In the Supreme Court of Pennsylvania

No. _____

RONALD GREEN, as the Executor of the Estate of JOSEPH FUSCO,

Petitioner,

v.

PENNSYLVANIA HOSPITAL, et al.

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at No. 2858 EDA 2012, filed January 30, 2014, Affirming the Order of the Court of Common Pleas of Philadelphia County, Pennsylvania, Civil Division, June Term 2009, No. 4093, entered August 21, 2012

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TABLE OF CONTENTS

Page

I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW 1

II. THE ORDER IN QUESTION 1

III. QUESTIONS PRESENTED 2

IV. STATEMENT OF THE CASE 3

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED 7

A. Introduction 7

B. Review Should Be Granted To Resolve Whether A Patient Can Maintain A Vicarious Liability Claim Against A Hospital For Ostensible Agency Stemming From Injuries Inflicted By A Hospital–Provided Physician During An Emergency That Resulted In The Patient's Death 10

C. This Court Should Also Grant Review To Determine Whether An Expert Witness Nurse Is Permitted To Give Causation Testimony Against A Defendant Nurse In A Case Where Doctors Have Also Been Sued For Their Own Negligence 18

VI. CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Bing v. *Thunig*, 143 N.E.2d 3 (N.Y. 1957) 14

Capan v. *Divine Providence Hosp.*, 430 A.2d 647 (Pa. Super. Ct. 1980) 14

Commonwealth v. *Tedford*, 960 A.2d 1 (Pa. 2008) 22

Fenchen v. *St. Luke's Hosp.*,
71 Pa. D.&C.4th 401 (C.P. Northampton Cty., Pa. 2005) 14, 15

Freed v. *Geisinger Medical Ctr.*, 971 A.2d 1202 (Pa. 2009)..... 2, 9, 19, 20, 22

People v. *Kane*, 107 N.E. 655 (N.Y. 1915) 20

Simmons v. *St. Clair Mem. Hosp.*, 481 A.2d 870 (Pa. Super. Ct. 1984) 13

Statutes

40 Pa. Stat. Ann. §1303.512 ..... 18, 19

40 Pa. Stat. Ann. §1303.516 ..... 8, 10–12, 15

Court Rules

Pa. R. App. P. 1112(d)..... 3

Pa. R. App. P. 1925(a)..... 1

Exhibits Attached to Petition for Allowance of Appeal in Accordance with the Pa. Rules of Appellate Procedure

Memorandum opinion announcing the judgment of the Superior Court of Pennsylvania filed January 30, 2014 ..... Exhibit A

Concurring and dissenting memorandum of Judge Jacqueline O. Shogan filed January 30, 2014 ..... Exhibit B

Trial court's Pa. R. App. P. 1925(a) opinion dated April 15, 2013 ..... Exhibit C

Trial court's order dated August 21, 2012 denying plaintiff's motion for post–trial relief ..... Exhibit D

Trial court's entry of nonsuit on June 8, 2012 ..... Exhibit E

Trial court's order dated June 4, 2012 precluding plaintiff's nursing expert William K. Pierce, R.N. from offering his opinion on the issue of causation ..... Exhibit F

I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

Senior Judge William H. Platt wrote the memorandum opinion announcing the judgment of the court that a partially divided three–judge panel of the Superior Court of Pennsylvania issued in this case on January 30, 2014. A copy of the memorandum opinion is attached as Exhibit A. Judge Susan Peikes Gantman concurred only in the result. *See* Exhibit A at 15. Judge Jacqueline O. Shogan issued a separate memorandum concurring in part and dissenting in part, which is attached as Exhibit B.

The opinion that the Court of Common Pleas of Philadelphia County, Pennsylvania issued pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) on April 15, 2013 is attached as Exhibit C.

II. THE ORDER IN QUESTION

The final paragraph of the Superior Court's memorandum opinion announcing the judgment of the court states:

> Order affirmed. Jurisdiction relinquished.

