[J-59-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

BRENTON D. BISHER AND CARLA S. BISHER, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF CORY ALLEN BISHER, DECEASED,	:	No. 22 MAP 2021
Appellants	:	Appeal from the Order of the Superior Court at No. 2743 EDA 2018 dated June 30, 2020, Reconsideration Denied August 28, 2020, Quashing the Order of the Lehigh County Court of Common Pleas, Civil Division, at No. 2017-C-2434 dated September 5, 2018
v.	:	
LEHIGH VALLEY HEALTH NETWORK, INC., LEHIGH VALLEY HOSPITAL, INC., LEHIGH VALLEY ANESTHESIA SERVICES, PC, LVPG PULMONARY AND CRITICAL CARE MEDICINE, DR. BRIAN CIVIC, DR. DOROTHEA WATSON, DR. JENNIFER STROW, DR. BONNIE PATEK, DR. FREDERIC STELZER, EASTERN PENNSYLVANIA GASTROENTEROLOGY AND LIVER SPECIALISTS, PC, AND NORMA D. WILSON, CRNA,	:	ARGUED: September 23, 2021
Appellees	:	

OPINION

JUSTICE DONOHUE **DECIDED: December 22, 2021**

Following the death of their twenty-five-year-old son Cory Bisher ("Cory"), Brenton D. Bisher ("Brenton") and Carla S. Bisher ("Carla")[1] filed suit, without representation by

[1] We refer to Brenton and Carla as "the plaintiffs" or "the Bishers" except where differentiation is needed.

counsel, against eleven defendants comprising both named individuals and corporate entities alleging their medical malpractice resulting in Cory's death. Each parent brought their own wrongful death claims,[2] and Carla filed a survival action[3] on behalf of Cory's estate ("Estate"). Following protracted proceedings, the trial court struck the amended complaint with prejudice because of defects in the Certificates of Merit mandated by Rule of Civil Procedure 1042.3 in professional liability suits against licensed professionals. On appeal, the Superior Court sua sponte determined that the Bishers committed two errors that jointly deprived the trial court of subject-matter jurisdiction over all claims: Carla's unauthorized practice of law and the lack of verification of the complaint. The panel concluded that it too lacked jurisdiction and quashed the appeal.

We find that neither the unauthorized practice of law in the trial court nor the lack of verification identified by the Superior Court implicated subject-matter jurisdiction and thus could not be raised sua sponte. We also disagree with the panel's alternative holding that the trial court properly struck the amended complaint because of the defects in the Certificates of Merit. Because the unauthorized practice of law issue will be ripe for further litigation on remand, we conclude that pleadings unlawfully filed by non-attorneys are not void ab initio. Instead, after notice to the offending party and opportunity to cure, the pleadings are voidable in the discretion of the court in which the unauthorized practice of law took place. We therefore remand for further proceedings consistent with this opinion.

---

[2] 42 Pa.C.S. § 8301.

[3] 42 Pa.C.S. § 8302.

I.

Factual and procedural history

The basic facts are undisputed. Cory was admitted to Good Samaritan Hospital in Lebanon, Pennsylvania on October 12, 2015 and diagnosed with Community Acquired Pneumonia. Three days later, Cory was transferred to Lehigh Valley Hospital for intubation and treatment because he had "Russell Silver Syndrome, a form of primordial dwarfism," which apparently required the use of pediatric equipment unavailable at Good Samaritan. Tragically, Cory died at Lehigh Valley Hospital on November 22, 2015.

On August 3, 2017, the plaintiffs, unrepresented by counsel, filed suit initially alleging a total of fifteen causes of action against eleven defendants. The complaint alleged that as early as October 27, 2015, Cory showed signs of gastrointestinal bleeding that the defendants failed to recognize and/or ignored, which led to his death. The defendants, suffice to say, dispute this version of events. We note at this juncture that the defendants were collectively represented by two different law firms. Defendants Lehigh Valley Health Network, Lehigh Valley Hospital, Lehigh Valley Anesthesia Services, LVPG Pulmonary and Critical Care Medicine, Norma Wilson, CRNA, and doctors Brian Civic, Dorothea Watson, Jennifer Strow, and Bonnie Patek were represented by Gross McGinley. For ease of reference, we refer to these defendants collectively as "Lehigh Valley." Defendants Frederic Stelzer, M.D., and Eastern Pennsylvania Gastroenterology and Liver Specialists, were represented by the Perry Law Firm.[4] We refer to this group as "Eastern Gastro."

[4] Initially, Gross McGinley entered appearances on behalf of all eleven defendants. Praecipe for Entry of Appearance, 8/22/2017. The Perry Law Firm entered its

As later identified by the Superior Court, an immediate complication with the originating complaint is that Carla and Brenton, who are not licensed attorneys, are permitted only to represent themselves when pursuing their respective wrongful death actions. "Wrongful death damages are established for the purpose of compensating the spouse, children, or parents of a deceased for pecuniary loss they have sustained as a result of the death of the decedent." *Kiser v. Schulte*, 648 A.2d 1, 4 (Pa. 1994) (citations omitted). Survival actions which are brought on behalf of the decedent's estate, however, must be filed through an attorney. Conceptually, the estate itself is the plaintiff and, for largely the same reasons that corporate entities must be represented by a lawyer, an attorney must represent the estate. Further complicating matters, Carla exclusively signed virtually all of Brenton's documents, and therefore acted as an attorney for all three plaintiffs. However, the defendants did not object and the trial court did not raise these issues.

Instead, the defendants raised numerous preliminary objections regarding the plaintiffs' failures to comply with the Rules of Civil Procedure. Pertinent to this appeal, the bulk of the litigation centered on plaintiffs' attempts to comply with a requirement peculiar to professional negligence actions.

Certificate of Merit litigation

The Rules of Civil Procedure dictate that a Certificate of Merit ("COM") must accompany "any action based upon an allegation that a licensed professional deviated from an acceptable professional standard[.]" Pa.R.C.P. 1042.3(a). The COM "signals to

---

appearance on the same day. Praecipe for Entry of Appearance, 8/22/2017. Gross McGinley subsequently withdrew its appearances for Frederic Stelzer and Eastern Pennsylvania Gastroenterology and Liver Specialists.

the parties and the trial court that the plaintiff is willing to attest to the basis of his malpractice claim; that he is in a position to support the allegations he has made … and that resources will not be wasted if additional pleading and discovery take place." *Womer v. Hilliker*, 908 A.2d 269, 275 (Pa. 2006). That attestation includes a representation that a qualified expert has supplied a written statement. COMs are subject to timing, procedural, and substantive requirements.[5]

COM timing litigation

We begin with the timing. The COM must be attached to the complaint or filed within sixty days after the filing of the complaint. *Id*. The rule permits the court to extend the time as follows:

> (d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. A motion to extend the time for filing a certificate of merit must be filed by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6(a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater. The filing of a motion to extend tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.

Pa.R.C.P. 1042.3(d). The Note to this Rule states that a court may extend the time as many times as it wishes, provided that the plaintiff files a timely motion each time and shows cause. *Id*. at Note.

---

[5] As further discussed in our analysis, pro se plaintiffs, unlike counseled parties, are required to attach to the COM the actual written statement from a qualified expert. While the Bishers did so, the supplied written statement did not use the same language as prescribed by Rule 1042.3. For ease of reference, the use of the acronym COM includes both the certificate and the attached written statement unless the context indicates otherwise.

As the complaint did not include a COM, on September 5, 2017, Lehigh Valley filed a Notice of Intent to Enter Judgment of Non Pros. *See* Pa.R.C.P. 1042.6, 1042.7.[6] Plaintiffs filed an emergency motion requesting a continuance due to a family emergency. Motion, 9/19/2017. Lehigh Valley objected, arguing that "[t]he only acceptable response would be either the filing of a [COM]" or a motion to extend the time for filing a COM. Brief, 9/28/2017, at 2. They noted that the emergency motion did not indicate that plaintiffs "ever intend to file a [COM] or seek an extension to do so. Plaintiffs appear to seek only to respond, whatever that may mean." *Id*.

Before the court could rule on the emergency motion and the objections, the Bishers filed a joint motion to (1) strike the notice of intent to enter judgment of non pros and (2) have the trial court determine whether a COM was necessary. *See* Pa.R.C.P. 1042.6(c) (authorizing plaintiff to file, in response to a motion seeking judgment of non pros, "a motion seeking a determination by the court as to the necessity of filing a certificate of merit."). In the accompanying brief, the Bishers requested that the court "waive the [COM] requirement." Brief, 10/5/2017, at 4. The Bishers argued that obtaining a COM was financially burdensome and their "inability to obtain and/or pay for it would impede their right of access to courts[.]" *Id*. at 6. Additionally, the Bishers argued that their complaint was not a " 'frivolous claim' that should be weeded from the court docket," as it was supported by twenty-six exhibits and further argued that a COM was not necessary as their negligence theory was in the nature of res ipsa loquitur.

[6] Eastern Gastro filed its notice of intent to enter judgment of non pros on September 25, 2017.

That same day, the trial court entered an order denying that motion. In an explanatory footnote, the trial judge acknowledged the difficulties facing pro se litigants and observed that the court could "excuse certain procedural defects," but could not waive the COM requirement. Meanwhile, correctly anticipating that their motion to excuse the COM would be denied, the Bishers filed a contingent motion[7] requesting sixty days to file a COM. The trial court responded to the contingent motion by, inter alia, granting the Bishers leave "to file appropriate Certificates of Merit with respect to all Defendants against whom Certificates of Merits must be filed" within sixty days. Order, 10/16/2017. Notwithstanding the ruling that the COM requirement could not be waived or otherwise excused, the Bishers renewed their request to have the trial court determine the necessity of filing a COM. Motion, 12/11/2017. This motion raised new grounds in support, including allegations that (1) the defendants "fraudulently concealed and misrepresented facts in a key medical record" and (2) the defendants "withheld and/or destroyed key video evidence", as well as an assertion that the COM requirement is unconstitutional. In the alternative, the Bishers requested an additional ninety days to file COMs.

The trial court ordered the Bishers to cease filing any further motions to determine the necessity of filing a COM. Order, 2/2/2018. As well, this order reiterated that a COM was necessary "with respect to the professional medical service providers identified as Defendants[.]" *Id*. The trial court ruled that the COM was due within twenty days. *See* Pa.R.C.P. 1042.6(c) ("If it is determined that a certificate of merit is required, the plaintiff

[7] The chronological asymmetry stems from the fact that the Bishers are Wisconsin residents and materials were mailed to their home.

must file the certificate within twenty days of entry of the court order on the docket or the original time period, whichever is later.").

On February 22, 2018, the Bishers filed a single COM (hereinafter "original COM") with an attached one-and-one-half page written statement from Marvin Ament, M.D., a board-certified adult and pediatric gastroenterologist. As relevant to the ensuing litigation, Dr. Ament's attached statement related that he was asked "to determine whether there was sufficient merit to consider the case for malpractice." Exhibit to original COM at 1. The statement related that Cory "warranted an esophagogastroduodenoscopy to determine the cause of his bleeding." *Id*. That procedure was not done "because the physicians and gastroenterologists caring for him thought there was nothing to be learned by doing an endoscopy and felt his treatment with proton-pump inhibitors was sufficient." *Id*. That "was a grave error" because, had the endoscopy been performed "and a specific bleeding lesion found, it could have been treated" and the bleeding stopped. Dr. Ament stated that the failure to perform the endoscopy "was a major contributing factor in [Cory's] death," and that the failure to treat "was responsible for his death." *Id*. at 2.

