

# the Quarterly Dose

Your Health Care Litigation Prescription



**Robin B. Snyder, Esq.**  
Director, Health Care Department

## Welcome to our first edition of 2026!

It is hard to believe we are approaching Spring already, but we hit the ground running. Three of our health care attorneys were elected to shareholder at our annual meeting in December 2025: Holli Archer, in Philadelphia; Nicholas Cerimele, in Pittsburgh; and Nataliana Guida, in Roseland. Please join me in congratulating them on this well-deserved achievement. Nataliana went immediately into trial, as second chair with Justin Johnson, in Bergen County, NJ, and achieved a “no cause” verdict two weeks ago!

Elsewhere, the Philadelphia Court of Common Pleas reported an average of 51 medical malpractice filings per month in 2025, which you know is an increase of at least six cases per month as compared to years past, and that means the industry is busy.

We are preparing for our eastern Pennsylvania biennial Medical Malpractice conference which will be held in May, and looking forward to seeing everyone. When that rolls around, the snow will have cleared, the ground thawed and the flowers will be blooming!

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# SIDEBAR

## News and Happenings



**Robert Aldrich** and **Melissa Dziak**, shareholders in our Scranton office, presented a webinar hosted by the Pennsylvania Association for Health Care Risk Management. In “Navigating The Digital Shift: Balancing The Benefits And Legal Risks of Patient Portals,” Rob and Missy discussed mitigation strategies for managing risks associated with the use of patient portals and how the reliance on them impacts medical malpractice laws.



Rob and Missy are also featured speakers at the upcoming Crittenden Medical Liability Conference in Savannah, Georgia, in April. Their presentation, “Patient Portals: The Benefits and Legal Risks,” will examine common exposure areas related to patient portals, including messaging, response times, documentation and data security. Learn more [here](#).



As President of the Pennsylvania Association for Health Care Risk Management, **Matthew Keris** will sit down with RaDonda Vaught at the PAHCRM 2026 Annual Meeting in April. A medication error by Mrs. Vaught ended the life of a patient in 2017, making her the subject of one of the highest-profile healthcare criminal cases in recent years. Matt will hold a discussion with her on the implications of the legal actions that followed and how she became a passionate advocate for safety and improvement. Find out more [here](#).



**Megan Nelson**, an associate in our Orlando office, contributed commentary to an article featured in *Healthcare Risk Management* magazine on best practices and common pitfalls in clinical documentation. Read the article [here](#).



**Robert Evers**, shareholder in our Roseland office, presented to surgical fellows and senior residents at Rutgers Health on best practices to mitigate medical malpractice risks. He also delivered a similar presentation to oral surgeons at Warren Oral Surgery Group.





**Congratulations** are in order for our Department's newly elected shareholders! Each of them has demonstrated exceptional skill, dedication, and leadership in advancing the interests of our clients and strengthening our firm.

**Holli K. Archer**  
Philadelphia

**Nicholas A. Cerimele**  
Pittsburgh

**Nataliana A. Guida**  
Roseland

***We continue to grow our health care team.  
Please join us in welcoming the following associates:***

**Anthony S. Armstrong**  
Pittsburgh

**Hannah L. Graetz**  
Scranton

**Rose M. Hughes**  
Scranton

**Steven A. Johnston**  
Roseland

## ***Wishing a Warm Farewell to Our Retirees***



**Jeff Bates** retired on December 31, 2025. Jeff was a shareholder in our Philadelphia office and his "open door" will be greatly missed. Throughout his career, Jeff tried cases, defended professionals in disciplinary board matters and always served as a tremendous mentor.



**Brad Blystone** also retired at the end of December. He led the Health Care group in Orlando and served as the office's Managing Attorney. Brad's career was defined by integrity, wisdom and unwavering advocacy. He had the reputation not only as a skilled attorney, but also as a trusted counselor and mentor.

*We extend our heartfelt appreciation and sincere gratitude as Jeff and Brad conclude their service and begin a well-earned retirement!*

# ALL RISE

## Recent Victories and Success Stories



**Robert Evers** and **Nataliana Guida**, with assistance from paralegal **Elina Sheldon** (all of Roseland), secured a defense verdict on behalf of an oral surgeon in a medical malpractice matter. The plaintiff alleged that our client deviated from accepted standards of care when extracting four wisdom teeth resulting in permanent injury to the inferior alveolar nerve. The jury returned a unanimous verdict for the defense.



