the timeline allows me to appreciate how each fact fits into the broader strategy. Although I'm no longer making split second medical decisions, the same disciplined approach guides my litigation work. Every detail counts. For every client, in every matter, my goal is to identify the key facts that allow us to build the strongest possible defense. My training in emergency medicine gave me the tools, mindset, and discipline that now make me an effective litigator.

Megan J. Nelson, Esq.

Registered Nurse

My nursing career has been a significant asset to my work as a medical malpractice defense attorney. A Registered Nurse since 2010, I have extensive, hands-on clinical experience across high-acuity settings. My background in neonatal and pediatric critical care (including work in the NICU, PICU, pediatric cardiac ICU, and pediatric emergency department) and experience managing critically ill patients (including those requiring ECMO and cardiac bypass) gives me a practical understanding of complex medical care, clinical decision-making, and the realities of fast-paced health care settings often central to malpractice claims. This firsthand knowledge allows me to analyze medical records with precision, communicate effectively with experts and providers, and identify nuances that may be overlooked by those without clinical training. In my current work on Rule 5.900 petitions for expedited judicial intervention regarding medical treatments, this clinical foundation is especially critical, as I am often tasked with effectively "educating" the court during emergency hearings—translating complex medical conditions, interventions, and risks into understandable terms for the judge. I am also able to prepare providers for testimony in a way that ensures clarity and accuracy under pressure. Ultimately, my clinical foundation enables me to bridge the gap between medicine and law, strengthening my ability to build compelling defenses grounded in real-world health care practice. ◆

Casual Care, Serious Consequences: How Informal Prescribing Can Trigger Medical Board Scrutiny

By: Steven A. Johnston, Esq.

The lesson for health care practitioners is that regular review of the regulatory requirements can ensure compliance and that casual prescribing may be in violation of state regulations if the necessary components are not met.

Consider the following scenario: in December 2025, a medical provider renewed a prescription for a long-standing telemedicine patient receiving a Schedule II controlled dangerous substance. This was not a violation of the New Jersey Administrative Code. Another provider doing the same action for an equally situated patient in March 2026 would be in violation. The casual prescriber who is not aware of newer regulatory requirements may have a more difficult time responding to a medical board complaint.

Medicine is a highly-regulated helping profession. Without addressing the merits of this regulatory burden, the practice of medicine continues to see drastic changes impacting the everyday life of patient and provider. Telemedicine, COVID-19, and other advances and roadblocks, present a challenge to those saving lives while attempting to comply with the rules of practice. Physicians often discover—through real cases and the lens of regulatory expectations—that even well-intentioned informal help can be reinterpreted as stepping outside mandated professional boundaries, and seemingly harmless actions can be construed as deviations from required practice standards specifically outlined in Title 13, Chapter 35, Subchapters 7.1A of the New Jersey Administrative Code.

Title 45, “Professions and Occupations,” of the New Jersey code governs the practice of medicine, nursing, optometry, pharmacy, and many other professional occupations. Section 9 specifically addresses the state board of medical examiners and allows for the creation of rules and regulations in Section 45:9-5.3. These regulations can be found in the New Jersey Administrative Code Title 13, Chapter 35. While broad in scope, Chapter 35 contains a subchapter dedicated to the administration and dispensing of prescription drugs. Such knowledge will arm physicians with the tools they need to prevent a negative outcome if a medical board complaint is filed. Likewise, attorneys must be familiar with these regulatory requirements when advising and defending providers.

In New Jersey, N.J.A.C. Section 13:35-7.1A(a) requires that a practitioner conduct an examination and appropriately document the same within the medical record before dispensing drugs or issuing prescriptions. The examination must include an “appropriate history and physical examination,” a diagnosis based upon the examination and any testing consistent with good medical care, the formulation of a therapeutic plan discussed with the patient, and the availability of appropriate follow-up care. There are only six exceptions to this requirement:

1. In admission orders for a newly hospitalized patient
2. For a patient of another physician for whom the practitioner is taking calls

3. For continuation medications on a short-term basis for a new patient prior to the patient's first appointment

4. For an established patient who, based on sound medical practice, the physician believes does not require a new examination before issuing a new prescription

5. For a patient examined by a healthcare professional who is in collaborative practice with the practitioner

6. When treatment is provided by a practitioner for an emergency medical condition

Emergencies are also limited to situations where someone's health is in serious jeopardy, there is serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.

During the COVID-19 pandemic, then New Jersey Governor Phil Murphy issued an executive order declaring a public health emergency and a state of emergency that allowed authorized prescribers to prescribe Schedule II controlled dangerous substances via telemedicine. The order was terminated when he left office earlier this year and the state reverted to the requirement of an initial in-person examination and quarterly in-person visits. With this return to prior regulatory requirements, practitioners subject to the jurisdiction of the board of medical examiners may benefit from a refresher on the regulatory limitations on their practice now that the pandemic-era flexibilities have ended.

