NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RONALD GREEN AS THE EXECUTOR OF THE ESTATE OF JOSEPH FUSCO, Appellant v. PENNSYLVANIA HOSPITAL AND CONTRIBUTORS TO PENNSYLVANIA HOSPITAL AND STELLA BARBER, RN AND SYLVIA AQUINO, RN AND LORI YAKISH, RN AND KELLY A. CARR, RRT AND JAMES KEARNEY, MD AND STEVEN A. GLASSER, MD AND JOHN D. SPRANDIO, JR., MD AND BORA LIM, MD AND EUGENE M. LUGANO, MD AND ANTHONY GIORGIO AND LORI J. RHOADES, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2858 EDA 2012

Appeal from the Order August 21, 2012
in the Court of Common Pleas of Philadelphia County
Civil Division at No.: 090604093; June Term, 2009

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED JANUARY 30, 2014**

Ronald Green, as the executor of the estate of Joseph Fusco, appeals from the order of August 21, 2012[1] denying the request to remove the

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* Retired Senior Judge assigned to the Superior Court.

[1] "Where a court has entered a judgment of compulsory nonsuit, the appeal lies not from the entry of the judgment itself, but rather from the court's refusal to remove it." ***Vicari v. Spiegel***, 936 A.2d 503, 508 n.5 (Pa. Super. 2007), *affirmed*, 989 A.2d 1277 (Pa. 2010) (quoting ***Smith v. Grab***, 705

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compulsory nonsuit the trial court entered on June 8, 2012, in favor of Appellees, Pennsylvania Hospital *et al*. After careful review, we affirm.

The trial court set forth the facts of the case as follows:

> Decedent Plaintiff, Joseph Fusco ("Decedent"), was taken to the Emergency Department of Pennsylvania Hospital on December 30, 2008 with complaints of shortness of breath, rapid breathing, and wheezing. Decedent was admitted to the Intensive Care Unit of the Hospital due to his symptoms and, after medication failed to ease the symptoms, he was intubated. He remained in critical condition due to serious preexisting medical [conditions] that included circulatory failure, respiratory failure, and an infection overwhelming his system. After being unable to be weaned from the ventilator, on January 9, 2009 a feeding tube and tracheostomy were performed on the Decedent.
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> Following the tracheostomy, bleeding was observed from the site of the procedure, and emergency steps were taken to address the issue, including bronchoscopy, repeat intubation, and placement of chest tubes due to the development of subcutaneous emphysema. Despite these measures, on January 10, 2009, Decedent arrested and after several attempts to resuscitate him, he was declared dead at 6:36 P.M. of that day. The cause of death on his Certificate of Death noted the immediate causes as cardiac arrest due to chronic obstructive pulmonary disease and pneumonia, and airway obstruction.
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> [Appellant] and Peter Fusco, brother of the Decedent, filed suit in Philadelphia County in June of 2009, with the trial commencing in June of 2012. Prior to [the jury] trial both [Appellant] and [Appellees] filed several Motions *in Limine*, which after oral argument on June 4, 2012 resulted in the effective claims being whittled down to a survival claim for damages due to pain and suffering during the approximate one and a half hour time period of resuscitation on January 10, 2009.

(Footnote Continued) ———————————

A.2d 894, 896 n.1 (Pa. Super. 1997)). We have amended the caption accordingly.

> On June 7, 2012 the [c]ourt heard arguments on [Appellees]' Motion *in Limine* to preclude the testimony of Kathleen Fleming, an expert witness proffered by [Appellant] as an "informatics" expert, and the Motion was granted. At the close of [Appellant]'s case that day, [Appellees] moved for non suit. [Appellant] agreed that non suits should be entered on behalf of Nurses Sylvia Aquino and Anthony Giorgio, and after hearing arguments from both sides, the [c]ourt then also granted non suit as to the other [Appellees], except Nurse Lori Yakish. On June 8, 2012 the [c]ourt heard arguments regarding [Appellees'] motion for Nurse Yakish to be granted non suit, which was granted. Subsequently, [Appellant] filed a Motion for Post-Trial Relief which was denied on August 21, 2012.