**Justin Johnson** and **Nataliana**, with support from paralegal **Elina Sheldon**, (all of Roseland) received a unanimous defense verdict of behalf of their clients. The plaintiff was a seven-year-old girl who presented with a sacral aneurysmal bone cyst, an expansile, lytic lesion that destroyed sacral bone and was causing compression on her lower lumbar and sacral nerve roots. The plaintiff experienced the inability to control her bladder and bowel post-operatively, and had no sensation in her sex organs. The plaintiff's experts alleged that the lower sacral nerve roots were transected by the defendants during the surgery, most likely by cinching them via a negligently placed suture circumferentially around the thecal sac. The defendants (and their experts) denied that such a suture was placed and also contended that the nerves were not transected, but rather were further injured by the necessary manipulation involved in removing the tumor — a recognized and accepted potential complication of this type of surgery.



**Leslie Jenny** (Cleveland) obtained a defense verdict on behalf of a nursing home in Cuyahoga County. The case involved a 75-year-old resident who fell, fracturing his hip, and died. The medical examiner ruled that the death was accidental and due to the fall. The plaintiff claimed inadequate fall precautions and failure to assess appropriately after the fall against the skilled nursing facility, and requested punitive damages. The plaintiff's Final Pretrial Statement demanded \$7 million. After three days of trial, the judge granted a directed verdict for the defense.



**Michael Roberts**, with assistance from paralegal **Sarah Schmidt** (both of Cincinnati), was successful in having a dental malpractice case dismissed at trial. The plaintiff alleged, among other things, that our client improperly placed a crown on a tooth, leading to a severe infection. At the trial, Michael argued that the case should be dismissed as the plaintiff failed to provide an affidavit of merit and expert testimony. The magistrate agreed and entered a dismissal on behalf of our clients.



**Gary Samms**, with support from **David McColloch** (both of King of Prussia), obtained a defense verdict on behalf of a major Philadelphia healthcare provider after a contentious six-day trial. After undergoing a kidney transplant, a patient suffered complications in post-operative care and died a day after the surgery. The plaintiffs were critical of the post-operative care, claiming the physicians failed to take the patient back to the operating room in light of post-op bleeding. The hospital and physicians maintained that the post-procedure complications were related to previously unknown liver issues that resulted in liver failure/liver shock that created an unstable condition and prevented re-operation. While the family presented a very sympathetic case, Gary was able to prove, through the science and medicine, that the doctors acted appropriately and did not cause the woman's passing. Paralegal **Nancy Farnen** (Philadelphia) was instrumental in the result. ◆





## Certificate of Merit Reform Takes Center Stage in Pennsylvania

By: Michael J. Cadigan, Jr., Esq.

On Tuesday, December 9, 2025, Pennsylvania State Representative Bryan Cutler of House District 100 proposed a bill that is intended to “provide measured and meaningful reform to Pennsylvania’s medical liability statutes.” House Bill 2088, in addition to its Senate Companion, SB 340, proposes to amend the Medical Care Availability and Reduction of Error (Mcare) Act. Acting together, the proposed bills seek to reshape the outset of medical professional liability actions, providing for definitions and additional expert qualifications, and increasing transparency on how claims of medical liability are reviewed on their merit.

As the law currently stands, 23 Pa. Code Rule 1042.3 promulgates Pennsylvania’s Certificate of Merit requirement and states within at least 60 days of filing a complaint, the plaintiff must file a document verifying that a defending licensed professional deviated from the requisite standard of care with respect to the plaintiff, and that they have appropriate support for that proposition. When filing the Certificate of Merit, a plaintiff is not required to identify the expert providing support for their case. Most often, counsel for a plaintiff files a certification that 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. The requirements of the law were originally designed to deter unsupported claims before they could cause financial and reputational harm to providers.

Additional requirements regarding who may qualify to sign a plaintiff’s Certificate of Merit are also spelled out in Section 512 of the Pennsylvania Mcare Act. Currently, a provider may support a Certificate of Merit if they possess sufficient education, training, knowledge and experience to provide credible, competent testimony and have an unrestricted license in any state, including the District of Columbia. The provider may also support the Certificate of Merit so long as they practice in the same (or a substantially similar) specialty as the defendant doctor, with the limitation that they cannot have retired in excess of the past five years from active practice or teaching in the same, or a substantially similar, specialty as the defendant. House Bill 2088 seeks to reinforce these requirements and proposes to add stricter qualifications for experts who may support a Certificate of Merit.

