NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KAREN FISCHER AND JONATHAN FISCHER, HER HUSBAND Appellants v. UPMC NORTHWEST, NORTHWEST EMERGENCY PHYSICIANS, LLP, AMANDA S. HARTWELL, D.O., UPMC COMMUNITY MEDICINE, INC. AND ALFONSE A. EMMOLO, M.D. Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 522 WDA 2012

Appeal from the Judgment Entered February 3, 2010
In the Court of Common Pleas of Venango County
Civil Division at No(s): 124-2007

BEFORE: BENDER, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.: FILED: September 12, 2013

Appellants, Karen Fischer and Jonathan Fischer, her husband ("the Fischers"), appeal *nunc pro tunc* from the judgment entered in the Venango County Court of Common Pleas in favor of Appellees, Amanda S. Hartwell, D.O. ("Dr. Hartwell"), Northwest Emergency Physicians, LLP and UPMC Northwest, following a jury trial; and the court's entry of non-suit in favor of Appellees Alfonse A. Emmolo, M.D. ("Dr. Emmolo") and UPMC Community Medicine, Inc. in this medical malpractice action. We affirm.

The relevant facts and procedural history of this case are as follows. On June 30, 2005, Mrs. Fischer suffered an intense headache while playing a

game of cards with her husband and others. Mrs. Fischer declined her husband's offer to call 911 and continued playing cards. The next day, July 1, 2005, Mrs. Fischer's symptoms did not subside, so she sought treatment at the UPMC Northwest Emergency Room. While there, Mrs. Fischer described her symptoms to the emergency room nurses as left-sided neck pain and a headache with pressure. The nurses set up Mrs. Fischer for an evaluation of the neck pain. Dr. Hartwell examined Mrs. Fischer and, based on Mrs. Fischer's chief complaint of left-sided neck pain, treated the matter as a cervical strain or spasm. Dr. Hartwell advised Mrs. Fischer to follow up with her primary care physician in two days.

Due to the July 4th holiday weekend, Mrs. Fischer did not see Dr. Emmolo, her primary care physician, until Wednesday, July 6, 2005. At that time, Mrs. Fischer described her symptoms and pain to Dr. Emmolo, who found Mrs. Fischer to be neurologically intact but still recommended and ordered a CT scan of Mrs. Fischer's head. Dr. Emmolo did not, however, order the CT scan "stat." Dr. Emmolo asked Mrs. Fischer to return to his office the next day to have her blood pressure checked because it was elevated during the visit. Mrs. Fischer returned to Dr. Emmolo's office on July 7, 2005 to have her blood pressure checked again.

On July 8, 2005, Mrs. Fischer returned to UPMC Northwest for her CT scan, which revealed a subarachnoid bleed showing early signs of a stroke. The hospital immediately transferred Mrs. Fischer to the emergency

department and then airlifted her to UPMC Presbyterian in Pittsburgh where Mrs. Fischer came under the care of neurosurgeon Daniel A. Wecht, M.D. ("Dr. Wecht"). Dr. Wecht ordered an angiogram for Mrs. Fischer, the results of which showed three aneurysms. Dr. Wecht also noted the presence of vasospasms (when blood vessels in the brain constrict due to suffering an irritation and/or injury as the result of a subarachnoid hemorrhage or ruptured aneurysm), which would make treatment of Mrs. Fischer's aneurysms riskier. On July 9, 2005, Dr. Wecht operated on two of the aneurysms.[1] A post-operative CT scan showed that Mrs. Fischer suffered a stroke on the right side of her brain, necessitating a second surgery by Dr. Wecht to remove dead tissue and reduce brain pressure. Mrs. Fischer sustained profound weakness on the left side of her body as a result of the stroke. On July 27, 2005, Mrs. Fischer began treatment at a rehabilitation facility for further care.

On January 29, 2007, the Fischers filed a complaint bringing negligence claims against Dr. Hartwell and Dr. Emmolo, and vicarious liability claims against UPMC Northwest[2] for the conduct of Dr. Hartwell, and UPMC Community Medicine, Inc. for the conduct of Dr. Emmolo. On October

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[1] Dr. Wecht did not believe treatment of the third aneurysm was an urgent concern.

[2] The Fischers added Northwest Emergency Physicians, LLP as a party later in the litigation, based solely on vicarious liability due to Dr. Hartwell's treatment of Mrs. Fischer.

19, 2009, the parties proceeded to a jury trial. At trial, the Fischers presented the following expert witnesses: Dr. Henry Woo, a neurosurgeon, to offer causation testimony; Dr. Mark Shoag, an internist, to offer standard of care testimony with respect to Dr. Emmolo; and Dr. John Tafuri, an emergency physician, to offer standard of care testimony with respect to Dr. Hartwell. At the close of the Fischers' case-in-chief, the court granted the compulsory nonsuit in favor of Dr. Emmolo and his practice, UPMC Community Medicine, Inc., based on the Fischers' lack of causation testimony provided by their experts. The court denied the non-suit for the remaining Appellees. On October 28, 2009, the jury reached a verdict in favor of the remaining Appellees, Dr. Hartwell, Northwest Emergency Physicians, LLP and UPMC Northwest.

The Fischers timely filed a motion for post-trial relief on Monday, November 9, 2009. On February 3, 2010, the court denied the Fischers' motion and entered judgment in favor of Appellees. The Fischers filed a notice of appeal on March 15, 2010, which this Court quashed as untimely on April 12, 2010. On April 27, 2010, the Fischers sought leave to appeal *nunc pro tunc*. Following a hearing, the trial court denied relief. On appeal, however, this Court reversed and, by judgment dated November 18, 2011, granted the Fischers leave to appeal *nunc pro tunc*. Appellees subsequently filed an application for reargument of this Court's November 18th order. On January 30, 2012, this Court denied Appellees' application.