COM substantive litigation

The litigation then shifted to whether the COMs and the accompanying statement were substantively sufficient. Lehigh Valley filed a motion to strike, identifying two flaws in the original COM. The first was that the Bishers had filed only one COM, but the Rule requires a separate COM "as to each licensed professional against whom a claim is asserted." Pa.R.C.P. 1042.3(b)(1). Second, Lehigh Valley questioned whether Dr. Ament was an "appropriate licensed professional" as contemplated by the Rule with respect to Dr. Civic, Dr. Watson, and Dr. Strow, all of whom are "Board Certified in Internal

Medicine with Board Certifications in the Subspecialties of Pulmonary Disease and Critical Care Medicine." Brief in Support of Motion to Strike, 2/26/2018, at 4. Similarly, Norma Wilson is a certified registered nurse anesthetist and Dr. Patek was a resident physician at the time of Cory's death. "As Dr. Ament is board-certified in a completely different subspeciality than named Defendants, the written statement submitted with Plaintiffs' [COM] is insufficient[.]" Motion to Strike, 2/26/2018, at 5.

The trial court granted Lehigh Valley's motions in part, striking with prejudice the original COM as to doctors Brian Civic, Dorothea Watson, Jennifer Strow, and Nurse Wilson. The court agreed that Dr. Ament was not qualified to render an opinion as to those individuals because they were board-certified in different specialties. With respect to the remaining Lehigh Valley defendants, the trial court denied the motion to strike the COM as to Dr. Patek. The trial court noted that "Dr. Stelzer did not file a motion seeking to strike Plaintiffs' Certificate of Merit." Trial Court Order, 3/22/2018, at 3 n.2. Nevertheless, the trial court struck the COM as to Dr. Stelzer without prejudice on the basis it was not individually filed and thus "does not indicate that any specific Defendant breached the applicable standard of care about which Dr. Ament is qualified to opine." *Id*.

The Bishers then filed amended individual COMs for two named defendants and three corporate entities: Dr. Stelzer, Eastern Pennsylvania Gastroenterology and Liver Specialists, Dr. Patek, Lehigh Valley Health Network, and Lehigh Valley Hospital.[8] Each COM was accompanied by a revised (and identical) written statement by Dr. Ament. In

[8] Lehigh Valley filed a praecipe for entry of judgment of non pros as to defendants Brian Civic, Dorothea Watson, Jennifer Strow, and Norma Wilson. The Bishers did not respond. Additionally, separate COMs were not filed against the remaining defendants.

relevant part, the written statement faulted "Dr. Frederic Stelzer and the Eastern Pennsylvania Gastroenterology and Liver Specialists" for failing to "initiate endoscopy early as they should have when they saw" Cory's condition. This condition "worsened when a resident and certified registered nurse anesthesiologist intubated him at the bedside causing a 'massive aspiration' of gastric contents." Addressing the Lehigh Valley defendants, they "are the medical entities that were involved in providing the care for Cory Bisher. They needed to have protocols in place to deal with gastrointestinal hemorrhage and alternative chain of commands if things do not go well." Dr. Ament's statement included a series of rhetorical questions implicating the standard of care. The statement concluded: "These are all of the reasons why this case merits evaluation for malpractice."

Eastern Gastro filed a motion to strike, arguing that the amended COMs were still defective. Eastern Gastro averred that the amended statement only faulted the Eastern Gastro defendants for not initiating endoscopy early enough, but Dr. Ament did not claim this constituted a breach of the standard of care. He did not state that this failure caused the harm, as Dr. Ament did not directly attribute Cory's degrading condition and ultimate death to the failure to perform an endoscopy. Nor did the phrases "standard of care," "acceptable professional standards," or "acceptably equivalent phrases" appear in the statement. Instead, Dr. Ament merely concluded that the case warrants "evaluation," which is not the same as the "reasonable probability" demanded by the Rule. Alternatively, Eastern Gastro contended that Dr. Ament, "a pediatric gastroenterologist, is not qualified to offer standard of care criticisms of an adult gastroenterologist[.]" Motion to Strike, 4/25/2018, at 3-5.

The Bishers responded by filing on May 5, 2018 a "Praecipe to Attach Curriculum Vitae" for Dr. Ament (a seventy-seven page document) and a "Praecipe to substitute" the written statement. The latter filing substituted Dr. Patek's name for the unnamed "resident," and replaced the "merits evaluation" language with the following: "There exists a reasonable probability and degree of medical certainty that the Defendants breached the appropriate standard of care, and that this breach was a cause in bringing about the harm to Cory Bisher." *See* Praecipe to Substitute/Replace Expert Statement in Certificate of Merit for Defendant, 5/5/2018, at 2 (hereinafter "final COM").

On June 11, 2018, the trial court issued an order and accompanying memorandum for each group of defendants. Addressing Eastern Gastro's preliminary objections, the court sustained in part and overruled in part. The Bishers were granted leave to file an amended complaint within twenty days. This order also struck the certificates of merit for both Eastern Gastro defendants. The court determined that Dr. Ament's "very impressive career in pediatric gastroenterology" does not permit him to offer an expert opinion regarding an adult gastroenterologist. The court separately addressed whether the COMs remained substantively deficient. The judge acknowledged that "[t]he third amended letter appears to include the requisite language … to state an opinion that a reasonable probability exists that the care exercised in the treatment of the decedent fell outside acceptable professional standards, and that such conduct was a cause in bringing about the harm," but this statement was a mere summary that "fails to identity the specific actions of Dr. Stelzer or EPGLS which breached the appropriate standard of care that led to Bisher's death." Memorandum Opinion, 6/11/2018, at 15.

The trial court separately issued an order sustaining Lehigh Valley's preliminary objections in the nature of a demurrer and dismissed the complaint against all Lehigh Valley defendants with prejudice. This opinion recognized that Lehigh Valley "ha[s] not filed any responsive pleadings to these praecipes to amend or substitute the previous certificates of merit," Trial Court Opinion, 6/11/2018, at 12. The trial court largely applied the same analysis set forth above, and added that Dr. Ament "is a pediatric gastroenterologist attempting to offer an opinion as to Dr. Patek, a medical resident who performed an intubation." *Id*. at 14.

The Bishers filed an amended complaint against the Eastern Gastro defendants, which was dismissed on September 5, 2018.

Superior Court

The Bishers timely appealed.[9] The Superior Court, sua sponte, took notice of the previously discussed unauthorized practice of law issue and issued a rule to show cause directing Carla Bisher "to notify this Court within ten days whether she is licensed to practice law in Pennsylvania on behalf of the other appellants." Order, 10/15/2018. Carla responded that she is not a lawyer but averred that Brenton granted her a limited power of attorney which she believed authorized her to act on his behalf in this matter. As to Cory's estate, Carla attached a "short certificate" issued by the Court of Common Pleas of Northampton County Register of Wills, naming Carla as administrator of the Estate. The Superior Court entered an order prohibiting Carla from acting on behalf of both

[9] The Superior Court determined that the June 11, 2018 order, while final as to the Lehigh Valley defendants, did not end the case as to all defendants since the Bishers were given an opportunity to amend the complaint against Eastern Gastro defendants. There was no final appealable order until the amended complaint was dismissed on September 5, 2018.

Brenton and the Estate. The court also ordered Carla "to retain counsel on behalf of the Estate," and directed counsel to enter an appearance within thirty days. Counsel entered an appearance and the Superior Court discharged its rule to show cause, informing the parties that the merits panel could address the issue.

In a split unpublished memorandum decision, the Superior Court held that it lacked subject-matter jurisdiction over the appeal and quashed. Judge Olson, joined by President Judge Emeritus Ford Elliot, separated each parent's wrongful death claims from the Estate claims for analysis. Regarding the Estate, the panel asserted that "whether a non-attorney's actions constitute the unauthorized practice of law implicates a trial court's jurisdiction over a particular matter." *Bisher v. Lehigh Valley Health Network, Inc.*, 237 A.3d 1091, 2020 WL 3542237, at *5 (Pa. Super. June 30, 2020), *appeal granted*, 251 A.3d 779 (Pa. 2021). The only case cited in support for this proposition was *David R. Nicholson, Builder, LLC v. Jablonski*, 163 A.3d 1048, 1056 (Pa. Super. 2017), wherein the Superior Court held that David Nicholson, the sole member of a LLC, was not authorized to litigate on behalf of said LLC as he was not a licensed attorney. The *Jablonski* panel concluded that the trial court lacked jurisdiction. Extending that logic to a non-attorney attempting to represent the Estate, the Superior Court concluded that all filings on behalf of the Estate were legal nullities, void ab initio. Because the trial court lacked subject-matter jurisdiction over the Estate claims, it followed that the Superior Court also lacked jurisdiction.

Turning to the claims that could be pursued pro se by the Bishers, the Superior Court concluded that those claims were also legal nullities, albeit for a different reason. "A complaint is a legal nullity, void *ab initio*, when the complaint is not signed by the *pro*

se plaintiff and fails to include the essential verification statement signed by the plaintiff." 2020 WL 3542237, at *7 (citing *Atl. Credit and Fin., Inc. v. Giuliana*, 829 A.2d 340, 344 (Pa. Super. 2003)). Although both Bishers individually signed the complaint, "a review of the complaint demonstrates it does not contain the necessary and essential verification statement signed by both of the *pro se* individuals." *Id*. Without that verification, the complaint "was nothing more than a narration of events and a legal nullity, void *ab initio*, as to the *pro se* individuals, Brenton Bisher and Carla Bisher. Consequently, the trial court was without jurisdiction over the matter as it pertained to Brenton Bisher and Carla Bisher, as individuals." *Id*. Alternatively, the Superior Court observed that even if the complaint itself were verified, "the complaint and amended complaint were the only documents in the case that were signed by both *pro se* individuals." *Id*. at *8. As Carla was not permitted to sign Brenton's filings, anything signed by Carla constituted the unauthorized practice of law.

As a third alternative basis for its decision, the majority agreed with the trial court that the COMs filed by Carla were insufficient as a matter of law and adopted that portion of the trial court opinion as its own.

The Honorable Mary Jane Bowes filed a dissent. She agreed that the Bishers engaged in the unauthorized practice of law with respect to the Estate. However, in the dissent's view "an action commenced through the unauthorized practice of law is merely voidable." *Id*. at *14 (Bowes, J., dissenting). Judge Bowes pointed out that in several Superior Court cases involving pleadings that were defective due to the lack of an attorney the parties were given an opportunity to amend. Judge Bowes determined that the voidable nature of this error meant that "the pro se litigant should be advised of the

problem and afforded the opportunity to obtain counsel." *Id*. In support, the dissent cited *Norman v. Temple University Health System*, 208 A.3d 1115 (Pa. Super. 2019), wherein the non-attorney administrator of an estate filed pro se a medical malpractice complaint. The trial court noticed the unauthorized practice of law issue and stayed the case for sixty days so the plaintiff could obtain counsel. The plaintiff failed to do so and the case was dismissed. Judge Bowes pointed out that following plaintiff's appeal, the Superior Court did not quash for lack of jurisdiction but instead affirmed the order that dismissed the complaint after the plaintiff failed to obtain counsel. Therefore, *Norman* implicitly recognized that a trial court has discretion to permit amendment.

Regarding *Jablonski*, Judge Bowes acknowledged that the Superior Court had considered the defect jurisdictional. However, "*Jablonski* involved a layperson non-party's filing of a complaint on behalf of an LLC, not an estate representative filing a *pro se* complaint." 2020 WL 3542237, at *14 n.5 (Bowes, J., dissenting). This distinction was significant because "the Bishers … are the proper parties to bring the instant survival and wrongful death actions. Therefore, this is not an instance where a complaint is wholly without effect for want of a competent legal party." *Id*. at *12 n.3 (citations omitted). Additionally, *Norman*, a case involving an estate, post-dated *Jablonski* and controlled.