Under the proposed bill, only providers who hold an unrestricted Pennsylvania medical license and actively practice or teach in the same (or substantially similar) specialty as the defendant may support a Certificate of Merit. Additionally, the proposed version of the bill removes the language allowing for the supporting provider to have returned within the past five years from active practice or teaching. Any provider supporting a Certificate of Merit would now have to maintain an active license in Pennsylvania and be engaged in practice of the same or a substantially similar specialty as the defendant doctor. The largest change in the proposed bill requires a plaintiff to file the contact information and curriculum vitae of the physician supporting the Certificate of Merit.

# Long-Term Care Liability

*Strengthen your defense by partnering with a legal team that understands the pressures facing long-term care providers and can make a meaningful difference in your litigation outcomes.*

As the U.S. population ages and life expectancy rises, long-term care providers face increasing pressure—not only from growing demand, but also from a sharp rise in litigation. Nursing homes, personal care homes, and assisted living facilities are navigating heightened scrutiny and an already strained care system. Our long-term care liability team is dedicated to defending these providers, offering deep experience, broad geographic reach, and a focused understanding of the unique challenges inherent in this type of litigation.

Long-term care cases often involve complex allegations ranging from abuse, neglect and regulatory non-compliance, to claims of corporate negligence, fraudulent documentation and punitive damages. These matters can be further complicated by staffing issues, extensive discovery needs, and the involvement of inexperienced witnesses. Our attorneys work closely with clients to craft tailored defense strategies that balance strong advocacy with cost-effective decision-making. Whether pursuing early resolution or taking a case to trial, we are committed to achieving the best possible outcome for every client.



Our practice co-chairs, **Leslie Jenny** and **Lynne Nahmani**, lead a talented team of trial lawyers who concentrate on defending long-term care litigation. Their philosophy: “As the long-term care landscape grows more complex, our mission remains simple: deliver smart, strategic, and unwavering defense for the providers who care for our aging population. Every case presents its own challenges, and we take pride in partnering closely with our clients to navigate them with clarity, efficiency, and confidence.” ♦

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Supporters of the new bill frame it as a necessary refinement, whereas critics may argue it raises barriers to an already complex area of practice. Representative Cutler says these measures seek to reinforce public trust in the fairness, rigor, and efficiency of Pennsylvania’s medical liability system, and that the benefits of the proposed bill are four-fold:

- reduce frivolous lawsuits by requiring claims to be supported by credible, licensed professionals;
- protect health care providers from reputational harm and rising malpractice insurance costs, which can ultimately drive up the cost of care;
- enhance expert witness integrity by requiring experts to be licensed in Pennsylvania, actively practicing or teaching, and board-certified in the relevant specialty; and
- limit judicial waivers for expert qualifications, ensuring consistent application of standards.

Whether House Bill 2088 and/or Senate Bill 340 ultimately pass in their current forms remains to be seen. What is clear is that practitioners on both sides should closely track these measures, as their adoption could significantly impact expert-vetting and procedural practice. ♦

*\* Michael is an associate in our Harrisburg office. He can be reached at 717-651-3502 and [MJCadigan@mdwvcg.com](mailto:MJCadigan@mdwvcg.com).*



## Checking the Box?

### Pennsylvania Supreme Court Holds Order Compelling Arbitration Is Not Immediately Appealable

By: Benjamin J. Phelps, Esq.

Plaintiffs cannot avoid arbitration through premature appeals challenging the validity of an arbitration agreement. In a landmark 6-0 decision, the Supreme Court of Pennsylvania recently held that a trial court order compelling arbitration and staying court proceedings does not qualify as an immediately appealable collateral order under Pennsylvania Rule of Appellate Procedure 313. See *Chilutti v. Uber Techs., Inc.*, --- A.3d ---, 2026 WL 156181 (Pa. Jan. 21, 2026). The impact of the court's decision clarifies that litigants may not immediately appeal an order compelling arbitration; instead, they must patiently await a final judgment to avail themselves of appellate relief.