See Exhibit A at page 15.

III. QUESTIONS PRESENTED

1. Where a physician provides emergency treatment at the request of a hospital for a person who was not previously the physician's patient, and does so negligently thereby causing the patient's death, may the patient's estate reach the jury on a claim that the hospital is vicariously liable under a theory of ostensible agency for the negligent conduct of that physician because a reasonably prudent person in the patient's position would be justified in the belief that the care in question was being rendered by the hospital or its agents?

2. Whether this Court's statement in footnote 8 of its ruling in *Freed* v. *Geisinger Medical Ctr.*, 971 A.2d 1202, 1212 n.8 (Pa. 2009) — that MCARE's limitation on who may provide causation testimony in a medical professional liability action against a physician does not apply where an expert witness nurse is testifying in support of a liability claim against a nurse — permits an expert witness nurse to provide causation testimony solely on a claim against a nurse defendant in a suit where the plaintiff has also sued doctors alleging further injuries stemming from the doctors' additional acts of negligence?

IV. STATEMENT OF THE CASE

Joseph Fusco presented himself at the emergency room of Pennsylvania Hospital on December 30, 2008 complaining of shortness of breath, rapid breathing, and wheezing. R.369a.[1] He was thereafter admitted to the Intensive Care Unit of the hospital. R.439a. When medication failed to improve his symptoms, Mr. Fusco was intubated to assist his breathing. R.440a.

In an effort to remove Mr. Fusco from a ventilator, on January 9, 2009 a physician at the hospital performed procedures to insert a feeding tube and a tracheostomy. R.440a. As the jury learned at trial, a tracheostomy is a surgical procedure to create an opening through the neck into the trachea (windpipe). R.342a–43a. A tube is then placed through this opening to provide an airway and to remove secretions from the lungs. R.343a. This tube is called a tracheostomy tube or trach tube.

Because a tracheostomy is a surgical procedure, it is normal for some small amount of blood to appear around the site of the incision for a time following the surgery. Around 4 p.m. on January 10, 2009, Nurse Yakish (who is identified in the caption of this case by her former name, Lori Rhoades) noticed a large to moderate amount of blood coming from Mr. Fusco's trach site. R.386a. The attending doctor advised Nurse Yakish to keep an eye on the situation. R.545a. At around 4:30 p.m., Nurse Yakish rolled Mr. Fusco over to his side so that she could clean his back.

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[1] Cites herein to "R." followed by a page number refer to the Reproduced Record filed in the Superior Court. In accordance with Pennsylvania Rule of Appellate Procedure 1112(d), petitioner is filing one copy of that Reproduced Record in this Court together with this Petition for Allowance of Appeal.

R.389a–90a. At that point, Nurse Yakish observed that a large amount of fresh blood began "squirting" from Mr. Fusco's trach site. R.389a–90a.

To address that highly dangerous situation, an emergency team responded to the room, and the team noticed that the trach tube had become blocked, thereby depriving Mr. Fusco of any airway to breathe through. R.388a. The emergency response team eventually included ear, nose, and throat physician Dr. Nora Malaisrie, whose responsibility included reestablishing an airway for Mr. Fusco. R.393a. The evidence presented at trial showed that because the medical staff had not re–inflated a trach cuff, a large amount of blood had traveled down Mr. Fusco's trachea, forming a clot at the end of the trach tube that blocked Mr. Fusco's airway. R.393a–94a.

The evidence introduced at trial established that Dr. Malaisrie negligently attempted to reinsert a larger endo–tracheal tube into Mr. Fusco's neck, rather than properly reinserting an endo–tracheal tube through his mouth. R.404a–05a. Plaintiff's medical expert testified that it is clear negligence to attempt to reinsert a trach tube through a fresh trach site, because there is a high probability that the tube will not end up in the trachea but rather will be misplaced into the thorax. R.411a. Because Dr. Malaisrie negligently reinserted the trach tube back through Mr. Fusco's neck, the trach tube did not end up in Mr. Fusco's trachea, but instead was misplaced into his thorax. R.423a–25a. This resulted in a large volume of air being forced outside and around Mr. Fusco's trachea while the medical team was "ambu bagging" him, causing his trachea to collapse. R.389a, 412a, 417a. Mr. Fusco

was ultimately asphyxiated to death, before which his internal organs were crushed over a period of two hours, resulting in his being pronounced dead at approximately 6:36 p.m. on January 10, 2009. R.411a–13a, 427a.