On March 13, 2012, this Court issued a certificate of remittal/remand of the record to the trial court. The next day, the trial court entered this Court's judgment allowing the Fischers to appeal *nunc pro tunc*. On March 27, 2012, the Fischers filed their notice of appeal *nunc pro tunc*. On April 2, 2012, the court ordered the Fischers to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The Fischers timely filed their Rule 1925(b) statement on April 17, 2012. Appellees filed an application to quash the Fischers' appeal as untimely, which this Court denied on May 15, 2012, without prejudice to Appellees' right to renew it in briefing the appeal.

The Fischers raise the following issues for our review:

> DID THE TRIAL COURT ERRONEOUSLY GRANT A NONSUIT IN FAVOR OF [MRS. FISCHER'S] FAMILY PHYSICIAN, WHOSE FAILURE TO ORDER AN IMMEDIATE CT SCAN DELAYED THE DIAGNOSIS OF A CEREBRAL HEMORRHAGE AND THUS DEPRIVED [MRS. FISCHER] OF THE OPPORTUNITY TO UNDERGO EARLIER SURGERY AND AVOID THE STROKE THAT HAS RENDERED HER INCAPACITATED?
>
> DID THE TRIAL COURT ERR WHEN IT HELD THAT A BOARD-CERTIFIED INTERNIST WAS NOT QUALIFIED TO TESTIFY THAT THE FAILURE OF [MRS. FISCHER'S] FAMILY PHYSICIAN TO ORDER AN IMMEDIATE CT SCAN DENIED [MRS. FISCHER] THE OPPORTUNITY OF AN EARLIER SURGERY AND, THEREBY, INCREASED HER RISK OF HARM?
>
> DID THE TRIAL COURT ERR WHEN IT PRECLUDED [THE FISCHERS'] EXPERT FROM TESTIFYING THAT THE EMERGENCY DEPARTMENT STAFF NEGLIGENTLY SELECTED AN INAPPROPRIATE QUALCHART®, THUS LEADING TO A MISDIAGNOSIS?

(The Fischers' Brief at 4).

Preliminarily, we address Appellees' application to quash the Fischers' appeal. Appellees argue the Fischers' appeal is untimely because (1) the Fischers failed to file a notice of appeal within thirty (30) days of this Court's November 18, 2011 order granting the Fischers *nunc pro tunc* relief; and (2) even assuming that Appellees' application for reargument of this Court's November 18th order tolled the time to file the appeal, the Fischers nevertheless failed to file their appeal within thirty (30) days of this Court's January 30, 2012 order denying Appellees application for reargument. We disagree.

Pennsylvania Rule of Appellate Procedure 2591 provides: "**On remand of the record** the court or other government unit below shall proceed in accordance with the judgment or other order of the appellate court and, except as otherwise provided in such order, Rule 1701(a) (effect of appeals generally) shall no longer be applicable to the matter." Pa.R.A.P. 2591(a) (emphasis added). Thus, the trial court lacks jurisdiction to act on a matter before the appellate court returns the record to the trial court. ***See Stanton v. Lackawanna Energy, Ltd.***, 915 A.2d 668 (Pa.Super. 2007) (stating that generally trial court lacks jurisdiction to take further action in case until appellate court remands record to trial court); ***Bell v. Kater***, 839 A.2d 356 (Pa.Super. 2003), *appeal denied*, 579 Pa. 709, 858 A.2d 108 (2004) (explaining trial court's order granting leave to appeal *nunc pro tunc* was

legal nullity where court lacked jurisdiction to enter order because Superior Court had yet to remand record to trial court).

Instantly, this Court granted the Fischers leave to appeal *nunc pro tunc* on November 18, 2011. Thereafter, Appellees filed an application for reargument, which this Court denied on January 30, 2012. Jurisdiction remained with this Court. Not until March 13, 2012, did this Court issue a certificate of remittal/remand of the record to the trial court. Upon remittal of the record in accordance with Rule 2591, the trial court entered this Court's judgment on March 14, 2012, allowing the Fischers to appeal *nunc pro tunc*. The Fischers filed the instant appeal on March 27, 2012, within thirty (30) days of the trial court's entry of the judgment allowing them to appeal *nunc pro tunc*. Significantly, until this Court remanded the record, the trial court lacked jurisdiction to enter the judgment permitting their *nunc pro tunc* appeal and any related orders (*i.e.*, an order to file a Rule 1925(b) concise statement of errors). ***See*** Pa.R.A.P. 2591; ***Stanton, supra***; ***Bell, supra***. Accordingly, the Fischers' appeal is timely and properly before us for review. Thus, we deny Appellees' application to quash.

With respect to the Fischers' claims on appeal, we initially address their second issue. The Fischers argue that their expert, Dr. Mark Shoag, a board-certified internist, was qualified to give causation testimony under the Medical Care Availability and Reduction of Error ("MCARE") Act at 40 P.S. § 1303.512. The Fischers contend a physician need only possess an

unrestricted license and be engaged in medical practice to offer causation testimony under the MCARE Act. The Fischers recognize the MCARE Act imposes limitations for standard-of-care testimony, but they assert the Act does not similarly limit causation testimony. The Fischers maintain a board-certified internist can give an opinion about the causes of a stroke and how the delay in diagnosis exposed Mrs. Fischer to an increased risk of harm. The Fischers complain the trial court failed to appreciate Dr. Shoag's knowledge concerning the diagnosis and symptoms of a stroke. The Fischers conclude the court misconstrued the MCARE Act and erred by precluding Dr. Shoag from offering causation testimony. The record belies this claim.