Judge Bowes separately disagreed with the majority's conclusion that pleading defects deprive the trial court of subject-matter jurisdiction. The dissent observed that a failure to challenge verification is waivable and the claim could not be raised sua sponte.

Simultaneously, Judge Bowes agreed with the majority that the unauthorized practice of law issue implicated the trial court's subject-matter jurisdiction and agreed that any merits-based determinations were void. "I would hold that the trial court did not have

jurisdiction to entertain the merits of the pending action, and, thus, all of its orders concerning the merits of the Bishers' claims are void." *Id*. at *14. Judge Bowes would have remanded the case to permit an amended complaint within sixty days.

We granted allowance of appeal on the following issues:

> (1) Did the Superior Court err in quashing Petitioners' appeal based upon the Superior Court's finding that it lacked jurisdiction to hear the appeal as it relates to the Estate of Cory Allen Bisher because the Estate's Complaint was void *ab initio*, where the trial court permitted a non-attorney to represent the Estate until the statute of limitations had expired?
>
> (2) Did the Superior Court err in quashing Petitioners' appeal based upon the Superior Court's holding that it lacked jurisdiction to hear the appeal as it relates to *pro se* litigants Carla Bisher and Brenton Bisher because of an improper verification, an issue raised *sua sponte* by the Superior Court?
>
> (3) Did the Superior Court err in ruling that the Certificates of Merit at issue in the instant case were deficient where the Certificates of Merit met the legal requirements of Pa.R.C.P. 1042.3 and the MCARE Act?

Bisher v. Lehigh Valley Health Network, Inc., 251 A.3d 779 (Pa. 2021) (per curiam).

II.

Parties' Arguments

The Bishers

The Bishers concede that Carla was not authorized to bring the Estate claims but argues that the court still had subject-matter jurisdiction over those claims. They believe that the Superior Court's " 'nullity' rule is contrary to Pennsylvania law." Bishers' Brief at 21. While this issue is one of first impression for this Court, both the Superior and Commonwealth Courts have embraced the view that pleadings deemed defective due to

the participation of a non-attorney constitute curable defects. *See Norman*, 208 A.3d 1115*; In re Rowley*, 84 A.3d 337 (Pa. Commw. 2014) (trial court held that estate must be represented by attorney and allowed administrator sixty days to retain counsel; litigant appealed that collateral order and Commonwealth Court affirmed and remanded). Echoing Judge Bowes' dissent, the Bishers argue that if a trial court lacks subject-matter jurisdiction in such circumstances, then the trial court has no discretion whatsoever to do anything other than declare the pleadings void ab initio.

The Bishers cite persuasive authority from other jurisdictions embracing the voidable approach. They acknowledge that a number of jurisdictions deem uncounseled pleadings void ab initio but describe that number as a minority; moreover, they characterize those decisions as being founded on (1) policy rationales surrounding the unauthorized practice of law or (2) "arguably hyper-technical interpretations of their rules of practice[.]" Bishers' Brief at 28. Comparatively, the Pennsylvania Rules of Civil Procedure dictate that the rules shall be liberally construed and errors or defects which do not affect substantial rights may be disregarded. *See* Pa.R.C.P. 126. The Bishers also cite conceptual conflicts that arise from strict adherence to the void ab initio approach. For example, if a plaintiff were to sue a corporation and a non-attorney appeared to defend, the nullity approach would dictate that any judgments entered simply did not exist. The Bishers stress that the trial court had jurisdiction over the entire pleading, and the fact that Carla was unauthorized to proceed on some of the claims raised within that complaint is of no moment for jurisdictional purposes.

Addressing the Superior Court's conclusion that the pro se claims were void ab initio due to the lack of a signature on the verification, the foregoing arguments equally

apply. Additionally, the Superior Court's decision in *Monroe Contract Corp. v. Harrison Square, Inc.*, 405 A.2d 954, 959 (Pa. Super 1979), recognized that the lack of a signature does not implicate subject-matter jurisdiction. Therefore, the Superior Court inappropriately acted as advocates for the defendants by raising this matter sua sponte. The lack of a signature is a pleading defect that must be raised or it is waived on appeal.

Turning to the COM issue, the Bishers maintain that the final COMs complied with the applicable Rule and that the trial court should be reversed. The Bishers point out that both Dr. Ament and Dr. Stelzer are board certified in the field of adult gastroenterology. Thus, he is clearly authorized to offer an opinion regarding Dr. Stelzer. Regarding Dr. Patek, the Bishers cite *Campbell v. Attanasio*, 862 A.2d 1282 (Pa. Super. 2004), which held that residents cannot be deemed a specialist and thus Dr. Ament is qualified to offer an opinion on her care. For the corporate defendants, the Bishers assert that the COMs adequately apprised the defendants of their claims. Finally, the Bishers claim that the Rule does not require the written statement to particularly identify any particular acts or omissions by individual defendants. The filing of a COM as to each individual defendant in combination with Dr. Ament's written statement satisfied the Rule's requirements.

Eastern Gastro

Eastern Gastro observes that the Bishers have not articulated a consistent position on the threshold question of whether the trial court had subject-matter jurisdiction of the Estate claims as well as Brenton's claims. Indeed, "it was the [Bishers] who first argued that the trial court lacked jurisdiction over the claims brought by Brenton Bisher and the Estate." Eastern Gastro's Brief at 13 (citing Bishers' Superior Court Brief at 19). Eastern Gastro agrees with that initial position, as well as the Superior Court's majority conclusion

that the want of jurisdiction renders all filings a legal nullity. "Accordingly, whatever causes of action, complaints, pleadings and certificates of merit which were filed before the trial court were not present in front of the Superior Court, nor are they currently present before the Honorable Court for disposition because they are void." *Id*. at 14-15. The Bishers' current argument is "a complete 180 degree turn in their approach from the time when they filed their Superior Court Brief[.]" *Id*. at 20. It remains "unclear whether [the Bishers] believe that the trial court's jurisdiction is implicated in the unauthorized practice of law. Absent clarity from the [Bishers], it seems prudent" to affirm. *Id*. at 21. Eastern Gastro makes similar arguments as to why the lack of verification deprived the trial court of subject-matter jurisdiction.

In the event this Court finds that the pleadings were not void ab initio, Eastern Gastro questions the suggestion that the defendants had any duty to object or that the trial court should have raised the issue. But in any event the trial court's failure to do so did not prejudice the Bishers in any way because their own pleadings reflect that as early as February of 2017 Carla made efforts to find counsel. Eastern Gastro quotes Carla's response to the rule to show cause, wherein she stated, "had [the Bishers] been able to retain counsel, they never would have filed their case *pro se* in the first place." Response to Rule to Show Cause, 10/19/2018, at 4. Eastern Gastro submits that the "decision to proceed *pro se* was one of necessity; she could not retain an attorney." Eastern Gastro's Brief at 24. As a result, a remand for an opportunity to cure would not only reward Carla, but it would prejudice the defendants who "would be forced to spend more time relitigating claims that they have been toiling over the course of four years." *Id*. Relatedly, all

defendants would be prejudiced by having to "defend against claims of professional malpractice which they believed had already been resolved in their favor." *Id*.

To the extent that policy considerations are properly considered as a component of whether unauthorized filings should be deemed void ab initio or merely voidable, Eastern Gastro maintains that this is not a situation where the unrepresented entity could be theoretically harmed by a non-attorney attempting to raise claims on that entity's behalf. It responds that the Bishers' example of a corporation with "tens or hundreds or even thousands of individuals" is markedly different from the Estate, because the Bishers are presumably the only beneficiaries of Cory's estate. Thus, unlike innocent shareholders who could have their own legal interests harmed by applying the void ab initio approach, Cory "[s]adly … is deceased, and cannot benefit from a settlement or verdict in his favor. He cannot suffer prejudice from his mother's unauthorized practice of law." *Id*. at 23.

Turning to the COM issue, Eastern Gastro urges this Court to affirm the trial court. They rely, in part, on the "complete procedural posture of the case on this issue" to highlight the travails before the trial court. The Bishers were granted great latitude, and the trial judge "afforded more deference and leniency than any *pro se* litigant or licensed attorney would reasonably expect in the same circumstances." *Id*. at 33. The plaintiffs "should not be granted even more grace and leniency … especially considering she was engaging in the unauthorized practice of law." *Id*. at 34.

With respect to the COM filed against Dr. Stelzer, Eastern Gastro submits that the trial court correctly struck the COMs based on the fact Dr. Ament has spent his career

specializing in pediatric gastroenterology, not adult gastroenterology. Additionally, the COM and attached statement do not satisfy the Rule's requirements.

Lehigh Valley

The Lehigh Valley defendants make many of the same arguments as their fellow appellee. Adding to those arguments, Lehigh Valley argues that the void ab initio rule is justified because the voidable approach effectively tolls the statute of limitations period. It also emphasizes that the practice of law "involves matters of extreme public concern[,]" Lehigh Valley's Brief at 8 (quotation marks and citation omitted), and argues that the policy reasons animating the void ab initio approach are not to protect attorneys but "preventing the intrusion of inexpert and unlearned persons in the practice of law, to assure to the public adequate protection in the pursuit of justice, than which society knows no loftier aim." *Id*. (quotation marks and citation omitted). They assert this Court should adopt the reasoning of the *Jablonski* decision and hold that documents filed by a non-attorney are nullities and thus there was nothing to appeal in this case.

Recognizing that other jurisdictions do not adopt this approach, Lehigh Valley states that the Bishers "have set forth an unfounded claim that the 'majority' of states find unauthorized practice of law a curable defect" as their briefs only cite a handful of cases. In any event, those cases involve "entirely different contexts" than this matter, including cases involving corporations. It urges this Court to follow decisions like *Kelly v. Saint Francis Medical Center*, 889 N.W.2d 613 (Neb. 2017), which adopts the void ab initio approach. The appellees point out that even today defendants Dr. Brian Civic, Dr. Dorothea Watson, Dr. Jennifer Strow, and Norma D. Wilson remain parties to the appeal despite the fact that the trial court dismissed those defendants with prejudice. Beyond

the costs involved in defending the frivolous claims against them, these individuals must continue "to report they are a defendant in an open case for insurance and credentialing purposes." *Id*. at 15. These types of harms illustrate the desirability of a void ab initio rule. Lehigh Valley agrees that authority exists to give parties an opportunity to amend in these situations, but adds that in multiple other contexts courts conclude that a pro se filing is a nullity. *See*, *e.g.*, *Commonwealth v. Leatherby*, 116 A.3d 73, 86 (Pa. Super. 2015) (holding that a pro se document is a nullity when the litigant is currently represented by counsel).

III.

Analysis – Subject-Matter Jurisdiction

We jointly address the first two issues on which we granted allowance of appeal. At the trial court level, neither the unauthorized practice of law issue nor the verification requirement was raised. The Superior Court could address those unpreserved issues only via its power, if not duty, to raise jurisdictional issues sua sponte.

A.

We begin with jurisdiction principles because a proper understanding of that concept provides critical background for addressing the competing arguments regarding the consequences this Court should attach to such defects.

Subject-matter jurisdiction

"The lack of jurisdiction of the subject matter may be raised at any time and may be raised by the court sua sponte if necessary." *LeFlar v. Gulf Creek Indus. Park No. 2*, 515 A.2d 875, 879 (Pa. 1986). In *Riedel v. Human Relations Commission of Reading*, 739 A.2d 121, 124 (Pa. 1999), we reiterated a common refrain: "Jurisdiction and power

are not interchangeable although judges and lawyers often confuse them. Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs." *Id*. at 124 (quoting *Delaware River Port Auth. v. Pa. Pub. Util. Comm'n,* 182 A.2d 682, 686 (Pa. 1962) (citation omitted)). Recently, in *Domus, Inc. v. Signature Building Systems of PA, LLC*, 252 A.3d 628, 636 (Pa. 2021), we discussed that point in connection with the plaintiff seeking to execute, in a court of this Commonwealth, a judgment obtained in New Hampshire. The plaintiff failed to authenticate that judgment as required by the Uniform Enforcement of Foreign Judgments Act (UEFJA), 42 Pa.C.S. § 4306. The Superior Court determined that the failure implicated subject-matter jurisdiction. We disagreed. "Here, the absence of proper authentication under UEFJA does not render the court of common pleas incompetent to determine controversies in the general class to which this case belongs, i.e., actions to enforce foreign judgments." *Domus*, 252 A.3d at 637.