Because Mr. Fusco did not have any next–of–kin, and because Mr. Fusco was in a dedicated same–sex relationship as to which Pennsylvania law failed to afford any legal status at the time of these events, Mr. Fusco's damages claim was limited to recovery for the pain and suffering that he experienced during the two– to three–hour period leading to his death on January 10, 2009.

Mr. Fusco originally sued various other defendants, but on appeal to the Superior Court Mr. Fusco only sought reversal of the trial court's order refusing to lift the nonsuit against defendants Pennsylvania Hospital and Nurse Yakish (identified in the caption by her former name, Lori Rhoades). Unfortunately, the medical experts consulting on Mr. Fusco's case did not identify the negligence of ENT Dr. Malaisrie as the cause of Mr. Fusco's injuries, suffering, and death until after the statute of limitations on medical negligence claims against Dr. Malaisrie had passed, which is why plaintiff was unable to name Dr. Malaisrie individually as a defendant. However, because a reasonably prudent person in Mr. Fusco's position would have been justified in the belief that Dr. Malaisrie was rendering care on behalf of Pennsylvania Hospital or as one of Pennsylvania Hospital's agents, plaintiff's lawsuit sought to hold Pennsylvania Hospital liable for Dr. Malaisrie's negligence.

Plaintiff Ronald Green, as executor of the estate of Joseph Fusco, initiated this lawsuit in the Court of Common Pleas of Philadelphia County in June 2009. R.1a. Trial was scheduled to begin in early June 2012. On June 4, 2012, Judge Di Vito heard oral argument on the parties' pending motions in limine. R.742a–62a.

As is pertinent to this appeal, one of the defendants' motions in limine challenged the proposed expert testimony of William K. Pierce, R.N. R.205a. In an order dated June 4, 2012, Judge Di Vito granted defendants' motion in limine addressed to the proposed expert testimony of Nurse Pierce. *See* Exhibit F hereto. Specifically, Judge Di Vito permitted Nurse Pierce to offer an opinion that certain actions of Nurse Yakish were negligent. *Id.* However, relying on a provision of the MCARE statute, Judge Di Vito explicitly prohibited Nurse Pierce from offering any opinions that Nurse Yakish's negligent acts were a cause of Mr. Fusco's pain, suffering, and resulting death. *Id.*

At the close of plaintiff's case, counsel for the defendants moved for a nonsuit, which Judge Di Vito first granted as to all defendants other than Nurse Yakish and then, the next day, which Judge Di Vito granted as to Nurse Yakish as well. R.547a–52a, 554a–57a. The trial court's grant of nonsuit in favor of all remaining defendants fully resolved this case as to all parties and all claims. R.557a.

Thereafter, plaintiff — to preserve his appellate remedies — filed a motion to remove nonsuit and for other post–trial relief. R.596a–658a. After briefing and oral argument of that motion, Judge Di Vito issued an order on August 21, 2012 denying plaintiff's motion to remove nonsuit and for other post–trial relief. *See* Exhibit D

hereto. Plaintiff filed a timely notice of appeal to the Superior Court on September 6, 2012. R.708a–09a.