Instantly, at trial, all Appellees moved for a compulsory non-suit. (***See*** N.T. Trial, 10/21/09, at 404; R.R. at 542a). During Appellees' oral motion, counsel for Dr. Emmolo, UPMC Community Medicine, Inc., and UPMC Northwest also asked the court to preclude the Fischers' expert, Dr. Shoag, from testifying because he did not have the training, knowledge, or experience necessary under the MCARE Act to proffer opinions as to appropriate treatment of subarachnoid hemorrhages. (***See id.*** at 409; R.R. at 547a). On that basis, counsel contended Dr. Shoag was not qualified to offer causation testimony. (***Id.***). Following counsel's argument and the presentation of some additional testimony, the court decided to defer ruling on the motion for nonsuit until the close of the Fischers' case-in-chief. (***See***

id. at 526-27; R.R. at 664a-665a.) Initially, the court **denied** Appellees' motion to preclude Dr. Shoag from testifying. The court stated:

> THE COURT: All right. Dr. Shoag. And the issue as to Dr. Shoag's testifying [depends] on the ruling on the nonsuit.
>
> The rules, actually, on a nonsuit during trial contemplate I cannot grant it until the conclusion of [the Fischers'] case. So, therefore, I would have to allow the expert to testify. They have to present all their evidence. …

(***Id.***)

Thereafter, the Fischers continued with their case and, two days later, they offered Dr. Shoag as an expert in internal medicine without objection from Appellees. (***See*** N.T. Trial, 10/23/09, at 770; R.R. at 908a). During Dr. Shoag's direct examination, counsel elicited testimony from Dr. Shoag regarding only whether Dr. Emmolo's conduct fell below the standard of care. (***See id.*** at 770-778; R.R. at 908a-916a). Significantly, however, counsel did not attempt to elicit, and Dr. Shoag did not offer, causation testimony on whether Dr. Emmolo's failure to order the CT scan "stat" increased Mrs. Fischer's risk of harm. (***Id.***) Therefore, the record belies the Fischers' contention that the court precluded Dr. Shoag from offering causation testimony. Rather, the Fischers' counsel simply did not ask their expert the appropriate causation-related questions. Therefore, the Fischers' second issue merits no relief.

In their first issue, the Fischers argue Dr. Emmolo should have directed Mrs. Fischer to undergo a CT scan on July 6, 2005, the first day

Mrs. Fischer visited Dr. Emmolo with her symptoms. The Fischers contend Dr. Emmolo's failure to order the CT scan as "stat" caused Mrs. Fischer to wait until July 8, 2005 to undergo the CT scan, resulting in a two-day delay in the diagnosis of Mrs. Fischer's condition. The Fischers aver this delay deprived Mrs. Fischer the opportunity to undergo surgery before she suffered a stroke. The Fischers assert they pursued a "loss of chance" negligence theory against Dr. Emmolo, which occurs when a physician's negligence diminishes the patient's opportunity to achieve a better result. The Fischers maintain their expert Dr. Henry Woo, a neurosurgeon, established that the delay in Mrs. Fischer's CT scan caused her to lose the opportunity to undergo surgery before she suffered a stroke, and diminished her chance of achieving a better surgical result. The Fischers insist Dr. Woo testified that the vasospasms did not increase Mrs. Fischer's risk of stroke, but instead increased only the risks of surgery, and Dr. Emmolo's failure to order a CT scan "stat" was what increased Mrs. Fischer's risk of harm, not the vasospasms. The Fischers conclude Dr. Woo's causation testimony was sufficient to raise a jury question as to Dr. Emmolo's negligence, and the court improperly granted the compulsory nonsuit in favor of Dr. Emmolo and his practice, UPMC Community Medicine, Inc.

In their third issue, the Fischers argue their allegations at trial of direct negligence against the UPMC Northwest hospital staff stem from the same chain of causal events alleged in the original complaint against UPMC

Northwest under a vicarious liability theory. The Fischers maintain the UPMC Northwest nurses incorrectly selected the neck pain QualChart®[3] instead of the headache QualChart®, which contributed to the lack of proper diagnosis and/or treatment of Mrs. Fischer's symptoms. The Fischers aver their allegations of direct negligence at trial against UPMC Northwest merely amplified the vicarious liability allegations made in the complaint. The Fischers assert the court improperly precluded their expert Dr. John Tafuri, an emergency room physician, from testifying as to the direct negligence of the UPMC Northwest emergency room nursing staff, based solely on the Fischers' failure to allege direct negligence against the hospital in their complaint. The Fischers contend the court should have allowed them to amend the complaint to conform to the proffered testimony. The Fischers recognize that at the time of trial, the statute of limitations precluded them from amending their complaint to add a negligence claim against the hospital. They nevertheless argue that an amendment would not prejudice UPMC Northwest because they supplied an expert report by Dr. Tafuri describing the hospital's negligence within two years of learning about the hospital's use of the wrong QualChart®. The Fischers conclude the trial

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[3] A QualChart® is a computer software program many hospitals use in charting emergency medical information such as a patient's history, tests, treatment, physical examination, evaluation or diagnosis.

court improperly limited Dr. Tafuri's testimony and this Court should grant them a new trial on that ground. We disagree.