Equating jurisdiction with the competence of the court to determine the controversy generally aligns with the United States Supreme Court's views. "Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). For instance, federal courts lack subject-matter jurisdiction "over a claim against a foreign state" unless a statutory exception applies. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Federal courts must raise subject-matter questions sua sponte because of the interest it serves. "Subject-matter limitations on federal jurisdiction serve institutional

interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Ruhrgas AG*, 526 U.S. at 583. The high Court has acknowledged that it too "ha[s] been less than meticulous in this regard[,]" by sometimes using the term "jurisdiction" too broadly. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). The *Kontrick* Court admonished that the label "jurisdictional" should be reserved "only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id*. In *Domus*, we likewise alluded to restricting jurisdictional concepts to this core concern. "Under our Constitution and per statute, the courts of common pleas have unlimited original jurisdiction of all actions, except where otherwise provided by law." *Domus*, 252 A.3d at 636.[10]

A court's sua sponte ability to raise subject-matter defects on its own ensures that a court, at any time, can make certain that the courts are adjudicating only those classes of cases which the law allows us to hear. Here, there is no question that the trial court

[10] Of course, this general framework does not supply ready answers to all questions. For example, a tribunal's ability to hear certain lawsuits can turn on whether the sovereign has waived sovereign immunity. Such cases do involve a restraint on a court's competency to hear the case insofar as absent a waiver of immunity the judiciary is powerless to do anything. *See Brownback v. King*, 141 S. Ct. 740, 749 (2021) ("The one complication in this case is that it involves overlapping questions about sovereign immunity and subject-matter jurisdiction."). We treat sovereign immunity as a waivable defense that does not implicate a trial court's competence to hear a case. "Sovereign Immunity is in the nature of an affirmative defense; (a) it does not go to jurisdiction and (b) it can be waived." *Chem. Nat. Res., Inc. v. Republic of Venezuela*, 215 A.2d 864, 867 (Pa. 1966). By stating that both Pennsylvania and the United States Supreme Court view subject-matter jurisdiction by reference to a trial court's competency to entertain the controversy at all, we do not intend to say that we follow federal courts in lockstep. We make these observations merely to highlight that both this Court and federal courts view subject-matter jurisdiction narrowly.

was authorized to adjudicate the Estate's medical malpractice lawsuit that Carla attempted to pursue. However, in the Superior Court's view, the participation of a non-attorney in bringing that otherwise cognizable suit implicates the trial court's subject-matter jurisdiction because the filing of the complaint was a nullity so that there was nothing over which the trial court could exercise jurisdiction such that issue preservation requirements may be ignored.

B.

The phrase "ab initio" means "from the beginning" and thus implies that the courts lack subject-matter jurisdiction, based on the idea such pleadings are void and the trial court had no authority to act. *See Jablonski*, 163 A.3d 1048. Conversely, the voidable approach suggests that the complaint had vitality and the trial court had the authority to act upon it. Whether the pleading filed by a person engaged in the unauthorized practice of law[11] is void or voidable is an issue of first impression for this Court. To aid in its resolution, we will first examine the competing approaches as adopted by our sister courts.

The "void ab initio" view

A number of jurisdictions agree with the Superior Court's subsidiary conclusion that uncounseled pleadings filed by a non-attorney in circumstances where an attorney is required are void from inception and thus cannot be cured or amended. Significantly, our analysis of these decisions establishes that few describe the issue as implicating jurisdictional concerns, subject-matter or otherwise. Instead, these courts adopted the

[11] We accept for purposes of this disposition that Carla engaged in the unauthorized practice of law by filing the Estate claims and by attempting to litigate her husband's claims.

void ab initio approach after weighing competing policy concerns surrounding the unauthorized practice of law versus the inherent harshness involved in nullifying pleadings. Lending support to the Bishers' assertion that the Superior Court's sua sponte invocation of these principles amounted to acting as an advocate, in virtually all of these decisions the opposing party or the presiding judge raised the issue at the trial court level.[12] That includes *Jablonski*. 163 A.3d at 1050 ("In their preliminary objections, Appellees averred: (1) Mr. Nicholson could not appear in the court of common pleas on behalf of Appellant because he is not an attorney… .").

Arkansas and Nebraska serve as exemplars of jurisdictions adopting the void ab initio approach while not adopting the Superior Court's subject-matter jurisdiction analysis. In *Davenport v. Lee*, 72 S.W.3d 85, 87 (Ark. 2002), a woman died minutes after an intubation given in advance of surgery. The probate court appointed the woman's sister as administrator of the estate. Acting pro se, the administrator then filed a lawsuit against various medical professionals, alleging negligence. A law firm entered its appearance three months later and filed a pleading. The defendants argued that the original complaint "should be dismissed because it was a nullity, as it had been signed by the estate's administrators who were non-lawyers and that any further claims were time barred." *Id*. at 88. The trial court agreed but the intermediate appellate court reversed.

[12] We have found one reported case from Nebraska involving the appellate court sua sponte raising the issue. The appellate court did so pursuant to its plain error review. Pennsylvania, however, does not employ the plain error approach. "[T]his Court has generally applied waiver rules that are stricter than those that pertain in many other jurisdictions. For example, the Court has abrogated the plain error doctrine in Pennsylvania, although that construct continues to prevail in many other courts." *Commonwealth v. Hays*, 218 A.3d 1260, 1267 (Pa. 2019) (Saylor, C.J., concurring) (citation omitted).

The Arkansas Supreme Court accepted review and affirmed the trial court ruling. The only reference to subject-matter jurisdiction came from the appellant's brief. "According to Appellants, the absence of counsel is a procedural defect that does not interfere with the subject-matter jurisdiction of the trial court, and thus, the complaint is simply defective, not void ab initio." *Id*. at 89. While ultimately disagreeing with that theory, the Court's analysis did not view the issue as involving subject-matter jurisdiction. Its analysis instead described the issue as a technicality and asked whether it could be cured.

> While we too disfavor dismissing actions on technical grounds, this court must remain cognizant of our duty to protect the interests of the public through the regulation of the practice of law. The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. Amendment 28 to the Arkansas Constitution specifically details our duty in this regard and states: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." This court accepted the responsibility assigned to it by the constitution and set the standards high in order to protect the public, as well as the integrity of the legal profession. In light of our duty to ensure that parties are represented by people knowledgeable and trained in the law, we cannot say that the unauthorized practice of law simply results in an amendable defect. Where a party not licensed to practice law in this state attempts to represent the interests of others by submitting himself or herself to jurisdiction of a court, those actions such as the filing of pleadings, are rendered a nullity.

Id. at 93–94 (citations omitted). Accordingly, the original complaint "never existed, and thus, an amended complaint cannot relate back to something that never existed, nor can a nonexistent complaint be corrected." *Id*. at 94.

In *Kelly v. Saint Francis Medical Center*, 889 N.W.2d 613 (Neb. 2017), Stephen Kelly received treatment at a hospital and died shortly after being discharged. His wife,

Ann, filed a pro se claim on her own behalf and on behalf of Mr. Kelly's estate. The defendants sought dismissal at the trial court level, arguing that "Ann was engaged in the unauthorized practice of law[.]" *Id*. at 616. Ann then retained counsel, who sought leave to amend the pro se complaint. The trial court deemed the filings a nullity and refused to permit amendment to "relate back" to the pro se pleading. The Supreme Court of Nebraska agreed. The *Kelly* Court did not conclude that dismissal was required due to a lack of subject-matter jurisdiction, instead opting to explain how the public interest would be served via the bright-line rule.

> By dismissing the case based on the unlawful filing of a wrongful death complaint by a nonlawyer on behalf of the estate, the lower court clearly promoted the policy reasons behind the prohibition against the unlawful practice of law and essentially sought to protect the estate. The policy considerations behind the prohibition of the unauthorized practice are furthered by the lower court's decision that the prior complaint was a nullity.

Id. 619-20.

Ann argued that courts should have the power to overlook those issues, especially in cases like hers where "the unauthorized practice of law was minimal and the party has taken steps to cure the unauthorized practice[.]" *Id*. at 620. The Nebraska Supreme Court then acknowledged the split we address today. Citing, inter alia, the *Davenport* decision, the *Kelly* Court characterized the "nullity" approach as "find[ing] that the 'proscription on the unauthorized practice of law is of paramount importance in that it protects the public from those not trained or licensed in the law.' " *Id*. (quoting *Davenport*, 72 S.W.3d at 93). The *Kelly* Court gave dispositive weight to the harms caused by the unauthorized practice of law. *Id*. at 620-21 ("[I]t is not necessary for this court to engage

in a calculation as to whether the consequences for the unauthorized practice of law are proportional to the gravity of the harm done to the public.").

It is evident that the jurisdictions following the void ab initio approach do so primarily by determining whether the bright-line rule is wise as a matter of policy in light of the harsh results. Jurisdictional concepts are largely not considered at all. *See also Ex parte Ghafary*, 738 So. 2d 778, 779 (Ala. 1998) (justifying the rule declaring documents filed by non-attorneys void ab initio as "serv[ing] to protect the public" in various ways); *Turkey Point Prop. Owners' Ass'n, Inc. v. Anderson*, 666 A.2d 904, 909 (Md. Ct. Spec. App. 1995) (declaring petition filed by non-attorney a nullity) ("The goal of the prohibition against unauthorized practice is to protect the public from being preyed upon by those not competent to practice law—from incompetent, unethical, or irresponsible representation.") (citation omitted); *Naylor Senior Citizens Hous., LP v. Sides Constr. Co.*, 423 S.W.3d 238, 247 (Mo. 2014) ("The Court will not send such mixed signals by substituting the fairness and predictability of this bright-line rule with a situational ethic based upon a post hoc weighing of circumstances and balancing of harms.").

We have found some authority treating the issue as jurisdictional. Connecticut, which follows the nullity approach, describes the question as jurisdictional albeit with respect to standing. *See Expressway Assocs. II v. Friendly Ice Cream Corp. of Conn*., 642 A.2d 62, 67 n.10 (Conn. App. Ct. 1994) (concluding that appeal filed by pro se individual was invalid) ("Having all the parties in interest before the court invokes subject matter jurisdiction, we cannot adjudicate the interests of parties who are not present. Mr. Sakon does not have standing to represent the general partnership."). New York decisions have similarly nullified documents filed by non-attorneys for standing reasons.

See Gazdo Props. Corp. v. Lava, 579 N.Y.S.2d 305, 306 (N.Y. App. Div. 1991) (dismissing appeal because "[t]here is nothing in this record to support any allegation that Mr. Brankovic is an attorney and therefore this proceeding is not being properly maintained by one with standing to maintain it."). Pennsylvania, however, does not view standing as a jurisdictional question. *In re Nomination Petition of deYoung*, 903 A.2d 1164, 1168 (Pa. 2006) ("This Court has consistently held that a court is prohibited from raising the issue of standing *sua sponte*.").