Under Pennsylvania law, appellate courts have limited jurisdiction and may entertain appeals from final orders. See Pa.R.A.P. 341(a). In general, a final order disposes of all claims and parties. See Pa.R.A.P. 341(b)(1). Although an order denying a motion to compel arbitration is deemed final for appeal purposes under Pa.R.A.P. 311(b)(8) and 42 Pa. C.S. § 7320(a)(1), an appeal from an order compelling arbitration has no such finality under the Pennsylvania Code. One exception to the "final judgment" rule is the collateral order doctrine. Pennsylvania Rule of Appellate Procedure 313 allows parties to appeal as of right from an interlocutory collateral order. To qualify as a collateral order, (1) the order must be separate from and collateral to the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that if review is postponed until final judgment, the claim will be irreparably lost. Pa.R.A.P. 313(b).

In *Chilutti*, plaintiffs Keith and Shannon Chilutti filed a complaint against Uber Technologies, Inc. in the Philadelphia County Court of Common Pleas, alleging Ms. Chilutti sustained injuries during an Uber transport from a medical appointment to her home. In response, Uber filed a petition to compel arbitration, asserting the plaintiffs had agreed to arbitration at the time they enrolled in Uber. On April 26, 2021, the trial court granted Uber's petition and stayed all court proceedings pending the resolution of arbitration.

The Chiluttis appealed the trial court's order, arguing that an order granting compelled arbitration qualifies as an immediately appealable collateral order under Pennsylvania Rule of Appellate Procedure 313. The Chiluttis also asserted the Uber arbitration agreement was invalid because it deprived plaintiffs of their constitutional right to a trial by jury. On appeal, the Superior Court reversed and remanded the trial court's order, holding first that an order compelling arbitration satisfies the criteria for an immediately appealable collateral order. *Chilutti v. Uber Techs., Inc.*, 300 A.3d 430, 439 (Pa. Super. 2023) (en banc). The court reasoned that the third requirement for a collateral order was satisfied, as delaying review of a final judgment "may result in the irreparable loss of [the Chiluttis'] claims." *Id.* Because the standard of review in common law arbitration appeals would be limited under 42 Pa. C.S. § 7341, the court determined that the appellant satisfied the third prong for collateral appeals under Pennsylvania Rule of Appellate Procedure 313. *Id.* Based on this reasoning, the Superior Court concluded it had

jurisdiction to resolve the merits of the Chiluttis' claim, and ultimately held the parties did not enter into a valid arbitration agreement. *Id.*

The Supreme Court of Pennsylvania granted review to determine whether the Superior Court lacked appellate jurisdiction to immediately review an interlocutory order staying litigation pending an arbitration. The court reversed the lower court's decision, holding that the Superior Court erred as a matter of law in determining the trial court's order satisfied the third prong of the collateral order doctrine. *Chilutti*, 2026 WL 156181 \*6. Relying upon the plain language of 42 Pa. C.S. § 7341, the Supreme Court reasoned that the limited standard of review applies only to arbitrators' awards rendered in nonjudicial arbitration, not trial court decisions or orders. *Id.* at \*5. To this end, because the basis of the Chiluttis' appeal would be predicated on a trial court order—and not a nonjudicial arbitration award—the litigants would not suffer irreparable loss of their rights under Pa.R.A.P. 313(b) by delaying appellate review of a trial court order granting compelled arbitration. *Id.* Writing for the court, Justice Brobson opined that “[i]f the Chiluttis are later aggrieved by the final judgment that the trial court enters after the matter is returned to that court following arbitration, then the Chiluttis can appeal that judgment to the Superior Court.” *Id.* \*6. Through this decision, the court reaffirmed its commitment to the underlying policy of the final order doctrine, which promotes “formality, completeness, and efficiency.” *Id.* \*4. Accordingly, the Superior Court lacked jurisdiction to consider the merits of the claims

on appeal regarding the validity of the arbitration agreement. *Id.* \*7.

The ramifications of the Supreme Court's decision in *Chilutti* are significant for those navigating the complex intersection of arbitration and litigation. The court's decision is also a decisive victory for companies seeking to avoid premature appeals of trial court orders enforcing arbitration clauses. Companies and other enterprises should be conscious of appellate courts' limited jurisdiction when entering into arbitration clauses. In cases where compelled arbitration is ordered by courts pursuant to an arbitration agreement, an immediate collateral appeal may not be taken as of right pursuant to the Supreme Court's application of Pennsylvania Rule of Appellate Procedure 313(b). Instead, the aggrieved party must await a final order in the trial court (after arbitration proceedings conclude) before seeking appellate relief.