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Robert L. Boyer, we conclude the Fischers' first and third issues merit no relief. The trial court opinion discusses and properly disposes of those claims. (***See*** Trial Court Opinion, filed July 17, 2012, at 3-7; 11-13) (finding: **(1)** the Fischers' own expert, Dr. Woo, testified that existence of vasospasms increased Mrs. Fischer's risk of harm; Dr. Woo testified that vasospasms typically form between Day 0 to Day 3, and peek around Day 7 to Day 9; according to Dr. Woo, optimal window of time for surgery was Day 0 to Day 3, **before** existence of vasospasms; the Fischers presented no testimony to establish that Dr. Emmolo's order of CT scan on July 6, 2005 (Day 6) increased Mrs. Fischer's risk of harm; rather, existence of vasospasms, which formed prior to Mrs. Fischer's initial visit with Dr. Emmolo on July 6, 2005, increased Mrs. Fischer's risk of harm; Dr. Woo's testimony failed to establish cause of action against Dr. Emmolo or his practice, UPMC Community Medicine, Inc.; therefore, court properly granted compulsory nonsuit in favor of Dr. Emmolo and his practice; **(3)** the Fischers' theory of liability against UPMC Northwest since beginning of suit was vicarious liability; they stated numerous times during trial that they were not asserting direct negligence claim against UPMC Northwest; despite such

assertions, the Fischers sought to introduce testimony from their expert Dr. Tafuri regarding his report that nursing staff at UPMC Northwest incorrectly used wrong QualChart®; court properly precluded Dr. Tafuri from offering that testimony because it would have worked to amend complaint to add claim of direct negligence against UPMC Northwest staff, which would disregard statute of limitations bar; moreover, the Fischers knew as early as August 2007 that separate QualChart® existed for headaches, but they did not attempt to amend complaint until after trial started in October 2009; therefore, court properly precluded Dr. Tafuri from offering testimony regarding direct negligence of UPMC Northwest staff). Accordingly, we affirm on the basis of the trial court's opinion as to the Fischers' first and third issues.

Judgment affirmed.

Judgment Entered.

Nicholas V. Cusatis

Deputy Prothonotary

Date: 9/12/2013

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IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

KAREN FISCHER and JONATHAN FISCHER, her husband, Plaintiffs,	:	
v.	:	CV NO 124-2007
UPMC NORTHWEST, NORTHWEST EMERGENCY PHYSICIANS, LLP, AMANDA S. HARTWELL, D.O., UPMC COMMUNITY MEDICINE, INC., and ALFONSE A. EMMOLO, M.D., Defendants.	:	

OPINION OF COURT

AND NOW, this 17th day of July, 2012, the Court has for consideration the Concise Statement of Errors Complained of on Appeal, filed in accordance with Pa.R.A.P. 1925 by Plaintiffs in the above-captioned matter.

Procedural History

The above-captioned medical malpractice claim was tried before the Court in October of 2009. At said trial, the Court disposed of some issues, and the remaining issues were submitted to the jury, who found in favor of Defendants. Plaintiffs filed post-trial motions, which were denied by Order of Court dated February 2, 2010. Plaintiffs filed appeal on March 15, 2010. Said appeal was quashed as "untimely" by the Superior Court on April 8, 2010. In quashing the appeal, the Superior Court gave Plaintiffs leave to file with this Court a request for leave to appeal *nunc pro tunc*. After conducting a hearing on the matter on October 6, 2010, the Court declined to grant Plaintiffs leave to appeal *nunc pro tunc*. Plaintiffs' Motion for Reconsideration was denied on January 5, 2011. Plaintiff then filed a timely notice of appeal on January 6, 2011, and the concise

statement followed on February 2, 2011. On February 23rd and 24th, 2011, Defendants filed motions to quash Plaintiffs' appeal. This Court issued its 1925(a) Opinion dated March 3, 2011, asserting the Plaintiffs' appeal was meritless and should be dismissed. The Superior Court, in a *per curiam* decision dated March 22, 2011, denied Defendants' motions to quash without prejudice to raise the issue again. In its Opinion dated November 18, 2011, the Superior Court reversed this Court's Order of December 16, 2010, and granted Plaintiffs' motion for leave to appeal *nunc pro tunc*. The Superior Court remanded the record on March 13, 2012. On March 26, 2012, Plaintiffs filed their Notice of Appeal with this Court. On March 29, 2012, this Court directed the Plaintiffs to file a concise statement, which was timely done on April 17, 2012.

Analysis

The present concise statement sets forth nine (9) errors complained of on appeal. These errors being too numerous to reproduce here, the Court summarizes them as follows. Errors one through three challenge the Court's legal conclusions by asserting that the Court erred as a matter of law or abused its discretion in granting Defendants Alfonse Emmolo, M.D., and UPMC Community Medicine, Inc.,'s Motion for Nonsuit. Errors four, five, eight, and nine also challenge the Court's legal conclusions by asserting the Court erred as a matter or law or abused its discretion in excluding or preventing certain testimony from reaching the jury. Errors six and seven were not issues at trial and were never raised, and therefore not preserved.

i. Errors Six and Seven

We begin our discussion by disposing of errors six and seven. In error six, Plaintiff contends Defendant UPMC failed to disclose that it had delegated operation of

its emergency department to an out-of-state corporation, Emergency Consultants, Inc. According to Plaintiff, said corporation was operating the emergency department on the day in which Plaintiff, Karen Fischer, received the care at issue in this case. In error seven, Plaintiff contends that Defendant Amanda Hartwell, D.O., the emergency room physician at UPMC Northwest, did not disclose she was denied MCARE coverage in her pre-trial interrogatories which in turn prevented inquiry into why such coverage was denied and which potentially prevented discovery of admissible evidence to support plaintiffs' negligence claim.