The "curable" view

Consistent with the foregoing discussion, jurisdictions rejecting the void ab initio approach largely do so by deeming the bright-line approach too harsh. The Florida Supreme Court, for example, addressed whether a "complaint filed and signed by an attorney not licensed to practice in Florida is a nullity or an amendable defect." *Torrey v. Leesburg Reg'l Med. Ctr.*, 769 So. 2d 1040, 1041 (Fla. 2000). The court decided on the latter. The court acknowledged the need to protect the public "from incompetent, unethical, or irresponsible representation," and that "the prevention of the unauthorized practice of law is a compelling public policy." *Id*. at 1044 (quoting *Szteinbaum v. Kaes Inversiones y Valores, C.A.*, 476 So. 2d 247, 249-50 (Fla. Dist. Ct. App. 1985)). But "the nullity rule truly places the burden on the unwary litigant, not the offending attorney." *Id*. at 1045.

Of course, in *Torrey*, an attorney not licensed in that jurisdiction commenced the suit and thus the "unwary litigant" was not attempting to litigate pro se. The Florida Supreme Court later extended the curable approach to a pro se litigant. In *Colby Materials, Inc. v. Caldwell Constr., Inc*, 926 So. 2d 1181, 1182 (Fla. 2006), the court

considered filings "prepared and filed *pro se* by the owner of Colby Materials, not by a licensed attorney." The *Colby Materials* Court applied *Torrey* and concluded the litigant must be given a "reasonable amount of time to cure its mistake in failing to file responsive pleadings through the offices of a licensed Florida attorney." *Id*. at 1184.[13]

These jurisdictions largely find that the public may be protected in other ways. "[E]nsuring competent representation on behalf of corporations is better served by other sanctions against the unauthorized practice of law, including injunctive relief and disciplinary sanctions." *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639, 645 (Minn. Ct. App. 2004), *aff'd*, 699 N.W.2d 307 (Minn. 2005). Attorney's fees are cited as a possibility where a lay plaintiff deliberately acts as an attorney. *See Rental Prop. Mgmt. Servs. v. Hatcher*, 97 N.E.3d 319, 333 (Mass. 2018) ("Where a plaintiff seeks to evict a tenant without the standing to do so … and where that conduct is not inadvertent but by design … a court has the inherent authority, in the exercise of its sound discretion, to impose appropriate sanctions, including attorney's fees and other costs[.]"). Such considerations would also include criminal prosecutions, as Pennsylvania criminalizes the unauthorized practice of law. 42 Pa.C.S. § 2524.

Additionally, these courts discuss competing policy concerns beyond that of whether the public is best served by a strict void ab initio approach, including "the policy favoring adjudication of cases on the merits." *Save Our Creeks*, 682 N.W.2d at 645. Thus, pleadings filed by non-attorneys "may be amended" as an exercise of the trial judge's discretion, which permits the court to consider numerous factors, including whether the

[13] The *Colby* Court declined to impose a finding of excusable neglect as a condition of an opportunity to amend.

party was told he or she could proceed pro se, whether the errors are promptly corrected when discovered, the extent of the non-attorney's participation in the litigation, and whether the opposing party was prejudiced. *Id*. Massachusetts has also recognized the concern that participation by non-attorneys may not always be truly unknowing and has indicated that dismissal would be warranted when litigants attempt to "game" the system. *Hatcher*, 97 N.E.3d at 329 (acknowledging that some litigants "may seek to 'game the system' … by having an agent … prosecute the action in the hope that the unauthorized practice of law will not be detected"; in those scenarios immediate dismissal is warranted). *See also CLD Constr., Inc. v. City of San Ramon*, 16 Cal. Rptr. 3d 555, 560–61 (Cal. Ct. App. 2004) (remarking that representation by an attorney "is **not** an absolute prerequisite to the court's fundamental power to hear or determine a case … it is more appropriate and just to treat a corporation's failure to be represented by an attorney as a defect that may be corrected … in the sound discretion of the court"). These decisions tend to find that courts can still guard against the threats posed by the unauthorized practice of law "because the court retains authority to dismiss an action if an unrepresented corporation does not obtain counsel within reasonable time." *Id*. at 561.

Still, some of these decisions do invoke jurisdictional concepts when applying the curable view. The Commonwealth of Massachusetts, like Connecticut and New York, characterizes the issue as one of standing. But Massachusetts does not follow the void ab initio approach. "A judge does have the discretion, however, to determine the appropriate remedy." *Hatcher*, 97 N.E.3d at 329. Indiana courts "generally have given the corporation an opportunity to retain counsel, which the corporation must refuse before dismissing the action." *Wireless Advocates, LLC v. Ind. Dep't of State Revenue*, 973

N.E.2d 111, 112 (Ind. T.C. 2012). However, although curable, permitting a corporation to proceed without an attorney is viewed as violating the court's jurisdictional bounds. *State ex rel. W. Parks, Inc. v. Bartholomew Cty. Ct.*, 383 N.E.2d 290, 293 (Ind. 1978) ("Respondent has therefore exceeded its jurisdiction by permitting the plaintiff corporation to appear through agents not admitted to the practice of law.").

The Arizona Supreme Court's decision in *Boydston v. Strole Dev. Co.*, 969 P.2d 653, 656 (Ariz. 1998), warrants discussion as well. There, the intermediate court of appeals dismissed a notice of appeal for lack of jurisdiction because a non-attorney filed the notice on behalf of a corporation. While the corporation was represented at trial by an attorney, a non-lawyer corporate officer signed a notice of appeal. The intermediate appellate court determined it lacked jurisdiction and dismissed the appeal. The Supreme Court of Arizona held that the offending party must be given a "reasonable opportunity" to cure the problem.

> The court of appeals had jurisdiction to decide this question. If it chose the nullity approach, it would dismiss the appeal. But if it chose the curable approach, it would not. In either case, the question was not one of jurisdiction but the appropriate approach to take when a non-lawyer signs a notice of appeal on behalf of a corporation. We have cautioned against the use of the word "jurisdiction" beyond its core meaning.
>
> * * * *
>
> Together, these … cases mean the following. A corporation cannot appear without a lawyer, but when it does so its action is not automatically a nullity. A reasonable opportunity should be given to cure the problem. A defective notice of appeal does not necessarily deprive the court of appeals of jurisdiction. It will be sufficient as a notice if it is neither misleading nor prejudicial to the appellee.

Id. at 656 (citations omitted). Describing the unauthorized practice of law as not "necessarily" depriving a court of jurisdiction suggests that the pleading is both before and not before the court. However, a better reading is that a court cannot condone the unauthorized practice of law by proceeding with the adjudication. Once the court determines there is a problem, the party is given a chance to cure.

C.

This issue does not implicate subject-matter jurisdiction

Our survey establishes that few courts view the participation of a non-attorney as implicating subject-matter jurisdiction. Some of our sister courts describe the unauthorized practice of law as jurisdictional but rarely, if ever, in terms of the trial court's competency to adjudicate the controversy. The closest jurisdictional tenet involves standing, but our jurisprudence does not view standing as a jurisdictional issue subject to sua sponte intervention. As explained, our views on this subject largely align with those of the United States Supreme Court, and we agree that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 454. Because the participation of a non-attorney has no connection to the classes of cases that a court may hear, we hold that the unauthorized practice of law is not a subject-matter jurisdiction issue. Accordingly, we disapprove of *Jablonski* and other cases to the extent they suggest the unauthorized practice of law implicates subject-matter jurisdiction. That conclusion is of dispositive significance with respect to the Superior Court's ability to raise that issue sua sponte, and the court should not have

quashed the appeal regarding the Estate claims or Brenton's claims based on a perceived jurisdictional defect at the trial court level.[14]

Simultaneously, we recognize that the Superior Court properly raised the issue of unauthorized practice of law with respect to the appellate proceedings. We fully agree with the Massachusetts Supreme Court that a court cannot ignore the unauthorized practice of law and must intervene.

> [W]here a court learns that a person is engaged in the unauthorized practice of law, the court is obligated to take corrective action, regardless of whether the adverse party requests such action. A court has no discretion to tolerate the unauthorized practice of law, and may not allow a person to engage in the unauthorized practice of law simply because the adverse party does not object. A judge does have the discretion, however, to determine the appropriate remedy.

Hatcher, 97 N.E.3d at 329.

This does not conflict with our holding that the unauthorized practice of law does not implicate subject-matter jurisdiction. The critical distinction is that a court's duty to stop the unauthorized practice of law is limited to the proceedings before that tribunal. As applied here, the Superior Court properly issued an order requiring Carla to cease her

---

[14] The Superior Court's holding that the lack of verification implicates subject-matter jurisdiction was erroneous. Whether the complaint is properly verified is something that is strictly between the parties and does not concern the court, and it certainly has no bearing on the court's competency to hear the suit. The Superior Court's concern that the complaint may not have been verified does not justify jurisprudential meddling any more than a trial judge can spontaneously exclude evidence based on the court's own view of its legal admissibility. We agree with the Superior Court's discussion in *Monroe Contract Corp. v. Harrison Square, Inc.*, 405 A.2d 954, 959 n.5 (Pa. Super 1979) (Pa. Super. 1979) (citations omitted), which "implicitly rejects the view that a deficient verification raises a question of jurisdiction. … [W]e view the verification as necessary to the protection of the party, not to the jurisdiction of the court." We agree that a defective verification harms no one but the defendants, and a defendant who suspects that the factual assertions are unverified is required to bring that point to the court's attention.

activities. The court would have been justified in dismissing all of the appellate claims pertaining to Brenton and the Estate had Carla refused to hire an attorney. Thus, the Superior Court had discretion to give Carla a reasonable period of time to obtain counsel. But its ability to prevent Carla from **continuing** the unauthorized practice of law does not extend to undoing what had already transpired at the trial court level.

D.

Application to this case

Our allocatur grant for the first two questions was limited to whether the Superior Court erred by raising the unauthorized practice of law and verification issues sua sponte, resulting in quashing the appeal. We have determined that this was erroneous. The predicate question of whether the complaint is void ab initio or curable must also be decided in this appeal because, as discussed infra, this matter will be remanded for further proceedings.

Our agreement that a court is required to prevent the unauthorized practice of law means that the trial court must address whether the defective pleadings filed on behalf of the Estate and Brenton can be cured. The merits of the underlying policy question has been fully briefed and argued due to the Superior Court's holding. Moreover, the consequences for the unauthorized practice of law ultimately lies within this Court's "power to prescribe general rules governing practice, procedure and the conduct of all courts[.]" PA. CONST. art. V, § 10. We therefore decide the prospective question facing the court on remand: May the trial court allow the administratrix of the estate and Brenton

Bisher, in its discretion, to cure the defective pleadings by virtue of the entry of appearance by counsel for these parties? We hold that the answer is yes.[15]

As a prefatory matter, we agree that the participation of a non-attorney is properly characterized as a technical defect. *See Davenport*, 72 S.W.3d at 93 ("[T]hose jurisdictions holding that the unauthorized practice of law results in an amendable defect have done so in an attempt to avoid what they deem to be the unduly harsh result of dismissal on technical grounds."). Our courts have long embraced the view that technical defects should not frustrate the goal of adjudicating cases on the merits. *See*, *e.g.*, *W. Penn Sand & Gravel Co. v. Shippingport Sand Co.*, 80 A.2d 84, 86-87 (Pa. 1951) ("[C]ourts should not be astute in enforcing technicalities to defeat apparently meritorious claims; if defendant has any real or substantive defense to the confessed judgment the way lies open to it to present it."). Rule of Civil Procedure 1033 ("Amendment") likewise expresses a liberal preference. *See Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1246 (Pa. 2016) ("[W]e observe that a procedural dynamic of this case militates in favor of allowing the amendment to substitute the Trustee for the Company as the plaintiff in the action against the Credit Union, given the liberal policy reflected in the applicable rules."). We find these precepts apply to whether a court can allow pleadings rendered defective because they were filed by non-attorneys to be cured, especially in light of Rule 126.