The *Chilutti* decision reinforces the importance of adopting well-drafted arbitration clauses when entering everyday business transactions. It also reaffirms the Pennsylvania judiciary's fidelity to promoting freedom of contract, including through arbitration clauses, which may ensure confidentiality, reduce cost, and provide an alternative forum for dispute resolution. ♦

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# Save *the* Date

Trends in Health Care &  
Health Law Seminar

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May 14, 2026  
Union League Liberty Hill  
Lafayette Hill, PA



## 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.

### Suzanne M. Utke, Esq.

#### *Senior Counsel and Registered Nurse*

When I was young with asthma, my hero was never a doll or TV character, it was my pediatrician. He made house calls multiple times per day with his black bag, a multidose vial of epinephrine, and a reusable syringe. He quickly taught me how to draw up my own injection, and from that moment I knew I wanted to become a doctor to help save kids' lives. I studied math, science, and Latin like a religion so I could excel in school. I had finished every AP math and science course that my high school had to offer by the end of my sophomore year, so the school partnered with Penn State to provide me with pre-med courses in the five-year Jefferson-Penn State pre-med/medical school program. In 1976, as an early admission candidate, I was one of very few women to be accepted into that med school program. Keeping in mind that this was the 70s, my parents and guidance counselors instructed me that "girls" are supposed to be nurses, teachers, and secretaries – not doctors. So I transferred to the Diploma Nursing program at Jefferson and managed expenses by working as a manager at an ice cream store in the Gallery.

As a nurse in a Pediatric ICU, and then in an Emergency Department (ED), I worked with prominent physicians in numerous specialties.

Details matter, especially when working with infants and children, and I have always been a stickler for details. It was my goal to always provide the best care possible, but sometimes even the mightiest efforts were not enough. After one especially tough and heartbreaking incident surrounding the death of a child, a mother came into the ED screaming at us, and eventually filed a lawsuit. We knew we had exceeded the standards of care, so we did not understand why the hospital settled the lawsuit. After the settlement, the Attending of the ED bought me an LSAT book and said "If you want to do more for the profession, go to law school." So I did.

Now, as an attorney, I bring the same meticulous care to my clients that I once brought to my patients. I take an assertive, detail-driven approach to achieving successful outcomes. I remain a Registered Nurse licensed in Pennsylvania and continue to volunteer in disaster-relief when needed. That dual identity—nurse and attorney—shapes how I advocate: with compassion, an understanding of the stress litigation creates, and unwavering attention to detail. My clinical background gives me an invaluable advantage throughout the litigation process, from understanding the medicine to working effectively with my clients, our experts and cross-examining opponents' experts. Communicating fluently with healthcare professionals across specialties has strengthened my practice and continually reminds me of the pediatrician who once taught me to draw up my own epinephrine injection—an act that set the course for my future. ♦



# LEGAL ROUNDUP

Case Law Updates

## New Jersey

By: Dylan T. Trochtenberg, Esq.

### **New Jersey Supreme Court Eases Affidavit of Merit Standard for Multi-Specialty Physicians in Medical Malpractice Cases**

*Wiggins v. Hackensack Meridian Health, et al.*, 259 N.J. 562 (2025)

A landmark decision with widespread implications for New Jersey medical malpractice law addresses whether an Affidavit of Merit from a board-certified internal medicine physician is sufficient to defeat a motion to dismiss when the defendant doctor holds multiple specialties.

The trial judge denied the defendants' motions to dismiss and opined that, when a physician practices multiple specialties, an Affidavit of Merit from any at-issue specialty is sufficient, in accordance with *Buck v. Henry*, 207 N.J. 377 (2011).

The Appellate Division reversed that decision, arguing that an Affidavit of Merit from physicians certified in each of the defendant's specialties was required.

Ultimately, the New Jersey Supreme Court overturned the Appellate Division and reaffirmed the trial court's ruling—an Affidavit of Merit from any specialty at issue suffices when the defendant has multiple specializations.

Obviously, this holding was based largely on the Supreme Court's interpretation of N.J.S.A. 2A:53A-41, which requires that an Affidavit of Merit come from an "appropriate licensed person" with specialization in the relevant field of the defendant physician. Interestingly, the Supreme Court reasoned that the statute's language "specialist or subspecialist" specifically includes the operative word, OR; thus, an expert need only share a "singular" specialty as the defendant physician.