A party waives all defenses and objections "which are not presented either by preliminary objection, answer or reply," except certain defenses inapplicable to this matter. Pa. R.C.P. No. 1032(a). Plaintiffs did not raise the issues complained of in errors six or seven in their pleadings, nor did they preserve such issues at trial via objections on the record. Therefore, this did not constitute an error on the part of this Court, and those issues are deemed waived. *See County of Dauphin v. City of Harrisburg*, 24 A.3d 1083, 1093-94 (Pa. Cmmw. Ct. 2011)(having failed to include *lis pendens* in their preliminary objections, defendants could not raise it later in an appeal to the Commonwealth Court).

ii. Errors One, Two, and Three

We now turn our attention to errors one through three which challenge the Court's legal conclusions by asserting that the Court erred as a matter of law or abused its discretion in granting Defendants Alfonse Emmolo, M.D., and UPMC Community Medicine, Inc.,'s Motion for Nonsuit. An abuse of discretion occurs if there was an error of law or the judgment was manifestly unreasonable or the result of partiality, prejudice, bias or ill will. *Silver v. Thompson*, 26 A.3d 514, 516 (Pa. Super. Ct. 2011)(citing *Kring*

v. Univ. of Pittsburgh, 829 A.2d 673, 675 (Pa.Super.2003)). When deciding whether to grant a defendant's motion for nonsuit, the court must allow the plaintiff the benefit of all favorable evidence and reasonable inferences arising therefrom, and any conflicts in the evidence must be resolved in favor of plaintiff. Where it is clear that a cause of action has not been established, a compulsory nonsuit is proper. *Braun v. Target Corp.,* 983 A.2d 752, 764 (Pa.Super.2009)(quoting *Wu v. Spence,* 605 A.2d 395, 396 (1992), *appeal dismissed as improvidently granted,* 632 A.2d 1294 (1993)).

In error one, plaintiffs contend this Court committed an error of law by granting Defendants Alfonse Emmolo and UPMC Community Medicine Inc., Motion for Nonsuit. Plaintiff argues that the testimony of Dr. Henry Woo, a neurosurgeon and plaintiffs' expert, established that the delay in defendants' treating Karen Fischer for her ruptured aneurysm increased the risk of harm to her, thereby rendering them liable. Testimony established that Karen Fischer was initially seen at UPMC Northwest on June 30, 2005, at 3:30 p.m., by Dr. Amanda Hartwell, an emergency room physician. *See* N.T. Vol. VI., p. 1038, *ll.* 4-8. Dr. Hartwell proceeded to examine Ms. Fischer and concluded that she most likely suffered from a cervical sprain strain and torticollis. *Id.*, at pp. 1060-61. Significantly, Ms. Fischer did not exhibit any signs of having suffered a subarachnoid hemorrhage or intracranial bleed, also known as a ruptured aneurysm.[1] Ms. Fischer did not present to Dr. Alfonse Emmolo until six days later, July 6, 2005, at which time Dr. Emmolo noted the patient was experiencing pain in her head, but was otherwise "neurologically intact", meaning there were no signs of a stroke. *See* N.T., Vol. IV., pp.

[1] When a brain aneurysm ruptures, it causes bleeding into the compartment surrounding the brain, the subarachnoid space, and is therefore also known as a subarachnoid hemorrhage.

722-23; p. 730, *ll.* 17-24. However, Dr. Emmolo did order a CT scan[2] "to make sure [he] didn't miss anything." *Id.*, at p. 732. Ms. Fischer had her CT scan on July 8, 2005, which revealed a subarachnoid bleed on the right side with brain edema or swelling. *See* N.T., Vol. V, p. 925, *ll.* 4-15. It is noteworthy that plaintiffs' expert Dr. Woo testified that he believed the risk of harm was increased due to the existence of vasospasms which typically occurs anywhere from Day 0 to 3, and peaks around Day 7 to 9, after the bleed.[3] *See* N.T., Vol. II, p. 263, *ll.* 5-9; p. 270, *ll.* 5-9. If surgery can be done before the vasospasms occur, then the outcome is better and the risk of harm to the patient lower. *Id.*, at p. 263, *l.* 25 – p. 264, *ll.* 1-7, 16-22. However, once the vasospasms occur, the risk of harm increases and it is better to put the surgery off until the vasospasms subside. *Id.*, at p. 283, *ll.* 20-25. Thus, by the plaintiffs' expert, Dr. Woo's own testimony and chronology, the opinion was that the optimal window of time for surgery was zero to three days, or before the existence of vasospasms. There was no testimony to the fact that Dr. Emmolo's ordering the CT scan on July 6, 2005, or Day 6, increased Ms. Fischer's risk of harm. Rather it was the existence of the vasospasms, not the date of the scan, which increased the patient's harm. *See* N.T., Vol. V, p. 802, *ll.* 17-25; pp. 803-08. The court accepted as true the testimony of the plaintiffs' expert, Dr. Woo, and gave the plaintiff the benefit of all favorable evidence and reasonable inferences arising from his testimony. However, it was clear that no cause of action had been established against Dr.

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[2] A CT (Computed Tomography) scan is "essentially an advanced form of x-ray [which] identifies the x-ray density within a specific area of the brain . . .by using mathematic algorithms [that] recreate black and white picture . . .any that is very dense on the x-ray will be white and everything that is not very dense will be much darker . . .grey to white." See N.T., Vol. II, p. 267, *ll.* 5-14. "[E]verything white . . .is either bone or blood, [e]verything that is grey is brain, [and] everything that's darker is going to be cerebral spinal fluid or water." *Id.*, at p. 266, *ll.* 22-24.

[3] A vasospasm is when the blood vessels in the brain begin to progressively narrow and restrict due to suffering an irritation and/or injury as the result of a subarachnoid hemorrhage or ruptured aneurysm. *See* N.T., Vol. II, p. 262, *ll.* 21-25, p. 263, *l.* 1.