> The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any

[15] We clarify that, in the event the unauthorized practice of law is framed as an issue for the first time on appeal, the appellate court should, following disposal of the preserved issues, remand to the trial court for this determination.

> error or defect of procedure which does not affect the substantial rights of the parties.

Pa.R.C.P. 126.

This Rule countenances rejection of the void ab initio approach, because whether an individual proceeds pro se or hires a licensed attorney, neither avenue can, by itself, impinge on any substantive rights of the opposing party. This does not mean that the non-participation of an attorney cannot impact substantial rights. Other jurisdictions have suggested that curing the defect is warranted where the non-attorney's participation was minimal. *See Save Our Creeks v. City of Brooklyn Park*, 699 N.W.2d 307, 311 (Minn. 2005) (narrowing the Minnesota intermediate appellate court's test by establishing four elements to apply when non-attorney represents a corporate entity, including requirement that "nonattorney's participation in the action is minimal"). It follows that extensive participation by a non-attorney may prejudice the opposing parties, and we recognize that Carla's participation was significant.

By the same token, the posture of this case amply demonstrates the undesirable consequences of the strict void ab initio approach. There is no dispute that, at bare minimum, Carla was authorized to pursue her own claims pro se. Thus, even if the Estate claims and Brenton's claims had been dismissed due to Carla's inability to litigate on their behalf, Carla's pro se claims would have gone forward. By all indications, the proof of those claims would materially overlap with Brenton's and the Estate claims; the same legal theories supporting the Estate's survival claims would apply to the wrongful death claims. In fact, had the trial court or the defendants raised the unauthorized practice of law midstream, requiring an attorney to appear almost certainly would have saved the

parties considerable time and expense. Additionally, our conclusion that a remand is required means that the resources spent to litigate this matter are a sunk cost.

We acknowledge that the bright-line void ab initio rule has its virtues. Our review of the cases involving participation of non-attorneys from other jurisdictions shows that the problem appears in many forms. Sometimes the plaintiff mistakenly believes that they can litigate the matter, or is even led to believe by the absence of objection or court intervention that the representation is permissible. In others, the counseled plaintiff is suing a defendant who attempts to defend without representation by counsel. Different considerations might apply to default judgments versus final adjudications on the merits. *See, e.g., Szteinbaum v. Kaes Inversiones y Valores, C.A.*, 476 So. 2d 247, 251 (Fla. Dist. Ct. App. 1985) (noting that "decisions pertaining to defaults differ analytically from decisions pertaining to complaints filed by non-attorneys on behalf of corporations"). Still others deal with difficult questions like whether a final judgment on the merits following a trial should be disturbed. And perhaps courts should treat differently an unauthorized notice of appeal taken from a proper underlying judgment. Indeed, Judge Bowes' dissent, which recognized that the panel was bound by *Jablonski*, raised the possibility that the unauthorized practice of law should be treated differently for plaintiffs like Carla bringing survival actions versus a corporation sending a non-attorney agent into a court. The bright-line rule is attractive precisely because it offers an easy solution to all of these scenarios.

Yet Rule 126 and our preference for adjudicating cases on the merits countenances against that temptation. Moreover, while we acknowledge that the unauthorized practice of law can threaten the public good, it is significant that this Court

already permits non-attorneys to participate in a limited capacity in Magisterial District Courts. *See* 246 Pa. Code Rule 207(A)(2) ("Partnerships may be represented by an attorney at law, a partner, or by an employee or authorized agent of the partnership with personal knowledge of the subject matter of the litigation and written authorization from a partner to appear as the partnership's representative."). Allegheny County Local Rule 200 likewise currently permits limited participation by non-attorneys for some matters in the Allegheny County Courts of Common Pleas. Furthermore, it would be ironic to protect the public from the unauthorized practice of law by adopting a remedy that can end up doing more damage than the infraction itself. For example, if a corporate officer mistakenly believes he or she can file an initial complaint and then has corporate counsel amend the pleading shortly thereafter, the void ab initio approach holds that amendment is impossible because there is nothing to amend. *Jablonski*, 163 A.3d at 1048. Perhaps that result is justifiable as a discretionary matter for a sole member LLC as in *Jablonski*. But the void ab initio approach logically tolerates no exceptions. If the corporation had thousands of stockholders, those innocent stakeholders would clearly be harmed by nullifying a pleading that was immediately amended by an attorney. The certainty and uniformity promoted by the void ab initio rule ignores too many costs. Because we are not bound by *Jablonski*, we have no need to harmonize the corporate scenario with this one. We adopt the view that any instance of unauthorized practice of law is curable in the court's discretion pursuant to the principles outlined herein.

This case also demonstrates that attempting to protect the judicial system by preventing unlicensed attorneys from wreaking havoc is not always served by the void ab initio approach. As discussed, courts have cited the need to protect the public as a

justification for the harsh nullity rule, but note that Lehigh Valley argues that they needed protection from Carla. "[I]t is plainly evident that Defendants required the protection 'in the administration of justice from the mistakes of the ignorant.' " Lehigh Valley's Brief at 15 (citation omitted). But this plea for protection has no connection to the public at large and ignores the fact that the defendants easily could have raised the issue in the trial court. Counsel for Eastern Gastro admitted at oral argument that he too shared Carla's belief that her status as administratrix allowed her to litigate on behalf of the Estate. We appreciate the candor, but it borders on hypocrisy to say that Carla should have known that she was mandated to hire an attorney while ignoring that the attorneys were also ignorant of the rule.

The defendants raise one concrete harm: the statute of limitations will be tolled if the trial court permits the unrepresented parties to retain counsel. That point is well-taken. But the statute of limitations creates a defense and not a jurisdictional impediment. *See Bellotti v. Spaeder*, 249 A.2d 343, 344 (Pa. 1969) ("In personal injury actions, the defense of the statute of limitations does not divest the court of power to hear the action and may be waived by consent or conduct of the parties. It is merely a procedural bar to recovery."). Statutes of limitations exist, in large part, "so that the passage of time does not damage the defendant's ability to adequately defend against claims made." *Dalrymple v. Brown*, 701 A.2d 164, 167 (Pa. 1997). The Bishers' timely filings and the defendants' prolonged defense against the claims vitiates any argument based on the danger of the passage of time to an adequate defense.

Significantly, we stress that we decide **only** that the court has the discretion to permit a remedy in these situations, not that it must do so. The default position in such

cases should be that the offending party should be given a "reasonable opportunity" to cure. But we are not convinced that the rule is absolute. As Massachusetts recognized, there may be cases in which the unauthorized practice of law is an attempt to game the system.

Here, after notice and an opportunity to cure by the Superior Court, the Estate and Brenton Bisher retained counsel for the appeal. On remand, we leave it to the trial court to determine whether the unrepresented parties will be given an opportunity to cure. We do not attempt to delineate a complete list of factors that the trial court should consider because the totality of the circumstances of the case as it exists on remand must be considered. However, the factors discussed in the foregoing pages are appropriate for the trial court's analysis.

IV.

The Certificates of Merit

We now address the trial court's ruling, adopted by the Superior Court, that the final COMs were defective. This issue raises a question of law and our standard of review is de novo. *See Womer v. Hilliker*, 908 A.2d 269 (Pa. 2006). For ease of discussion, we analyze the appellees' arguments separately.

As a preliminary matter, Pennsylvania Rule of Criminal Procedure 1042.3 distinguishes between pro se plaintiffs and attorneys and imposes different requirements as to each of them.[16] An attorney satisfies the COM requirements by certifying that "an

[16] This distinction reflects that, as officers of the court, attorneys are bound by the Rules of Professional Conduct and must be candid with the court. *See* Pa.R.P.C. 3.3(a)(1) ("A lawyer shall not knowingly … make a false statement of material fact[.]"). Additionally, a court "may impose appropriate sanctions, including sanctions provided for in Rule 1023.4,

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[.]" Pa.R.C.P. 1042.3(a)(1). In order to comply with the COM requirements, the pro se plaintiff must attach to the certificate of merit the actual written statement authored by the licensed professional. Pa.R.C.P. 1042.3(e). Nonetheless, the content of the required statement of the licensed professional is the same whether certified by an attorney or filed by a pro se plaintiff with the certificate of merit.

Further, the Rules provide a template for filers to use for the actual COM. Rule 1042.10 provides form language for a COM and includes two boxes for the filing party to check based upon the allegations in the complaint. These boxes reflect the content of Rule 1042.3(a)(1) and (a)(2), which pertain to different theories of liability. Subsection (a)(1) references direct liability (whether against an individual person or against a corporate entity), while (a)(2) addresses vicarious liability. Rule 1042.3 provides:

> (a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either
>
> > (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of

---

if the court determines that an attorney violated Rule 1042.3(a)(1) and (2) by improperly certifying that an appropriate licensed professional" has supplied a written statement. Pa.R.C.P. 1042.9(b).

the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard[.]

Note: A certificate of merit, based on the statement of an appropriate licensed professional required by subdivision (a)(1), must be filed as to the other licensed professionals for whom the defendant is responsible. The statement is not required to identify the specific licensed professionals who deviated from an acceptable standard of care. The purpose of this subdivision is to ensure that a claim of vicarious liability made against a defendant is supported by a certificate of merit. Separate certificates of merit as to each licensed professional for whom a defendant is alleged to be responsible are not required. Only a single certificate of merit as to a claim under subdivision (a)(2) is required.

* * * *

(b) (1) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

(2) If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file

(i) a separate certificate of merit as to each claim raised, or

> (ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2).

Pa.R.C.P. 1042.3.

Subsection (b)(1) requires that a separate COM is filed as to each defendant, and the Rule 1042.10 template with its "check the box" form signals to each defendant which theory or theories are being raised. In this case, the COMs filed against Dr. Patek and Dr. Stelzer indicate claims under Rule 1042.3(a)(1). The COMs filed against the corporate defendants designate claims under both Rule 1042.3(a)(1) and (2).

With that background, we address each appellee's arguments.

A.

Lehigh Valley

Rulings on the COMs for this group of defendants were issued at several different times. The complaint originally named corporate entities Lehigh Valley Health Network, Lehigh Valley Hospital, Lehigh Valley Anesthesia Services, and LVPG Pulmonary and Clinical Care Medicine as defendants. The Bishers also named the following individuals as defendants: Dr. Brian Civic, Dr. Dorothea Watson, Dr. Jennifer Strow, Norma Wilson (a Certified Registered Nurse Anesthetist), and Dr. Bonnie Patek.

Following the filing of the original COM on February 22, 2018, Lehigh Valley filed preliminary objections in the form of a demurrer. By order dated March 22, 2018, the trial court addressed that motion and struck with prejudice the COMs as to Dr. Civic, Dr. Watson, Dr. Strow, and Nurse Wilson. Subsequently, Lehigh Valley filed a praecipe for

entry of judgment of non pros for those defendants. The Bishers did not file any response or file any amended COMs against these defendants during the ensuing proceedings.

This March 22 order also struck the COM as to Dr. Patek, but without prejudice. The Bishers then filed the second COMs, as against three Lehigh Valley defendants: Dr. Patek, Lehigh Valley Hospital, and Lehigh Valley Health Network. These COMs were amended one more time. On June 11, 2018, the trial court agreed that these amendments did not cure the COMs and granted the preliminary objections in the form of a demurrer as to the following Lehigh Valley defendants: Lehigh Valley Health Network, Lehigh Valley Hospital, Lehigh Valley Anesthesia Services, LVPG Pulmonary and Critical Care, Dr. Civic, Dr. Watson, Dr. Strow, Dr. Patek, and Nurse Wilson.