(Trial Court Opinion, 4/15/13, at 1-2). Appellant timely appealed.[2]

Appellant raises two questions for our review:

> 1. Did the trial court err or otherwise abuse its discretion in concluding—notwithstanding the plentiful evidence of record concerning the circumstances of [Joseph] Fusco's death arising from oxygen deprivation due to the negligent emergency treatment received from an ear, nose, and throat (ENT) specialist physician at Pennsylvania Hospital—that no reasonably prudent person in the position of Mr. Fusco would be justified in the belief that the care he received from the ENT doctor was being rendered by the hospital or its agents?
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> 2. Did the trial court err or otherwise abuse its discretion in precluding plaintiff's nursing expert witness from testifying that Nurse Yakish's negligence was a cause of Mr. Fusco's death when the trial court's preclusion of that testimony—which resulted in a nonsuit being entered on plaintiff's claims against Nurse Yakish—appears to have been based on a provision of the MCARE statute that does not apply to claims against a non-physician?

(Appellant's Brief, at 3).

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[2] Pursuant to the trial court's order, Appellant filed a Rule 1925(b) statement on October 2, 2012, and the trial court entered a Rule 1925(a) opinion on April 15, 2013. ***See*** Pa.R.A.P. 1925.

In his first issue, Appellant argues that "[u]nder well established Pennsylvania law, [his] claim that a reasonable patient would have been justified in believing that Dr. Malaisrie was the ostensible agent of Pennsylvania Hospital should have reached the jury." (***Id.*** at 10). Specifically, Appellant complains that the court erred in granting non-suit as to Pennsylvania Hospital because of the negligence of the ENT, Dr. Nora Malaisrie, who allegedly deviated from the standard of care. (***Id.*** at 15-16). Appellant further argues that the court erred in determining that he failed to carry his burden of proof that Dr. Malaisrie was an agent of the hospital under section 1303.516 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. §§ 1303.101-1303.910. (***Id.*** at 12-13). We disagree.

Our standard of review of a grant of non-suit is well-settled:

> A nonsuit is proper only if the jury, viewing the evidence and all reasonable inferences arising from it in the light most favorable to the plaintiff, could not reasonably conclude that the elements of the cause of action had been established. Furthermore, all conflicts in the evidence must be resolved in the plaintiff's favor. In reviewing the evidence presented we must keep in mind that a jury may not be permitted to reach a verdict based on mere conjecture or speculation. We will reverse only if the trial court abused its discretion or made an error of law.

Gillard v. Martin, 13 A.3d 482, 486-87 (Pa. Super. 2010) (citations and quotation marks omitted).

> Although the basic elements of both ordinary negligence and medical malpractice are the same, medical malpractice has distinguishing characteristics. Medical malpractice is further defined as the unwarranted departure from generally accepted

> standards of medical practice resulting in injury to a patient, including all liability-producing conduct arising from the rendition of professional medical services. The underlying elements of negligence in a medical malpractice claim, mirroring those of a basic negligence claim . . . are more specifically described as a duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of the harm.

McManamon v. Washko, 906 A.2d 1259, 1287-88 (Pa. Super. 2006), *appeal denied*, 921 A.2d 497 (Pa. 2007) (citation and emphasis omitted).

Section 1303.516 of the MCARE Act provides:

> **§ 1303.516. Ostensible agency**
>
> **(a) Vicarious liability.—**A hospital may be held vicariously liable for the acts of another health care provider through principles of ostensible agency only if the evidence shows that:
>
> (1) a reasonably prudent person in the patient's position would be justified in the belief that the care in question was being rendered by the hospital or its agents; or
>
> (2) the care in question was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents.
>
> **(b) Staff privileges.—**Evidence that a physician holds staff privileges at a hospital shall be insufficient to establish vicarious liability through principles of ostensible agency unless the claimant meets the requirements of subsection (a)(1) or (2).

40 P.S. § 1303.516.

Thus, in order to hold Pennsylvania Hospital vicariously liable for the alleged negligence of Dr. Malaisrie, the burden of proof is on Appellant to demonstrate that "a reasonably prudent person in the patient's position would be justified in the belief that the care in question was being rendered

by the hospital or its agents." 40 P.S. § 1303.516(a)(1)[3]; ***see also Jacobs v. Chatwani***, 922 A.2d 950, 961 (Pa. Super. 2007), *appeal denied*, 938 A.2d 1053 (Pa. 2007) (noting that burden of proof rests with plaintiff in medical malpractice suit).

Here, the trial court found that "[Appellant] failed to offer any evidence with which to meet the standard," noting that Appellant elicited no testimony about the organizational structure of the hospital, the manner in which Dr. Malaisrie presented herself to Decedent, or whether a reasonable patient would believe her to be an agent of Pennsylvania Hospital. (Trial Ct. Op., 4/15/13, at 3; ***see id.*** at 4).