Emmolo or UPMC Community Medicine, Inc. Therefore, the Court's granting defendants' nonsuit motion was manifestly reasonable in light of the evidence adduced from Dr. Woo's testimony and not the result of partiality, prejudice, bias or ill will, and thus granting the compulsory nonsuit was proper.

In error two, plaintiffs also contend this Court committed an error of law by granting Defendants Alfonse Emmolo and UPMC Community Medicine Inc., Motion for Nonsuit. Plaintiffs argue the testimony from Dr. Daniel Wecht, the neurosurgeon who repaired Ms. Fischer's ruptured aneurysm on July 9, 2005, indicated that the vasospasms resulting from the hemorrhage rendered Ms. Fischer's vascular system more fragile, thereby complicating the aneurysm repair. Such testimony, plaintiff contends, should have resulted in the Court dismissing, rather than granting, defendants' nonsuit. In contrast to the plaintiffs' contentions, however, all the testimony and evidence pointed to the vasospasms existing prior to the time Dr. Emmolo saw the patient. *See* N.T., Vol. III, pp. 408-18; Vol. V, pp. 804-06. While the Court is sympathetic to the fact that the neurosurgeon operated "under the gun" as it were and was confronted with a lady in her seventh or eighth day of vasospasms, which increased the patient's risk of harm at the time of surgery, the fact remains that the testimony given by both Dr. Woo and Dr. Wecht established that the vasospasms started at Day 3 and usually peaked at Day 7 or 8. *See* N.T., Vol. III, p. 412, *ll.* 1-8; p. 413, *ll.* 6-24. No testimony was presented by either Dr. Wecht or Dr. Woo that indicated Dr. Emmolo's order that the CT scan be done on Day 6, increased any risk of harm to Ms. Fischer. *See* N.T., Vol. V, p. 806, *ll.* 14-25. The Court reiterates that the optimal time for surgical intervention per expert testimony was anytime before the vasospasms started, ideally between Day 0 and Day 3. *See* N.T.,

Vol. V, p. 805. Once the vasospasms start, according to the plaintiffs' experts, surgical intervention is best put off until the vasospasms end, usually Day 8 or 9, post bleed. *Id.*, at 805, *ll.* 23-25.[4] Once again, this Court took into account the experts' testimonies of record and gave the plaintiff the benefit of all favorable evidence and reasonable inferences arising from such testimonies. However, it was clear that no cause of action was established against Dr. Emmolo or UPMC Community Medicine, Inc. Clearly, testimony established that, if anything, the vasospasms were already occuring at the time Ms. Fischer saw Dr. Emmolo on Day 6, even though she presented neurologically intact. Given the existence of the vasospasms, the evidence and testimony show that any operation was already risky, so a delay, if any, in ordering a CT scan, actually would have worked to Ms. Fischer's benefit as Dr. Woo suggested potentially a better outcome might have resulted in waiting to perform the surgery on Day 10. Therefore, the Court's granting defendants' nonsuit motion was manifestly reasonable and proper in light of the evidence adduced from both Dr. Woo and Dr. Wecht's testimony and not the result of partiality, prejudice, bias or ill will.

In error three, plaintiffs contend this Court committed an error of law in making findings of fact in support of its granting the nonsuit to the effect that only surgery during the first three days post-hemorrhage would have been safe. We decline to revisit the testimonial record already referenced above in errors one and two. However, we note that we relied upon plaintiffs' own experts who testified that the optimal time for intervention was Day 0 to Day 3. We, therefore, do not see any error in this regard and

[4] Although it was plaintiffs' expert Dr. Woo who testified that waiting until the vasospasms ended and operating as late as Day 10 might possibly have increased the odds of successful intervention, he did qualify his statement by saying he deferred to Dr. Wecht's decision to operate on July 9, 2005, given the presentation of the patient at that time. *See* N.T., Vol. II, pp. 298-99.

believe our granting the nonsuit was manifestly reasonable and proper in light of the evidence adduced via the experts' testimony and not the result of partiality, prejudice, bias or ill will.

iii. Error Four

In Error Four, Plaintiff contends the Court abused its discretion when granting defendants' Motion in Limine thereby preventing plaintiffs' expert witness Dr. Mark Shoag, a board certified Internal Medicine doctor, from testifying that Dr. Emmolo increased the risk of harm to plaintiff, Karen Fischer. Plaintiff asserts this amounts to an abuse of discretion for this Court justified its position in granting defendants' motion in limine by citing the lack of opinion evidence that Dr. Emmolo increased the risk of harm, the very testimony, which plaintiff contends, Dr. Shoag could have supplied.

An abuse of discretion occurs if there was an error of law or the judgment was manifestly unreasonable or the result of partiality, prejudice, bias or ill will. *Thompson*, 26 A.3d at 516. It is well settled that the admissibility of evidence is a determination left to the sound discretion of the trial court, and it will not be overturned absent an abuse of discretion or misapplication of law. *Reott v. Asia Trend, Inc.*, 7 A.3d 830, 839 (Pa.Super.2010). Furthermore, Pa.R.E. 702 governs the admissibility of expert testimony and what it means to be qualified as an expert in testifying as to a particular subject matter. Moreover, under Medical Care Availability and Reduction of Error ("MCARE") Act, our legislature has articulated the requirements which must be met as to a plaintiff's medical expert's qualifications before he may testify as to the standard of care of defendant physicians. *See* 40 P.S. §1303.512.