The trial court issued an accompanying opinion in support. The analysis was not limited to the final COM, but also addressed flaws in the prior versions. First, while the content of Dr. Ament's original written statement "at first glance … would appear damning in their appraisal of the medical care provided to the decedent by the Defendants," the letter did not satisfy the Rule 1042.3(a)(1) standard. Trial Court Opinion, 6/11/2018, at 10. Dr. Ament said that "it was a 'grave error' not to perform an endoscopy upon the decedent because of the possibility a bleeding lesion may have been found," but he did not say that the chosen care was outside acceptable professional standards. *Id*. Additionally, Dr. Ament originally said the errors were "a major contributing factor" in Cory's death, but did not say there was a "reasonable probability" that the identified errors were a cause in the harm. *Id*. at 10-11. "This language falls far short of the level of professional certitude which is required by our Commonwealth's procedural rules in

professional negligence cases." *Id*. at 11. Additionally, the allegations alleging vicarious liability

> failed to meet the requirements set forth under Rule 1042.3(a)(2) to assert that those Defendants for whom liability is alleged due to their responsibilities for the conduct of other licensed professionals deviated from an acceptable professional standard. In short, Dr. Ament fails to even mention any of the Defendants against whom vicarious liability is alleged for the actions of the physician defendants. In fact, Dr. Ament never identifies any specific individual or entity he identifies as having deviated from acceptable professional standards.

Id.[17]

Addressing the subsequent versions, the trial court observed that the second written statement contained the conclusion that "[t]hese are all of the reasons why this case merits evaluation for malpractice." *Id*. at 13. However: "This conclusory statement fails to express reasonable probability that medical care provided to the decedent fell below acceptable professional standards and led to his death." *Id*. Ultimately, the court addressed the third and final written statement, wherein Dr. Ament concluded that "[t]here exists a reasonable probability and degree of medical certainty that the Defendants breached the appropriate standard of care, and that this breach was a cause in bringing about the harm to Cory Bisher." The court acknowledged that this statement "appears to include the requisite language required under Pa.R.C.P. 1042.3(a)," yet still deemed the statement noncompliant because it "merely summarizes 'that the Defendants breached the appropriate standard of care, and that this breach was a cause in bringing about the harm to Cory Bisher.'" *Id*. at 14. That summary "fails to identity the specific defendant

[17] The trial court's Rule 1925(a) opinion quoted this opinion. Trial Court Opinion, 11/19/2018, at 14-15.

who breached the appropriate standard of care, and that said breach led to Bisher's death." *Id*.

Finally, the trial court concluded that Dr. Ament could not offer an opinion regarding Dr. Patek's actions because he "is a pediatric gastroenterologist attempting to offer an opinion as to Dr. Patek, a medical resident who performed an intubation." *Id*.

Echoing the trial court's analysis, Lehigh Valley argues that Dr. Ament's written statement as attached failed to specifically link any of the Lehigh Valley defendants to a specific act that fell below a standard of care. It faults the language employed within Dr. Ament's written statement because it does not contain the precise language "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[.]" Pa.R.C.P. 1042.3(a)(1). Lehigh Valley also agrees with the trial court that Dr. Ament lacked the requisite qualifications to opine on Dr. Patek's care.

In determining whether these COMs are sufficient, Lehigh Valley does not limit its arguments to the language in the final written statement. Instead, it cites the "grave error" language, which appeared in the original COM. Additionally, Lehigh Valley directs our attention to the COMs filed against Dr. Civic, Dr. Watson, Dr. Strow, and Nurse Wilson and notes that none of those individuals are gastroenterologists. However, the Bishers did not challenge the trial court's order striking those COMs with prejudice, and the only COMs at issue for Lehigh Valley are those filed against Dr. Patek, Lehigh Valley Health Network, and Lehigh Valley Hospital.

B.

Analysis

Lehigh Valley contends that Rule 1042.3 requires a plaintiff to submit a written statement using the precise language set forth in the Rule, and this Court "should confirm that the statement submitted by Dr. Ament and the language used fundamentally failed to meet the requirements of the Rules of Civil Procedure[.]" Lehigh Valley's Brief at 23.

We decline to hold that the written statement must parrot the Rule's language. This Court has rejected strict compliance with the COM requirements, instead holding that "substantial compliance" is sufficient. In *Womer*, we held that the trial court correctly denied Womer relief from judgment of non pros entered against him due to his attorney's failure to file a COM. Instead of filing a COM with the court, the attorney sent an expert report to the opposing party. He thereafter sought to open the judgment. The *Womer* Court acknowledged that Rule of Civil Procedure 126, which permits a "court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties[,]" applies to COM requirements. Womer argued that Rule 126 should apply because the expert report "set forth the information that a COM would have provided and fulfilled Pa.R.C.P. No. 1043's purpose to show that he had a meritorious claim[.]" *Womer*, 908 A.2d at 278. Therefore, he "substantially complied" with the COM requirements.

We agreed that substantial compliance was the correct benchmark but declined to find substantial compliance under the facts. The Court declined to address whether the expert report satisfied the Rule's requirements because we determined that Womer "made no effort" to follow the Rule's filing requirements. Having failed to file anything with

the court, the doctrine would not apply. Substantial compliance can excuse "a procedural misstep in attempting to do that which a rule instructs," but cannot excuse "a party who does nothing that a rule requires[.]" *Id*. at 278.

Here, the plaintiffs repeatedly attempted to comply with Rule 1042.3 having filed multiple COMs. Consistent with the substantial compliance doctrine endorsed in *Womer*, we decline to hold that the written statement must recite verbatim the requisite language. The failure to use the exact language quoted in the Rule is, in our view, a procedural misstep per *Womer* and not fatal per se.

Further, pursuant to *Womer*, whether there is substantial compliance presents a question of law. *Id*. at 276 n.8. Thus our standard of review is de novo and we will review the written statement for substantial compliance with Rule 1042.3.

We conclude that the final COMs and the attached written statements were substantially compliant with the Rule. The trial court's analysis described faults in the first written statements filed with the COMs and its opinion explained that the use of "grave error" fell short of the applicable "reasonable probability" standard. Furthermore, the trial court concluded that the second COM's statement that "this case merits evaluation for malpractice" fell short of the reasonable probability standard required by Rule. But whether those statements were complaint with the Rule is irrelevant because the trial court allowed amendment, and a final COM with a corresponding written statement was filed.

Each final written statement contained Dr. Ament's conclusion: "There exists a reasonable probability and degree of medical certainty that the Defendants breached the appropriate standard of care, and that this breach was a cause in bringing about the harm

to Cory Bisher." *See* Praecipe to Substitute/Replace Expert Statement in Certificate of Merit for Defendant, 5/5/2018, at 2. Comparatively, the Rule requires an appropriate licensed professional to supply "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[.]" Pa.R.C.P. 1042.3(a)(1).

A comparison of the two formulations illustrates that the differences are minor; the trial court's written opinion acknowledged that "[t]he third amended letter appears to include the requisite language required under Pa.R.C.P. 1042.3(a) for an appropriately licensed professional to state an opinion that a reasonable probability exists[.]" Order, 6/11/2018, at 15. Dr. Ament's statement concluded that there (1) was a reasonable probability that (2) the Defendants breached the appropriate standard of care, and that (3) the breach was a cause in bringing about the harm. The Rule's language requires the written statement to state that (1) there is a reasonable probability that (2) the skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, (3) fell outside acceptable professional standards and that (4) the conduct was a cause in bringing about the harm.

Dr. Ament's conclusion does not indicate that the relevant "care" was that which was the "subject of the [Bishers'] complaint." Although Dr. Ament's conclusion does not reference "the subject of the complaint," the balance of the written statement rectifies that omission because its detailed discussion of the treatment and care provided to Cory

tracks the allegations in the complaint.[18] Dr. Ament's detailed observations in conjunction with his conclusion that "[t]here exists a reasonable probability and degree of medical certainty that the Defendants breached the appropriate standard of care, and that this breach was a cause in bringing about the harm to Cory Bisher," satisfies the requirement that the statement pertained to "the treatment, practice or work that is the subject of the complaint," as required by Rule 1042.3.

In concluding that the written statement was non-compliant, the trial court implicitly held that a pro se plaintiff is required to file a more detailed written statement than that which a licensed attorney must procure from an expert. The court characterized Dr. Ament's statement as a "final postscript" that "merely summarizes 'that the Defendants breached the appropriate standard of care, and that this breach was a cause in bringing about the harm to Cory Bisher.' " A summary is all that is required by Rule 1042.3(a)(1).[19]

---

[18] The complaint avers that Cory "began exhibiting signs and symptoms of GI bleeding for which he was not timely tested, diagnosed, or treated with reasonable care by Defendants." Complaint, 8/3/2017, at 4. The complaint states that on October 27, 2015, Cory "began to vomit blood and his hemoglobin levels fell over four consecutive days[.]" *Id*. at 5. The complaint states that the defendants "did not diagnose and treat the underlying cause of the GI bleeding (and even cancelled the [e]ndoscopy that had been scheduled for that purpose)," and Cory's condition worsened until he died. Dr. Ament's statement specifically comports with these allegations. He agrees that Cory should have been given an endoscopy and specifically faults the Eastern Gastro defendants for not doing so. Had that procedure been performed, they could have "determine[d] what the cause of his GI bleeding was and to then treat him specifically." The Bishers' complaint mirrors this point, as it said that Cory's gastrointestinal bleeding was not treated. Dr. Ament also criticized Dr. Patek for intubating Cory, "which led to the massive aspiration," and he opined that "they should have aspirated the stomach first, and then proceed to do the endoscopy." Regarding the corporate defendants' direct liability, the statement faults the hospitals for not having proper protocols in place, which implicates the type of systemic negligence that is the hallmark of a corporate negligence claim.

[19] As amicus curiae Pennsylvania Association for Justice persuasively posits, what the trial court found wanting in Dr. Ament's statements are things that would be addressed in

The trial court's determination that Dr. Ament was required to "identify the specific actions" finds no support in the Rule's text.[20]

Because the written statement supplied by Dr. Ament was substantially compliant with what Rule 1042.3(a)(1) requires, the trial court erred in striking the COMs as to the three Lehigh Valley defendants and dismissing the direct liability claims.

Next, the trial court concluded that the COMs were deficient as to the corporate defendants with respect to the Rule 1042.3(a)(2) vicarious liability claims.[21] The court reasoned that the COMs "failed to articulate that Lehigh Valley Health Network, Inc. and Lehigh Valley Hospital, Inc. deviated from acceptable professional standards based on the allegations the physicians for whom the Health Network and the Hospital are

---

discovery. Brief of Amicus Curiae the Pennsylvania Association for Justice at 20 (observing that discovery rules require, inter alia, "the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion") (citation omitted).

[20] Co-appellees correctly acknowledge that a summary in the format prescribed by Rule 1042.3(a)(1) would satisfy the Rule.

> If [the Bishers'] expert, Dr. Ament, had written a statement that included no more than words "I have reviewed this case, and I believe there exists reasonable probability that the treatment provided by Dr. Stelzer and his practice fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm," [the Bishers] would have met their burden.

Eastern Gastro's Brief at 37-38.

[21] Lehigh Valley does not draw any distinction between the COMs filed against Dr. Patek versus the COMs filed against these two corporate defendants. Instead, its brief groups them together. Lehigh Valley's Brief at 26 (arguing that "the statement of Dr. Ament … failed to even suggest that any of the LVH Appellees fell outside acceptable professional standards with any type of reasonabl[e] probability.").

responsible deviated from acceptable professional standards. *See* Pa.R.C.P. 1042.3(a)(2)." Its opinion elaborated on that point:

> With regard to allegations in the Complaint alleging vicarious liability on the part of Lehigh Valley Hospital, Lehigh Valley Anesthesia Services, P.C., and LVPG Pulmonary and Critical Care Medicine, the letter from Dr. Ament failed to meet the requirements set forth under Rule 1042.3(a)(2) to assert that those Defendants for whom liability is alleged due to their responsibilities for the conduct of other licensed professionals deviated from an acceptable professional standard. In short, Dr. Ament fails to even mention any of the Defendants against whom vicarious liability is alleged for the actions of the physician defendants. In fact, Dr. Ament never identifies any specific individual or entity he identifies as having deviated from acceptable professional standards. For all these reasons, the moving Defendants Motion to Strike the Certificate of Merit was granted.