Our independent review of the trial testimony confirms that Appellant did not carry his burden of proof. In fact, Appellant's own witness, Dr. Steven Glasser, an anesthesiologist who treated Decedent, testified that he performed services at a variety of hospitals, which was a common practice among other treating physicians. (***See*** N.T. Trial, 6/04/12, at 5-6). When questioned about Dr. Malaisrie's care of Decedent, Dr. Glasser testified that he was paged away when the ENT arrived and did not observe her begin to treat Decedent. (***Id.*** at 11-13). On his return, "she was performing an

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[3] Appellant does not challenge whether he established Pennsylvania Hospital's vicarious liability for Dr. Malaisrie as its ostensible agent under section 1303.516(a)(2). (***See*** Appellant's Brief, at 11-12); ***see also*** 40 P.S. § 1303.516(a)(2).

examination with a fiber optic bronchoscope," and "there was a cardiopulmonary resuscitation going on with [Decedent]." (***Id.*** at 13, 15; ***see id.*** at 15, 17). On direct examination by counsel for Appellant, Decedent's brother, Peter Fusco, testified only that he saw "[s]hadows of people" attending to Decedent, and that, other than Dr. John Sprandio, Mr. Fusco "didn't know any other doctors or nurses in the hospital there." (***Id.*** at 170, 179). In addition, Ronald Green, Decedent's partner, testified that he was not at the hospital while Dr. Malaisrie treated Decedent. (***See*** N.T. Trial, 6/07/12, at 111-15). Therefore, Dr. Glasser, Mr. Fusco, and Mr. Green offered no evidence as to whether a reasonably prudent person in Decedent's position would have been justified in believing that Dr. Malaisrie's care was being rendered by the hospital or its agents. ***See*** 40 P.S. § 1303.516(a)(1). Nor did Appellant present any other witnesses or evidence to illustrate the substance of, or what a reasonably prudent person in Decedent's position would have believed to be, the relationship between Dr. Malaisrie and Pennsylvania Hospital.

Appellant argues that he proved ostensible agency by "rel[ying] principally on the following facts: (1) Dr. Malaisrie first became involved in treating [Decedent] as part of an emergency response team at the hospital; (2) [Decedent] had no prior patient/doctor relationship with Dr. Malaisrie; and (3) Dr. Malaisrie responded to [Decedent]'s emergency at the request of the hospital, and not at the request of [Decedent] or [his] family or companion." (Appellant's Brief, at 13 (record citations omitted)). He cites

to ***Simmons v. St. Clair Mem. Hosp.***, 481 A.2d 870 (Pa. Super. 1984), and ***Capan v. Divine Providence Hosp.***, 430 A.2d 647 (Pa. Super. 1980), to argue that "these facts are more than sufficient to allow a jury to find for [Appellant] on the issue of ostensible agency." (Appellant's Brief, at 13; ***see id.*** at 13-14).[4] However, these cases are unavailing.

In ***Simmons***, ***supra***, this Court found that the record raised a factual issue regarding the ostensible agency of a treating physician where:

> there was testimony that Dr. Wright did not maintain an office at St. Clair Hospital and that he did not receive a salary. On the other hand, there was evidence that Dr. Wright was the Chairman of the Department of Psychiatry at the hospital and that he was responsible for problems that developed with patient care. In addition, there were inferences of record indicating that Dr. Wright may have been responsible, to some extent, for the physical facilities in the psychiatric unit of the hospital.

Simmons, ***supra*** at 874. Here, Appellant proffered no testimony or evidence as to the extent of Dr. Malaisrie's duties or responsibilities at

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[4] In addition, Appellant cites to ***Fenchen v. St. Luke's Hosp.***, 71 Pa. D. & C.4th 401 (Northampton Cty. 2005) for the proposition that "emergency care or care provided by physicians whom the patient did not personally seek out describe categories of care where a fact-finder reasonably could conclude that the patient looked to the hospital rather than the individual physician for care[.]" (Appellant's Brief, at 15; ***see id.*** at 14-15). However, it is well-settled that this is not binding authority. ***See Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co.***, 52 A.3d 347, 351 n.1 (Pa. Super. 2012), *appeal granted*, 66 A.3d 763 (Pa. 2013) (noting that the Superior Court is not bound by decisions of the courts of common pleas). Moreover, as previously discussed, absent any evidence or testimony by Appellant, this proposition would be "mere conjecture or speculation." ***Gillard***, ***supra*** at 486-87 (citation omitted).

Pennsylvania Hospital, let alone the manner in which she presented herself to Decedent while treating him.