Here, Dr. Mark Shoag is a board-certified physician practicing internal medicine. *See* N.T., Vol. V, p. 767, ll. 14-21; p. 770, ll. 5-8. In addition to his practice, Dr. Shoag also has been an assistant clinical instructor of medicine with Case Western Medical School since 1984. *Id.* at 766, ll. 2-6. Thus, while Dr. Shoag could properly testify as to the requisite standard of care under the MCARE Act, and he was properly offered as an expert in the area of internal medicine, he could not testify as to the issue of causation. Dr. Shoag was not qualified to testify as to causation for he does not practice neurology; he is not a neurosurgeon and did not have the training, knowledge, or experience under the MCARE Act to proffer opinions as to the appropriate treatment regimen in a patient presenting with a subarachnoid hemorrhage. As such, we found persuasive defendants' arguments on this issue. *See* N.T., Vol. III, p. 409, *ll.* 17-25; p. 410, *ll.* 1-3. Moreover, plaintiffs' neurological expert, Dr. Woo, the person who could speak to the causation issue—the ultimate neurological problems—simply did not establish that Dr. Emmolo's ordering the CT scan on July 6, 2005, or Day 6, increased Ms. Fischer's risk of harm. To the contrary, as previously noted, Dr. Woo's testimony underscored that it was the existence of the vasospasms, not the date of the scan, which increased the patient's harm. *See* N.T., Vol. V, p. 802, *ll.* 17-25; pp. 803-08. Therefore, we assert this Court committed no abuse of discretion in granting defendants' Motion in Limine thereby precluding Dr. Shoag's testimony.

iv. Error Five

In Error Five, plaintiffs contend the Court committed an error of law and abused its discretion when it precluded the plaintiffs from introducing "unproduced evidence,

correspondence" from plaintiffs' monitoring neurophysiologist which cited the presence of the vasospasms as complicating the surgery that led to the plaintiff's stroke.

An abuse of discretion occurs if there was an error of law or the judgment was manifestly unreasonable or the result of partiality, prejudice, bias or ill will. *Thompson, supra.* It is well settled that the admissibility of evidence is a determination left to the sound discretion of the trial court, and it will not be overturned absent an abuse of discretion or misapplication of law. *Reott*, 7 A.3d at 839. Pennsylvania Rules of Civil Procedure govern the discovery process by which parties prepare for trial. *See* Pa.R.C.P. 4003.1 *et. seq.* A party may obtain discovery regarding any matter not privileged so long as it is relevant to the subject matter in the pending action. *Id.* Moreover, so long as the discoverable material is neither privileged nor otherwise objectionable, the party upon whom such request is made has a duty to produce the requested documents to the other side. *See* Pa.R.C.P. 4009.12. "The question of whether the permissible limits of testimony under the Rule [would be] violated [by introduction of certain testimony] is to be determined on a case by case basis, and the essence of the inquiry is fairness. The fairness of the court's decision is gauged by whether the opposing party has sufficient notice of the expert's opinion to fashion a meaningful defense." *Burton-Lister v. Siegel, et al.,* 798 A.2d 231, 241 (Pa. Super. Ct. 2002), *appeal denied,* 808 A.2d 568 (Pa. 2002)(citations omitted). A fully realized defense includes the presentation of an expert witness to rebut the evidence offered by the opposing party. *Id.*, at 242. This is fundamentally an issue of fairness, so as to prevent surprise and to enable both sides to obtain the information necessary to try their case adequately before the court.

In the case *sub judice*, plaintiffs sought to introduce a report that referenced an opinion as to an "evoked potential"[5] from The Center For Neuro Electrophysiology. *See* N.T., Vol. V, p. 877, *ll.* 4-13, 19-23. The problem this Court faced was two-fold: the plaintiffs received the document on October 15, 2009, but never sent the report to opposing counsel, despite counsel for the defendant UPMC Northwest, Mr. Puntil, subpoenaing such records;[6] and the underlying documents upon which the opinion was based were non-existent. *Id.*, at 880, *ll.* 16-22. During trial, on October 23, 2009, plaintiffs desired to use the report to cross-examine defendants' expert, Dr. Schwartz. Despite the relevance of the report, this Court could not, in fairness to the discovery process and the parties, allow such a report into the record. Defendants had no opportunity to review the report, or have their expert, Dr. Schwartz, review the document. *Id.*, at 880-83. Therefore, we do not believe we erred or abused our discretion in disallowing admission of the report in light of fairness concerns and the fact that opposing counsels and their expert did not have sufficient notice to fashion a meaningful defense on this piece of evidence. *Burton-Lister*, 798 A.2d at 242.

v. Error Eight

In Error Eight, Plaintiffs contend the Court abused its discretion when granting defendants' Motion in Limine limiting the testimony of Dr. John Tafuri, plaintiffs' emergency medicine expert, thereby preventing him from criticizing the nursing staff at UPMC. Essentially, plaintiffs contend the Court should have permitted an amendment to their complaint to assert a negligence action against UPMC so as to allow Dr. Tafuri's

[5] An "evoked potential" purports to show a "real-time monitoring of the electrical activity of the brain" *See* N.T., Vol. V, p. 877, *ll.* 9-13.

[6] The Court recognizes that the records were nearly four years old at the time and that apparently the place, The Center for Neuro Electrophysiology, had moved its location to another building. *See* N.T., Vol. V, pp. 877-78. The Court speculates that perhaps, regrettably, records may have been misplaced during the move.

testimony regarding alleged omissions of the nursing staff as pertains to Ms. Fischer's Qualcharts.[7]

An abuse of discretion occurs if there was an error of law or the judgment was manifestly unreasonable or the result of partiality, prejudice, bias or ill will. *Thompson, supra.* "A trial court enjoys broad discretion in evaluating amendment petitions." *Borough of Mifflinburg v. Heim*, 705 A.2d 456, 463-64 (Pa. Super. Ct. 1997)(quoting *Capobianchi v. BIC Corp.*, 666 A.2d 344, 346 (Pa. Super. Ct. 1995)(citations omitted)). In exercising its discretion whether to allow an amendment to the pleadings, a trial court should liberally allow such amendment so as to permit the case to be decided on the merits; however, an amendment should not be allowed where it will present an entirely new cause of action. *Sejpal v. Corson, Mitchell, Tomhave, & McKinley, M.D.'S., Inc.*, 665 A.2d 1198 (Pa. Super. Ct. 1995). Moreover, under Pennsylvania law, tort claims for negligence are subject to a two-year statute of limitations. *See* 42 Pa.C.S.A. § 5524. The statute begins to run "as soon as the right to institute and maintain a suit arises" and a party asserting a claim is under the duty to use all reasonable diligence to properly inform themselves of the facts upon which one could seek recovery. *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983).