Trial Court Opinion, 6/11/2018, at 11.

The filing of the COM and checking the box for both (a)(1) and (a)(2) served to apprise the corporate defendants of both the direct and vicarious liability claims. The trial court's conclusion that Dr. Ament's statement "fails to even mention any of the Defendants against whom vicarious liability is alleged for the actions of the physician defendants" does not account for the Note to subsection (a)(2), which instructs that a separate COM must be filed as to the other licensed professionals for whom the defendant is responsible (in this case, Dr. Patek), and explicitly states that the statement "is not required to identify the specific licensed professionals who deviated from an acceptable standard of care. The purpose of the subdivision is to ensure that a claim of vicarious liability against a defendant is supported by a certificate of merit." Pa.R.C.P. 1042.3(a)(2), Note.

We finally address the trial court's conclusion that Dr. Ament was not qualified to render an opinion against Dr. Patek. The "appropriate licensed professional" who provides the statement must be "an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony, or stated another way, the expert who supplies the statement must have qualifications such that the trial court would find them sufficient to allow that expert to testify at trial." Pa.R.C.P. 1042.3(a)(1), Note. On this point the Note cites Section 512 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303.512, which sets forth the requisite qualifications for expert testimony. Per the Act, a professional testifying to a physician's standard of care must satisfy several requirements. The only one at issue with respect to Dr. Patek involves 40 P.S. § 1303.512(c)(2), which mandates that the expert must "[p]ractice in the same subspecialty as the defendant physician[.]" The trial court concluded that Dr. Ament could not render any opinion concerning a medical resident who performed an intubation.

We agree with the Superior Court's holding in *Campbell v. Attanasio*, 862 A.2d 1282, 1289 (Pa. Super. 2004), that a resident "cannot be deemed a specialist … or held to the standard of care of a specialist or a subspecialist[.]" *Id*. at 1289. "A resident may have had only days or weeks of training in the specialized residency program; a specialist, on the other hand, will have completed the residency program and may also have had years of experience in the specialized field." *Jistarri v. Nappi*, 549 A.2d 210, 214 (Pa. Super. 1988). At oral argument, counsel for Lehigh Valley argued that this cannot mean any doctor can criticize the care of any resident. Counsel stated that residents perform rotations and there is little reason to think that Dr. Ament could, for example, offer an opinion against Dr. Patek for care she provided during the delivery of a baby. We are not

confronted with that type of medical mismatch. Here, Dr. Ament was qualified to opine on the gastroenterology procedures performed by the resident.

C.

Eastern Gastro

The Eastern Gastro defendants were ultimately dismissed from the case as a result of the trial court's grant of its motion to strike the COMs. Eastern Gastro submits that the trial court's memorandum opinion, which largely followed the analysis with respect to Lehigh Valley, was correct. Eastern Gastro's Brief at 34-35 ("The trial court set forth a thorough and detailed explanation in its June 11, 2018 memorandum opinion as to how the certificates of merit were insufficient."). As with Lehigh Valley, the trial court explained that the written statements suffered from the same flaws and "fail[ed] to identify the specific actions of Dr. Stelzer or EPGLS which breached the appropriate standard of care that led to Bisher's death." Trial Court Opinion, 6/11/2018, at 15. Eastern Gastro does not separately discuss whether the COM was sufficient as to Dr. Stelzer's employer.[22]

Contrary to *Womer*, 908 A.2d at 276 n.8, Eastern Gastro also claims that the relevant standard of review is in the nature of an abuse of discretion as opposed to a question of law. Its brief states that "it is important to first look at the complete procedural posture of the case on this issue," Eastern Gastro's Brief at 31, references language contained in the first and second COMs' written statements, and concludes that the COMs

[22] As we have explained, vicarious liability to the employer follows naturally from an allegation that an agent of the employer was negligent. Eastern Gastro is, of course, correct that any vicarious liability claims against the corporate entity would necessarily fail if the COMs were defective as to its agent, Dr. Stelzer.

were "appropriately stricken by the trial court, and the trial court did not abuse its discretion." *Id*. at 36.

Alternatively, Eastern Gastro argues that Dr. Ament is not an appropriate licensed professional, agreeing with the trial court's determination that Dr. Ament is a pediatric gastroenterologist who is unqualified to review the care provided by an adult gastroenterologist. While not directly tying this argument to any statutory provision, Eastern Gastro appears to argue that Dr. Ament's exclusive practice in the field of juvenile gastroenterology has rendered him unfamiliar with adult gastroenterology practice. Per 40 P.S. § 1303.512(c)(1), an expert testifying as to a physician's standard of care must "[b]e 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." According to Eastern Gastro, Dr. Ament's written statement detailing his credentials establishes that "he had taken the gastroenterology boards more than [forty-five] years before writing his statement[.]" *Id*. at 39. While his letter "boasted that he trained 110 pediatric gastroenterologists at UCLA Medical Center from 1974 through his retirement in 2010," his letter does not indicate "whether he ever practiced gastroenterology on adult patients in his [five] decade career following his board certification." Eastern Gastro states, "There is no evidence of record that Dr. Ament has engaged in the practice of adult gastroenterology and kept current his knowledge of the ever-changing and evolving field." *Id*. at 44. Eastern Gastro argues that the trial court did not abuse its discretion in declining to waive the "same specialty" requirement.

D.

Analysis

Our analysis of Lehigh Valley's arguments resolves and rejects Eastern Gastro's claim that the trial court correctly concluded that the written statement must link particular acts or omissions to specific defendants. Next, its assertion that the trial court's ruling on the validity of the COMs implicates the trial court's discretion is mistaken. Lehigh Valley argues that the Bishers were "afforded more deference and leniency than any pro se litigant or licensed attorney would reasonably expect in the same circumstances." *Id*. at 33. The trial court certainly gave the Bishers a large degree of leeway in this case, as evidenced by the fact that the final COMs were submitted on May 5, 2018, or slightly more than nine months after the complaint was filed. But the fact remains that the trial court extended the time periods for filing the COMs, and as explained the only question is whether the final COMs and the attached written statement are valid. If the final COM was sufficient as a matter of law, then any defects in the prior COMs are irrelevant. Thus, we squarely reject the argument that the trial court had discretion to strike the COMs based on the protracted proceedings and purported defects in earlier COMs.

Dr. Ament's written statement as attached to each COM was universal and thus the same language we have already deemed substantially compliant likewise appeared in the COMs filed against Dr. Stelzer and Eastern Pennsylvania Gastroenterology and Liver Specialists. Therefore, for the same reasons expressed above, we find that the trial court erred as a matter of law by striking these COMs. *See Womer*, 908 A.2d 269.

Lastly, we address the argument that Dr. Ament was unqualified to render an opinion regarding Dr. Stelzer's care. Per the Act, a professional testifying to a physician's standard of care must satisfy several requirements.

> **(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.

40 P.S. § 1303.512.

In *Vicari v. Spiegel*, 989 A.2d 1277 (Pa. 2010), the Court explained the interplay among these statutory provisions:

> Thus, pursuant to Section 512, to testify on a medical matter in a medical malpractice action against a defendant physician, an expert witness must be a licensed and active, or a recently retired, physician. In addition, in order to render an opinion as to the applicable standard of care, the expert witness must be substantially familiar with the standard of care for the specific care in question. Furthermore, the expert witness must practice in the same subspecialty as the defendant physician, or in a subspecialty with a substantially similar standard of care for the specific care at issue ("same specialty

> requirement"). Finally, if the defendant physician is board certified, the expert witness must be board certified by the same or a similar board ("same board certification requirement"). Importantly, the expert witness must meet all of these statutory requirements in order to be competent to testify. However, there is an exception to the same specialty and same board-certification requirements: if a court finds that an expert witness has sufficient training, experience, and knowledge to testify as to the applicable standard of care, as a result of active involvement in the defendant physician's subspecialty or in a related field of medicine, then the court may waive the same specialty and same board certification requirements.

Id. at 1281 (emphases omitted).

Like Dr. Stelzer, Dr. Ament is board-certified in adult gastroenterology, thus meeting the Section 1303.512(c)(3) requirement. Eastern Gastro's criticisms are focused on whether Dr. Ament meets the remaining requirements. As to (c)(1), the appellees claim that Dr. Ament is effectively out of touch with the adult gastroenterology field due to the fact he has apparently exclusively practiced on juvenile patients. As to (c)(2), the appellees claim that pediatric gastroenterology and adult gastroenterology are not the same specialty, or, alternatively, that Dr. Ament's subspecialty is not substantially similar to adult gastroenterology.

The trial court largely ignored Dr. Ament's written statement wherein he explicitly stated that the "modalities to treat GI bleeding in pediatric patients do not differ from adults." Exhibit to Final COM, 4/18/2018, at 1. The trial court's opinion states, "While the court is not able to discern if there is a significant difference between adult gastroenterology and pediatric gastroenterology, the lack of information in Dr. Ament's resume deprives the Court from being able to conclude Dr. Ament meets the grounds for a waiver of the same subspeciality requirement." Trial Court Opinion, 6/11/2018, at 14.

But the written statement informed the court that there is no significant difference between the two fields with respect to the treatment at issue. Both the trial court and this Court are ill-equipped to disagree with Dr. Ament's statement. This is not a case where the appellees offered contradictory evidence subject to credibility findings. Indeed, the motion to strike filed by Eastern Gastro focused on the precept that adult gastroenterology and pediatric gastroenterology are definitionally different specialties by virtue of the fact that separate board certifications exist. That is a straightforward point, but Dr. Ament said that there is in fact no difference with respect to treating GI bleeding in pediatric patients versus adults, thus obviating any need to proceed to the waiver provisions. Dr. Ament represented that his specialty is exactly the same and that he is substantially familiar with the applicable standard of care. We find that the trial court erred in rejecting that assertion in the absence of evidence of record challenging it. Along those same lines, to the extent that the appellees challenged that representation, we find that the trial court abused its discretion in issuing a finding without receiving any evidence. *Cf. Vicari*, 989 A.2d at 1284 (observing that for subsection 512(e) waiver the "relatedness" of medicine fields "is likely to require a supporting evidentiary record and questioning of the proffered expert during voir dire."). The motion to strike the amended COMs filed by Eastern Gastro requested, in the alternative, "the opportunity to depose Dr. Ament regarding his credentials, qualifications, and training or conduct a hearing in that regard." Motion to Strike, 4/25/2018, at 10. In sum, without an adequate record we cannot determine whether Dr. Ament meets all three of the subsection 512(c) requirements. The appellees requested an opportunity to explore that issue, and they are free to renew that request on remand.

V.

Conclusion

The Superior Court erred by sua sponte invoking subject-matter jurisdiction principles. Additionally, it erred by adopting the trial court's conclusion that the COMs were deficient. Because we find that the COMs to the defendants remaining on appeal were sufficient, we remand for further proceedings consistent with this opinion as to those five defendants. On remand, the trial court cannot permit the unauthorized practice of law. Therefore, presuming that an attorney will enter his or her appearance on behalf of the Estate and/or the Bishers, the trial court shall decide whether the pleadings rendered defective as a result of the unauthorized practice of law may be cured consistent with the principles set forth in this opinion.

Jurisdiction relinquished.

Chief Justice Baer and Justices Saylor, Todd, Dougherty, Wecht and Mundy join the opinion.