Following briefing and oral argument, a three–judge panel of the Superior Court of Pennsylvania issued it ruling in this appeal on January 30, 2014. *See* Exhibit A hereto. Senior Judge William H. Platt issued a memorandum opinion, with Judge Susan Peikes Gantman concurring only in the result. *Id.* And Judge Jacqueline O. Shogan, who had worked as a nurse for some 12 years before entering law school, issued a memorandum concurring in part and dissenting in part. *See* Exhibit B hereto. Judge Shogan dissented from the majority's decision upholding the trial judge's refusal to allow a jury to decide whether a reasonably prudent person in Mr. Fusco's position would be justified in the belief that the care in question that he received from Dr. Malaisrie was being rendered by the hospital or its agents.

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

A. Introduction

This case presents two important questions of first impression under Pennsylvania law. The first question presented will affect anyone who receives negligent emergency treatment at a hospital from a physician with whom the patient had no prior relationship. And the second question presented will affect anyone who was separately injured by the negligence of a nurse in an action also

alleging that doctors further injured the plaintiff due to the doctors' additional negligence.

In 40 Pa. Stat. Ann. §1303.516(a)(1) of the MCARE Act, titled "Ostensible agency," Pennsylvania law allows a hospital to be held vicariously liable for the negligence of a physician whenever "a reasonably prudent person in the patient's position would be justified in the belief that the care in question was being rendered by the hospital or its agents." By a vote of 2–to–1, and in the absence of any majority opinion expressing the Superior Court's reasoning (since Judge Gantman only concurred in the judgment without separate opinion), the Superior Court has ruled that the estate of a patient who received negligent medical treatment at a hospital during a medical emergency from a physician with whom the patient had no prior dealings, resulting in the patient's death, cannot reach a jury on a claim of ostensible agency against the hospital that provided the doctor whose negligent care produced the patient's death.

This first issue presents an important question of first impression under Pennsylvania law that cries out for this Court's consideration and resolution. Not only was the Superior Court panel divided over the resolution of that issue, but the panel failed to produce a majority opinion on the point. Judge Shogan, who worked for 12 years as a nurse before entering law school, concluded that a nonsuit *should not* have been entered on plaintiff's vicarious liability claim against the hospital. Given Judge Shogan's background as a former nurse, and given Judge Shogan's record as far from the most plaintiff–friendly judge serving on the Superior Court in

personal injury actions, her vote in favor of the plaintiff on this issue speaks volumes in support of the need for this Court's review and resolution of the first question presented.

The second issue presented herein is equally deserving of this Court's review, because it arises from an area of the law that remains unsettled even in the aftermath of this Court's ruling in *Freed* v. *Geisinger Medical Ctr.*, 971 A.2d 1202, 1212 n.8 (Pa. 2009), that MCARE's limitation on who may provide causation testimony in a medical professional liability action against a physician does not apply where an expert witness nurse is testifying in support of a liability claim against a nurse. In *Freed*, the nurse who was being sued did not have any physician co–defendants. In this case, the Superior Court limited footnote 8 of *Freed* to its facts, holding that where a defendant nurse has co–defendants who are physicians, the plaintiff may not introduce expert testimony from a nurse to establish that the defendant nurse's negligence was a cause of the plaintiff's injuries and damages.

The Superior Court theorized that if plaintiff's expert witness nurse was allowed to testify that the defendant nurse's negligence was a cause of plaintiff's harm, the jury might somehow use that causation testimony against the doctors whom plaintiff was alleging had further harmed the plaintiff due to their separate negligence. Yet even the most basic limiting instruction could have avoided that possibility. Thus, the Superior Court's ruling herein deprived this Court's recognition in *Freed* that MCARE does not prevent an expert witness nurse from providing causation testimony against a defendant nurse of any vitality in a case

where physicians are also joined as defendants. Whether that ruling is correct cries out for this Court's resolution, because in a typical case asserting a personal injury claim against a nurse for nursing–related negligence, doctors are also likely to be sued as co–defendants.

B. Review Should Be Granted To Resolve Whether A Patient Can Maintain A Vicarious Liability Claim Against A Hospital For Ostensible Agency Stemming From Injuries Inflicted By A Hospital–Provided Physician During An Emergency That Resulted In The Patient's Death

The first question presented herein failed to produce a majority opinion from the Superior Court and also was the subject of a dissent in favor of the plaintiff by a Superior Court judge who worked in the health care field for a substantial period of time as a nurse and who has developed a reputation for ordinarily being quite conservative in adjudicating personal injury cases.