We note that plaintiffs reiterated multiple times they were not asserting any negligence claim against UPMC Northwest. *See* N.T., Vol. II, p. 234, *ll.* 8-9; pp. 241-43. Plaintiffs' Complaint clearly stated the action against UPMC Northwest was in vicarious liability. *Id.*, at p. 234, *ll.* 2-4. However, despite such assertions, plaintiffs desired to use testimony from Dr. Tafuri regarding his report that essentially opined that the nursing

[7] A Qualchart is computer software program used by hospitals in charting emergency medical information such as a patient's history, tests, treatment, physical examination, evaluation or diagnosis.

staff at UPMC was negligent as the Qualchart form was not filled out completely and the wrong one used. *Id.*, at p. 240-41. Had the Court allowed such testimony in, the facts in evidence would have required an amending of the Complaint to reflect an assertion of negligence on the part of the UPMC staff. Moreover, to allow such an amendment would be to disregard the statute of limitations bar. According to the plaintiffs, they were aware of the fact that a different Qualchart existed in the emergency department for headache complaints due to Dr. Hartwell's deposition of August 27, 2007. As such, plaintiffs were put on notice and the statute began to run. *See Pocono Int'l Raceway, Inc.*, 468 A.2d at, 471. The plaintiffs did not seek to amend their pleadings as pertained to UPMC Northwest until after the trial started in October of 2009, more than two years later. *See* N.T. Vol. II, p. 238-41; Vol. III, p. 320, *ll.* 8-13; p. 325, *ll.* 13-25. In light of the above, the Court would not allow an amendment to the pleadings as to UPMC given both the case law which prohibits such action, *Sejpal supra*, and our statutes. *See* 42 Pa.C.S.A. § 5524. Therefore, we do not believe we abused our discretion and Dr. Tafuri's testimony was properly excluded to prevent the issue of negligence being raised at such a late date.

vi. Error Nine

In Error Nine, Plaintiffs contend the Court abused its discretion when it prevented the plaintiff from offering testimony as to her habit and custom in providing her medical history to physicians.

An abuse of discretion occurs if there was an error of law or the judgment was manifestly unreasonable or the result of partiality, prejudice, bias or ill will. *Thompson, supra.* Pennsylvania Rule of Evidence 406 provides as follows:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of

> the presence of eyewitnesses, is relevant to provide that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Pa.R.E. 406(2009).

The concept of habit and routine practice "denote conduct that occurs with fixed regularity in repeated specific situations." Comments to Pa.R.E. 406 (2009). As explained in *Baldridge v. Matthews*, 106 A.2d 809 (Pa. 1954), *rev'd* on other grounds in *Fadgen v. Lenkner*, 365 A.2d 147 (Pa. 1976), admissibility turns on whether the usage occurred with sufficient regularity to make it probable that such would be the case in every instance or most circumstances.

Here, Plaintiff attempted to establish that Ms. Fischer had a "habit" of advising the physician of all her symptoms when being seen at the physician's office. However, according to Ms. Fischer's testimony, she has no memory of anything from the onset of the headache on June 30, 2005, until being in rehabilitation at the hospital in Pittsburgh. *See* N.T., Vol. IV, pp. 705-05. In addition, Karen Schreffler, R.N., who saw Ms. Fischer in the emergency room at UPMC Northwest, testified that the patient did not mention her earlier episode of vomiting or make any remark that the headache was the "worst headache of her life." *See* N.T. Vol. VI, pp. 987-93. Had Ms. Fischer mentioned any of that, Nurse Schreffler stated it would have been written down and noted. *Id.* Moreover, even Jonathan Fischer, plaintiff/husband, testified he did not remember giving any history to Dr. Hartwell at the emergency room nor did he remember his wife communicating either the vomiting episode or that the headache was the "worst headache" ever experienced. *See* N.T., Vol. I, pp. 146-47, 159. In sum, the testimonies of Dr. Hartwell, Nurse Schreffler, and, to an extent, even the plaintiff's husband all

contradict the claim that Ms. Fischer's habit was to divulge her history to her physicians. Therefore, it is our view that this Court properly precluded such testimony and did not abuse its discretion in so doing.

Conclusion

In light of the foregoing, the court would respectfully assert that the matter complained of on appeal is without merit, and the appeal should be dismissed.

BY THE COURT,

Robert L Boyer

ROBERT L. BOYER, Judge

cc: David Hunter, Esq.
821 State Street.
Erie, PA 16501
(f) 814-454-2371

Ron DiNicola, Esq.
1001 State Street
Erie, PA 16501
(f) 814-838-0676

Ronald Puntil, Esq.
Marshall, Dennehey, Warner, Coleman & Goggin
US Steel Tower
600 Grant Street, Ste. 2900
Pittsburgh, PA 15219
(f) 412-803-1188

John Conti, Esq.
Dickie, McCamey & Chilcote, P.C.
Two PPG Place, Ste. 400
Pittsburgh, PA 15222
(f) 412-392-5367

faxed + mailed 7/17/2012 pkr