At its core, *Wiggins* effectively eases a plaintiff's burden in cases where the defendant has multiple specialties. In practice, should a defendant physician hold specialties in oncology, radiology and pediatrics, with board-certifications in same, and should the plaintiff offer an expert with a specialty in oncology, this would be sufficient under the statute to overcome a Motion to Dismiss, so long as the issue at hand involved the specialty of oncology. ♦

*\* Dylan is an associate in our Mount Laurel office. He can be reached at 856-414-6043 and DTTrochtenberg@mdwgc.com.*



## Pennsylvania

By: Julianna L. Malloy, Esq.

### **Pennsylvania Supreme Court Broadens MHPA Immunity to Include Ordinary Negligence in Physical Care During Involuntary Commitment**

*Wunderly v. Saint Luke's Hospital of Bethlehem*, 345 A.3d 692 (Pa. 2025)

The Pennsylvania Supreme Court has recently expanded the scope of provider immunity under the Mental Health Procedures Act (MHPA), holding that the statute can shield providers from ordinary negligence claims arising from medical care for physical ailments provided during involuntary commitment. The case arose from a wrongful death and survival action following the death of a patient involuntarily committed for dementia-related aggression who developed severe pressure ulcers.

Under 50 P.S. § 7114(a), facilities and practitioners participating in decisions to examine or treat individuals under the MHPA are immune from civil and criminal liability, absent a showing of willful misconduct or gross negligence.

As § 114 does not define “treat,” the court looked to Section 104 of the MHPA, interpreting “treatment” to include medical care necessary to maintain “decent, safe, and healthful living conditions.” The court concluded that care for physical conditions is covered

when it is coincident to the patient’s mental health treatment, even if the condition did not result from psychiatric care or advance psychiatric recovery.

This decision significantly broadens the precedent established in *Allen v. Montgomery Hospital*, 696 A.2d 1175 (Pa. 1997). While *Allen* provided immunity for physical conditions caused by psychiatric care (such as medication side effects), *Wunderly* extends that protection to general medical care that simply occurs during the same timeframe as the commitment (such as treatment for pressure ulcers).

The dissent warned that the majority’s interpretation risks lowering the standard of care for involuntarily-committed patients by immunizing ordinary medical malpractice based solely on commitment status. The dissent argued that the patient’s pressure ulcers arose independently of his mental health condition and should not fall within MHPA immunity. ♦

*\* Julianna is an associate in our King of Prussia office.*

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## Ohio

By: Michael P. Vigorito, Esq.

### Ohio Appellate Courts Split on Constitutionality of Medical Malpractice Damages Cap: Sixth District Enforces Limit

*McNalley v. Keiser, 2025-Ohio 5561*

Earlier this year, the 10<sup>th</sup> District and the 8<sup>th</sup> District in *Lyon v. Riverside Methodist Hospital, 2025-Ohio-2991* (10<sup>th</sup> Dist.) and *Paganini v. Cataract Eye Center of Cleveland, 2025-Ohio-275* (8<sup>th</sup> Dist.), respectively, held that Ohio's medical malpractice non-economic damages cap is unconstitutional as applied to the plaintiff-appellees. Ohio's 6<sup>th</sup> District in its case, *McNalley v. Keiser, 2025-Ohio-5561* (6<sup>th</sup> Dist.), held that the plaintiff did not meet its burden of showing that the non-economic damages cap was unconstitutional as applied.

McNalley sued radiologist Dr. Keiser and his employer after Keiser allegedly failed to diagnose a blood clot, resulting in extensive bowel loss and short-gut syndrome. At trial, a jury awarded McNalley approximately \$5.15 million, including \$4.5 million in non-economic damages. Dr. Keiser moved to apply the statutory cap on non-economic damages for medical claims, which limits recovery to \$500,000 for plaintiffs who suffer catastrophic injuries. McNalley opposed the motion, arguing that the statute violated both due process and equal protection as applied to him, although the 6<sup>th</sup> District noted that the substance of McNalley's arguments suggested he was arguing that the statute was unconstitutional on its face. The trial court denied the motion, holding the cap unconstitutional as applied to McNalley, but declined to find the statute unconstitutional on its face.

On appeal, the 6<sup>th</sup> District emphasized the critical distinction between facial and as-applied constitutional challenges. In a rational basis analysis, as used here, to show that a statute is unconstitutional on its face, the movant must show beyond a reasonable

doubt that there is no set of circumstances under which the statute may be valid. To show a statute as unconstitutional as applied, a movant must show clear and convincing evidence of a presently existing set of facts that makes the statute unconstitutional when those facts are applied. Although McNalley framed his argument as an as-applied due process challenge, the court found that he failed to present clear and convincing, case-specific facts showing that the statute was unreasonable or arbitrary as applied to him. Instead, his arguments—like those relied upon by the trial court—amounted to a broader attack on the statute's treatment of all catastrophically injured medical malpractice plaintiffs, which constitutes a facial challenge, and he did not meet the heightened standard.