Section 1303.516 of Title 40, Pennsylvania Statutes, is a section of the MCARE statute titled "Ostensible agency." That statutory section provides, in full:

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

> liability through principles of ostensible agency unless the claimant meets the requirements of subsection (a)(1) or (2).

40 Pa. Stat. Ann. §1303.516.

In entering nonsuit against plaintiff, and in affirming the entry of nonsuit against plaintiff, with regard to the emergency treatment that Mr. Fusco received from ENT physician Dr. Malaisrie in the panicked hours before he asphyxiated, both the trial court and Judge Platt's opinion announcing the judgment of the Superior Court focused largely on subsections (b) and (a)(2) of the foregoing statute. But it is subsection (a)(1), which focuses on what "a reasonably prudent person in the patient's would be justified" in believing, that mandates allowing plaintiff's ostensible agency claim against Dr. Malaisrie to reach the jury.

To be sure, subsection (b) of the statute states that "[e]vidence that a physician holds staff privileges at a hospital shall be insufficient to establish vicarious liability through principles of ostensible agency" — but only unless the claimant can meet either the requirements of subsections (a)(1) or (a)(2). Hospital "staff privileges" means that a physician has the ability to use the facilities and equipment of a hospital in accordance with the specific rights extended to that physician. For example, an orthopedic surgeon may diagnose that a patient needs knee surgery based on diagnostic tests performed at an MRI center and the physician's review of the results of those tests. If the surgeon has staff privileges at a particular hospital, the surgeon can schedule the surgery to take place at that hospital using that hospital's facilities and equipment. In that type of a scenario, the MCARE statute makes clear that the mere fact that the orthopedic surgeon has

hospital staff privileges does not make the surgeon an ostensible agent of the hospital without more.

When it comes to answering the question of what more is needed to establish that a physician who holds hospital staff privileges may be considered the ostensible agent of a hospital for purposes of legal liability, the answer is found in either subparagraph (1) or (2) of subsection (a) of Section 1303.516. Subparagraph (2) expressly refers to a situation where "the care in question was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents." Thus, for ostensible agency to exist under subparagraph (a)(2), there must be actual evidence that someone — ordinarily the hospital or the physician in question — advertised or otherwise represented to the patient that the care was being rendered by the hospital or agents of the hospital.

By contrast, under subsection (a)(1) of Section 1303.516, it is the surrounding circumstances of the care that the patient received that authorizes the jury to find that a physician was the ostensible agent of a hospital. To so find, a jury must conclude that "a reasonably prudent person in the patient's position would be justified in the belief that the care in question was being rendered by the hospital or its agents." Under subsection (a)(1), which is the provision of the statute on which plaintiff relies here, what the patient actually may have thought — as to which there is no evidence in this case due to Mr. Fusco's unfortunate death as the result of the medical negligence in question — is immaterial. Rather, the jury must focus on what a reasonably prudent person would have been justified in believing under

the circumstances presented. And when it comes to deciding what a reasonably prudent person is justified in believing, the collective wisdom of a jury is of course unparalleled.

The key question thus becomes whether, under the facts of this case, sufficient evidence existed to permit the jury to find that "a reasonably prudent person in [Mr. Fusco's] position would be justified in the belief that the care [provided by Dr. Malaisrie] was being rendered by the hospital or its agents." As explained above, plaintiff relies principally on the following facts: (1) Dr. Malaisrie first became involved in treating Mr. Fusco as part of an emergency response team at the hospital (R.388a); (2) Mr. Fusco had no prior patient/doctor relationship with Dr. Malaisrie (R.393a); and (3) Dr. Malaisrie responded to Mr. Fusco's emergency at the request of the hospital, and not at the request of Mr. Fusco or Mr. Fusco's family or companion (R.393a).