In ***Capan***, ***supra***, this Court noted two factors relevant to a finding of ostensible agency: 1) whether the patient looks to the institution, rather than the individual physician for care; and 2) whether the hospital "holds out" the physician as its employee. ***See Capan***, ***supra*** at 649-50. This Court determined that, where an appellant sought care at an emergency room and was treated by the physician on call, the trial court erred in failing to instruct the jury on ostensible agency where "the jury could reasonably have determined that **both** of the factors relevant to a finding of ostensible agency were present." ***Id.*** at 650 (emphasis added). Here, Appellant argues that Decedent sought care from the institution, rather than a specific physician, but fails to acknowledge that, throughout the litigation, the Hospital denied that Dr. Malaisrie was its agent, nor did Appellant present evidence to establish the extent of Dr. Malaisrie's relationship with Pennsylvania Hospital. (***See*** Trial Ct. Op., 4/15/13, at 3). Thus, unlike in ***Capan***, Appellant has failed to establish both factors relevant to a finding of ostensible agency. ***See Capan***, ***supra*** at 649-50.

Ultimately, viewing the evidence and all reasonable inferences arising from it in the light most favorable to Appellant, a jury could not reasonably conclude that the elements of the cause of action had been established where Appellant failed to adduce any evidence regarding Dr. Malaisrie's relationship to Pennsylvania Hospital or the manner in which she presented

herself to Decedent. ***See*** 40 P.S. § 1303.516(a)(1)-(2); ***Gillard***, ***supra*** at 487; ***McManamon***, ***supra*** at 1287-88. Appellant failed to carry his burden of proof, and cannot rely on "mere conjecture or speculation." ***Gillard***, ***supra*** at 486-87; ***see also Jacobs***, ***supra*** at 961. Accordingly, the trial court did not err or abuse its discretion in granting a non-suit to Pennsylvania Hospital. Appellant's first issue lacks merit.

In his second issue, Appellant argues that "[t]he trial court also erred in failing to remove the nonsuit in favor of Nurse Yakish, since the trial court's refusal to allow [Appellant]'s nursing expert to testify that Nurse Yakish was a cause of [Decedent]'s damages was legally erroneous." (Appellant's Brief, at 17). Specifically, Appellant contests the trial court's decision to grant Appellees' motion *in limine* to preclude the expert testimony of Nurse Pierce against Nurse Yakish, relying on ***Freed v. Geisinger Med. Ctr.***, 971 A.2d 1202 (Pa. 2009), to argue that the MCARE Act's limitation on expert testimony by non-physician healthcare providers does not apply here. (***Id.*** at 18-19). We disagree.

"When assessing the propriety of a ruling on a motion *in limine*, this Court applies the standard applicable to the particular evidentiary matter under consideration." ***Houdeshell v. Rice***, 939 A.2d 981, 983 (Pa. Super. 2007) (citations omitted). "The admissibility of expert testimony is soundly committed to the discretion of the trial court, and the trial court's decision will not be overruled absent a clear abuse of discretion." ***Hatwood v. Hosp. of the Univ. of Pa.***, 55 A.3d 1229, 1239 (Pa. Super. 2012), *appeal*

denied, 65 A.3d 414 (Pa. 2013) (citation and internal quotation marks omitted).

Appellant relies on a footnote of ***Freed***, ***supra*** which provides, in relevant part:

> [The Pennsylvania Supreme Court] recognize[s] that [its] decision to overrule ***Flanagan*** [***v. Labe***, 690 A.2d 183 (Pa. 1997),] may have limited impact in light of the legislature's enactment of the MCARE Act, which became effective on May 19, 2002 and resulted in substantial changes in the requirements for qualifying an expert witness in medical professional liability actions. Specifically, Section 1303.512 of the MCARE Act provides:
>
> > **(a) General rule.—**No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.
> >
> > **(b) Medical testimony.—**An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:
> >
> > > (1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.
> > >
> > > (2) Be engaged in or retired within the previous five years from active clinical practice or teaching.
> >
> > Provided, however, the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.
> >
> > **(c) Standard of care.—**In addition to the requirements set forth in subsections (a) and (b), an expert testifying as

> to a physician's standard of care also must meet the following qualifications:
>
> > (1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.
> >
> > (2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).
> >
> > (3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).
>
> **(d) Care outside specialty.—**A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that:
>
> > (1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and
> >
> > (2) the defendant physician provided care for that condition and such care was not within the physician's specialty or competence.
>
> **(e) Otherwise adequate training, experience and knowledge.—**A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

However, there are certainly situations in which it is questionable whether the MCARE Act will apply and thus [the Court] conclude[s its] decision today retains its vitality. For example, the MCARE Act, by its terms, appears to apply only to medical professional liability actions against physicians, and not to other professional liability actions, or to actions against non-physician health care providers. . . .