The court was not persuaded by the holding in *Paganini*, going so far as to indicate that they would have agreed with the defendants that the challenge in *Paganini* was actually a facial challenge and would have held differently. Accordingly, the court held that the holding in *Lyon* was appropriately found, based upon articulated and specific facts as applied to the plaintiff. In this case, the court noted that both parties' arguments were nearly devoid of facts, thereby only allowing it to view the challenge as a facial challenge.

Because McNalley did not meet the heightened burden required for a facial challenge and the record lacked specific factual findings supporting an as-applied challenge, the 6<sup>th</sup> District concluded that the statutory cap must be enforced. The 6<sup>th</sup> District reversed the trial court's judgment and remanded the case with instructions to apply the noneconomic damages cap under R.C. 2323.43(A)(3), reinstating the statutory limitation on McNalley's recovery. The Ohio Supreme Court is scheduled to hear oral arguments in *Paganini* on February 10, 2026. The decision in *Lyon* has not been appealed to the Ohio Supreme Court. ♦

*\* Michael is an associate in our Cleveland office. He can be reached at 216-912-3799 and MPVigorito@mdwgc.com.*



## The Impact of *Berk v. Choy* on Malpractice Lawsuits in Federal Court

By: Hannah L. Graetz, Esq.

On January 20<sup>th</sup>, 2026, in *Berk v. Choy*, 607 U.S. \_\_\_\_ (2026), the U.S. Supreme Court unanimously ruled that state law requirements for expert affidavits of merit in medical malpractice cases do not apply in federal court. The Court concluded that the plaintiff only needs to provide a “short and plain statement of the claim” when filing a malpractice lawsuit, effectively removing the affidavit of merit requirement. By removing this safeguard, the Court has opened the door for plaintiffs to file medical malpractice claims without having an expert review their allegations.

The affidavit of merit exists to ensure that a malpractice claim has authoritative medical and legal support. Because litigation demands substantial time, energy, and emotional investment from both plaintiffs and defendants, ensuring that defendants are not subjected to unfounded claims by requiring a qualified medical expert to review the facts and determine whether a breach of the standard of care is likely an important check against allegations rooted in speculation rather than evidence.

In the opinion from *Choy*, the majority identified Federal Rule of Civil Procedure 8 as the federal rule in conflict with Delaware’s affidavit requirement. The issue under review was whether a malpractice lawsuit may be dismissed for lack of an affidavit of merit. The majority concluded that Rule 8 sets a ceiling on what information a plaintiff is required to provide at the outset of litigation. The Court interpreted this standard to be a “short and plain statement of the claim,” finding that Delaware’s evidentiary requirement does not apply in federal court.

Alternatively, Justice Jackson’s concurrence expressed a grounded view of the litigation process.

She emphasized the key question of what is required to bring a medical malpractice action in federal court. Justice Jackson explained that the affidavit here is a “matter outside the pleadings,” highlighting that it cannot be required as a condition of filing under Rule 3 of the Federal Rules of Civil Procedure or considered at dismissal under Rule 21(d) of the Federal Rules. Concluding, the majority’s reliance on Rule 8 is unwarranted because it only governs what a pleading itself must contain, not what must accompany it.

If the purpose of an affidavit of merit is to filter out meritless claims early, then eliminating this safeguard will not only strain our justice system, but also place a profound burden on healthcare providers. They may now face additional professional, personal, and emotional harm from claims that lack any expert foundation for merit. While it is essential that injured people have access to the courts, it is equally as important that people are not forced to defend themselves against unmeritorious claims.

The Court’s ruling will have a significant impact on malpractice litigation. Federal courts may now see an increase of malpractice filings that lack early expert review. This will have a domino effect, potentially increasing discovery burdens and clogging dockets with matters not supported by expert review. This decision signals a shift toward more permissive filing standards, and we will continue to monitor the practical consequences of this new procedural landscape. ♦

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**The Quarterly Dose – February 2026, has been prepared for our readers by Marshall Dennehey. It is solely intended to provide information on recent legal developments and is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.**

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