This new requirement may create confusion for prescribers and lead to casual prescribing of medication in violation of the regulations, even in the setting of recurrent telemedicine appointments as noted in the example above. Casual prescribing can take many forms: filling a prescription request from a friend or family member without an examination or contemporary medical record; using telemedicine to expand your practice without proper in-person appointments or documentation in the medical record; failing to ensure appropriate follow-up care for a "one time" prescription; etc.

Although not all board complaints end in a publicly available opinion, serious deviations from regulatory requirements can shine a light on practices that will require action by the board if a complaint is received. Consider the following cases:

- In October 2025, the board issued a final consent order in an administrative action where a doctor provided opioids without examination and his license was permanently revoked. *In re Robert Dela Gente, D.O.,* N.J. State Bd. of Med. Exam'rs Oct. 21, 2025. Criminal charges were filed (though that is not always the case).

- In a September 2025 consent order, a physician was reprimanded for "prescribing opioids several months in advance without the proper patient follow-up..." and explained that they did so for "patients who can not pay for multiple visits to refill medications." *In re A/an E. Schultz, M.D.,* N.J. State Bd. of Med. Exam'rs Sept. 25, 2025.

- Another physician was suspended and placed on probation in a consent order for prescribing three patients the weight-loss medication "Ozempic" via text messages through a website called "Push Health" and without any further communication with the patients or taking a medical history. *In re Laura E. Purdy, M.D.,* N.J. State Bd. of Med. Exam'rs Aug. 29, 2025.

- A June 2025 interim consent order required a "full evaluation and assessment of [a physician's] general knowledge and skill, with specific emphasis on his knowledge of and ability to safely prescribe [controlled dangerous substances]" due to his failure to review a patient's prior medical history and medical record, assess and review the prescription monitoring program before prescribing CDS, and conduct random urine screens on a patient that tested positive for CDS upon admission to his practice because "he trusted the patient." *In re Donald Oh, M.D.,* N.J. State Bd. of Med. Exam'rs June 2, 2025.

Each of these examples demonstrate a failure to follow strict procedure regardless of the intention. Failing to follow procedure secondary to good intentions, such as considering a patient's financial constraints, trust in the patient, or utilizing a new

telemedicine service platform, will not be a defense to a board complaint. Especially when practicing via telemedicine, practitioners must ensure they are adhering to the appropriate regulatory standard.

A provider who calls in a prescription for a traveling friend or family member or agrees to prescribe medication for individuals using the newest phone app will have a hard time meeting the requirements of N.J.A.C. Section 13:35-7.1A. Even if a history was taken, a "therapeutic plan" was created, and "follow up care" was provided, the prescriber would still not be in compliance with the regulation without an in-person examination. In our opening hypothetical, the prescriber's behavior did not change between December and March; however, the legal shift in the regulatory landscape made once acceptable behavior a violation as a required examination did not occur.

When complaints are made with regard to informal prescribing, the board has discretion to employ measures to encourage compliance in lieu of formal proceedings such as a private, written warning; suspending fines subject to continuing compliance; medical or professional treatment as may be necessary; medical or diagnostic testing and monitoring; skills assessment; corrective training; participation in outreach programming; or contribution to the consumer fraud protection fund.

The lesson for health care practitioners is that regular review of the regulatory requirements can ensure compliance and that casual prescribing may be in violation of state regulations if the necessary components are not met. Even compliant providers who had not conducted an in-person examination for telemedicine patients during the COVID-19 emergency would be in violation of the regulations as of January 2026 for the same practice. Practitioners should be diligent in adhering to the prescribing rules to avoid sanctions related to casual care. Likewise, attorneys advising or defending practitioners before the board must be aware of the in-person examination requirements for prescribing in New Jersey whether the care in question took place in-person or in a telemedicine setting.

We are pleased to announce the addition of two new Medical Malpractice attoneys!

Maria R. Granaudo – Shareholder, Wilmington | **Susan L. Derasmo** – Associate, Roseland

LEGAL ROUNDUP

Case Law Updates

Pennsylvania

By: Benjamin J. Phelps, Esq.

Pennsylvania Superior Court Clarifies Legal Standard for Jury Instruction on Increased Risk of Harm in Medical Malpractice Cases

Matthews v. Hosp. of the Univ. of Penn., 2026 WL 537727 (Unpublished) (Feb. 26, 2026)

In this appeal, the Superior Court of Pennsylvania clarified in an important unpublished opinion, the requirements for plaintiffs to obtain a jury instruction on increased risk of harm in medical malpractice actions.

At trial, the plaintiff presented expert testimony from a maternal fetal medicine expert that the attending physicians deviated from the standard of care by delaying C-section delivery after monitoring fetal heart rate decelerations. The plaintiff also elicited testimony from a pediatric neurologist that minor-plaintiff was at risk for stroke based on diminished fetal heart tracings and blood flow. Importantly, the plaintiff failed to present any expert testimony that the defendants' alleged failure to timely initiate a C-section delivery caused or increased the risk of harm of minor-plaintiff's injury. Prior to the jury charge, the court denied the plaintiff's request for an instruction on increased risk of harm. Ultimately, the jury found that the defendants' conduct was not the factual cause of minor-plaintiff's harm and awarded no damages. The plaintiff appealed, asserting that the trial court's decision to not charge the jury on increased risk of harm was a clear abuse of discretion and error of law.