Freed, ***supra*** at 1212 n.8 (citing 40 P.S. § 1303.512).

Appellant argues that "the MCARE statute **does not** preclude an expert witness nurse from offering causation testimony on a negligence claim against a nurse," and therefore the trial court erred in precluding Nurse Pierce's testimony. (Appellant's Brief, at 19 (emphasis in original)). This claim, however, is unsupported by the footnote, which explains that an expert in a medical professional liability claim must "[p]ossess an unrestricted physician's license to practice medicine," but that the MCARE Act's requirement of a physician's license may not apply in "other professional liability actions," such as a malpractice claim against a nurse. ***Freed***, ***supra*** at 1212 n.8. Furthermore, the court "may" waive the requirement that only physicians may render expert opinions on other physicians for matters other than the standard of care "if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience." ***Id.*** Thus, the trial court has discretion to permit non-physicians, including nurses, to testify about certain matters **if** the court deems them competent. ***See id.***

Here, however, Appellant attempts to transform the discretionary language of the ***Freed*** footnote into mandatory language, assuming error where the trial court declined to exercise this discretion. (***See*** Appellant's Brief, at 19). Appellant asserts that the court exclusively relied on the MCARE Act's prohibition on nurse expert testimony against physicians and its "ruling excluding Nurse Pierce's causation testimony against Nurse Yakish

was not predicated on and cannot be justified by any other basis[.]" (***Id.***). This claim completely ignores the trial court's stated rationale.

On June 4, 2012, the trial court granted Appellees' motion *in limine* to preclude Nurse Pierce "from offering any testimony regarding medical issues or medical causation issues and other testimony outside the area of his expertise[.] . . . Pierce is further precluded from offering his opinion as to causation[.]" (N.T. Trial, 6/04/12, at 74-75). The court precluded Nurse Pierce's testimony as an expert regarding causation "because this was a medical professional liability action[] against a physician and Pierce did not possess an unrestricted physician's license." (Trial Ct. Op., 4/15/13, at 9 (citing 40 P.S. § 1303.512(b)(1))). The court reasoned compellingly that, "since [the litigation] involved liability against multiple physicians and nurses, it would have created an anomalous result to allow Pierce to testify as to causation as to the nurses, but claim he was incompetent to testify against the physicians for care that was in many places indivisible as to who was providing it." (***Id.***). Therefore, the court permitted Pierce only to testify "regarding his expert opinion of the **quality of care** provided by the Defendant nurses but not as to **causation** of Decedent's death." (***Id.*** (emphases added)).

It is well-settled that "the trial judge has discretion to admit or exclude expert opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice." ***Houdeshell***, ***supra*** at 986 (citation omitted). Under the MCARE Act, as

explained by ***Freed***, the court **may** permit a nurse to testify as an expert witness for "matter[s] other than the standard of care **if** the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience." ***Freed***, ***supra*** at 1212 n.8 (emphasis added); ***see also*** 40 P.S. § 1303.512. Here, however, the trial court specifically found that Nurse Pierce could not testify "outside the area of his expertise[.]" (N.T. Trial, 6/04/12, at 74). Appellant fails to acknowledge this determination, and we can discern no abuse of discretion by the trial court in granting the motion *in limine* to preclude testimony that was outside Nurse Pierce's expertise and would potentially cause confusion for the jury where it was unclear who had rendered treatment to Decedent. ***See Hatwood***, ***supra*** at 1239; ***Houdeshell***, ***supra*** at 983.

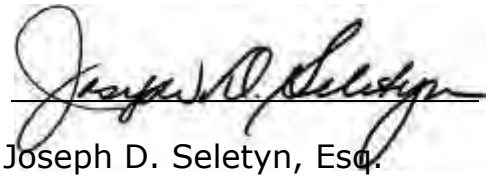
Because Nurse Pierce was precluded from testifying as to causation, Appellant was unable to satisfy a necessary element of his negligence claim against Nurse Yakish. ***See McManamon***, ***supra*** at 1287-88. Therefore, a jury "could not reasonably conclude that the elements of the cause of action had been established." ***Gillard***, ***supra*** 487. Accordingly, the court did not err or abuse its discretion in declining to remove the nonsuit against Nurse Yakish. ***See id.*** Appellant's second issue does not merit relief.

Order affirmed. Jurisdiction relinquished.

Gantman, P.J., concurs in the result.

Shogan, J., files a Concurring and Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/30/2014