The Pennsylvania Suggested Standard Civil Jury Instructions provide for a "relaxed" causation charge under specific circumstances. This instruction on increased risk of harm provides, in relevant part, as follows:

Where the plaintiff presents expert testimony that the negligent act or failure to act or delay on the part of the defendant has increased the risk of harm to the plaintiff, this testimony, if found credible, provides a sufficient basis from which you may find that the negligence was a factual cause of the injuries sustained.

Pa. SSJI (Civ.) 14.20.

On appeal, the Superior Court affirmed the trial court's decision denying plaintiff's request for an instruction on increased risk of harm. The court held that in order for plaintiffs to be entitled to the jury charge, they must provide expert testimony, to a reasonable degree of medical certainty, that the acts and omissions complained of could cause the type of harm suffered. Since the plaintiff failed to present expert testimony that the defendants' alleged failure to timely initiate C-section delivery caused or increased the risk of harm of the brain injury suffered by minor-plaintiff, the plaintiff was not entitled to the increased risk of harm instruction at trial.

The Superior Court's decision is helpful for health care defendants, as it clarifies the legal standard necessary for plaintiffs to demonstrate a basis for instructing the jury on increased risk of harm, which has been diluted over time. Litigants in medical malpractice cases should cautiously analyze each element of expert testimony at trial to ensure this standard has been satisfied when it is anticipated the plaintiff will request an instruction on increased risk of harm. ◆

SIDEBAR

News and Happenings

We are pleased to share that attorneys from our health care team have been selected to the 2026 New Jersey and Pennsylvania Super Lawyers and Rising Stars lists. Their dedication to clients and commitment to high-quality work continues to strengthen our firm! Please join us in congratulating:

NJ Super Lawyers: **Robert T. Evers** and **Justin F. Johnson**

NJ Super Lawyer Rising Stars: **Nataliana A. Guida**

2026 Pennsylvania Super Lawyers: Alyson J. Kirleis and **Gary M. Samms**

2026 Pennsylvania Rising Stars: Holli K. Archer and **Daniel Dolente**

Victoria Scanlon (Scranton) was a faculty presenter at the 2026 American Roentgen Ray Society (ARRS) Annual Meeting in Pittsburgh. She participated in the "Resident Symposium: Producing Quality Reports," focusing her presentation on "How to Write a Great Report: Malpractice Lawyer's Perspective." Vicky, the only attorney presenter for this two-hour segment, was joined by several health care professionals including diagnostic radiologists, an interventional radiologist, an internal medicine physician, and a radiologist turned AI entrepreneur expert.

Matthew Keris (Scranton), President of the Pennsylvania Association for Health Care Risk Management (PAHCRM) and shareholder in our Scranton Health Care Department, presented an important and timely session titled "Keynote Address: A Conversation with RaDonda Vaught on Criminalizing Errors" at PAHCRM's Annual Meeting in April. RaDonda is a former Tennessee nurse widely known for being criminally convicted in 2022 of negligent homicide and gross neglect after a 2017 fatal medication error at Vanderbilt University Medical Center. Her case gained national attention because she was criminally prosecuted rather than just facing licensing board action, sparking debate over blaming individual nurses for systemic healthcare failures. Matt and RaDonda's conversation explored one of the most consequential issues in health care risk management today—how systems respond to human error, and what it means for patient safety, accountability, and the professionals who serve on the front lines.

Gary Samms (King of Prussia/Philadelphia) was a panelist for a podcast hosted by the Medical Liability Monitor, "From Outliers to Pattern: The Increasing Predictability of Megaverdicts in the Med-Mal Industry – and How to Reduce the Likelihood of Getting Hit with One." Gary discussed the changing megaverdict landscape and why "outlier" verdicts are becoming structural, in addition to how plaintiffs turn weaknesses into megaverdicts (including building emotional narrative and jury psychology).

Thank you to our clients who joined us for our *Trends in Health Care & Health Law seminar.*

Led by our Health Care Department Director and Assistant Director, **Robin Snyder** and **Donna Modestine**, the session explored key issues that are currently shaping outcomes in health care litigation.

We owe a debt of gratitude to our esteemed guest speaker, **Mary Ellen Nepps, Esq.**, Senior Counsel, University of Pennsylvania, who presented "Medical Malpractice Litigation: Driving Another Health Care Crisis in Pennsylvania."

And special thanks to our attorneys who presented and shared their insights, including **John J. Hare** and **Holli Archer** who discussed "Highlights in PA Medical Malpractice Law;"

David Drake for his presentation, "From Claims to Courtroom: Key Trends in NJ Medical Malpractice Litigation;" and

Matthew Keris with an "Update on Health Care Tech Discovery."