Under longstanding Pennsylvania law, which the MCARE statute did not displace, these facts are more than sufficient to allow a jury to find for plaintiff on the issue of ostensible agency. For example, in *Simmons* v. *St. Clair Mem. Hosp.*, 481 A.2d 870 (Pa. Super. Ct. 1984), the Superior Court recognized that it was relevant as tending to establish ostensible agency that the patient presented at the hospital at the emergency room and that the physician in question was the hospital's "on call" emergency physician, *see id.* at 874–87, the same way that here Dr. Malaisrie was Pennsylvania Hospital's "on call" physician for emergency ENT matters.

A few years earlier, in *Capan* v. *Divine Providence Hosp.*, 430 A.2d 647 (Pa. Super. Ct. 1980), the Superior Court quoted with approval the following passage from a ruling of New York State's highest court:

> The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present–day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action.
>
> Thus, a patient today frequently enters the hospital seeking a wide range of hospital services rather than personal treatment by a particular physician. It would be absurd to require such a patient to be familiar with the law of respondeat superior and so to inquire of each person who treated him whether he is an employee of the hospital or an independent contractor. Similarly, it would be unfair to allow the "secret limitations" on liability contained in a doctor's contract with the hospital to bind the unknowing patient.

Id. at 649 (quoting *Bing* v. *Thunig*, 143 N.E.2d 3, 8 (N.Y. 1957)).

And in *Fenchen* v. *St. Luke's Hosp.*, 71 Pa. D.&C.4th 401 (C.P. Northampton Cty., Pa. 2005), a case decided after the relevant MCARE provision had been enacted, the trial court recognized that "when addressing a claim for ostensible agency" of a hospital for a physician's malpractice, a court should consider "whether the patient looked to the institution, rather than the individual physician for care." *Id.* at 409. The trial court's ruling in *Fenchen* goes on to recognize that emergency care or care provided by physicians whom the patient did not personally seek out describe categories of care where a fact–finder reasonably could conclude that the

patient looked to the hospital rather than the individual physician for care, and therefore a finding of ostensible agency would be proper. *Id.* at 410–13.

Returning to the earlier hypothetical involving an orthopedic surgeon, whom a patient had sought out for treatment before surgery was even determined to be the preferred course of treatment, presumably the patient could not reasonably view that doctor as an ostensible agent of the hospital where the surgery was performed merely because the surgeon had staff privileges there. By contrast, if the hospital were to assign a physician anesthesiologist to be responsible for the patient's sedation during the surgery, and if the anesthesiologist's negligence causes injury and harm to the patient, then the patient would be able to reach a jury on the question of the anesthesiologist's ostensible agency, given that the anesthesiologist was selected by the hospital for the procedure, and the patient had no preexisting patient/doctor relationship with the anesthesiologist.

To summarize, the type of evidence that plaintiff in this case placed before the jury to enable the jury to find that "a reasonably prudent person in [Mr. Fusco's] position would be justified in the belief that the care [provided by Dr. Malaisrie] was being rendered by [Pennsylvania Hospital] or its agents" is quintessentially the type of evidence that should suffice to reach a jury on the issue of ostensible agency, both under Section 1303.516(a)(1) of the MCARE act and also under longstanding Pennsylvania jurisprudence in this area.

As previously described above in the Statement of the Case, Dr. Malaisrie was a part of an emergency team that responded to Mr. Fusco's hospital room after

Nurse Yakish rolled Mr. Fusco over to his side so that she could clean his back and, soon thereafter, a large amount of fresh blood began "squirting" from Mr. Fusco's trach site. R.388a, 393a. To address that highly dangerous situation, an emergency team including Dr. Malaisrie responded to Mr. Fusco's hospital room, and the team noticed that the trach tube had become blocked, thereby depriving Mr. Fusco of any airway to breathe through. R.393a–94a.

The evidence introduced at trial established that Dr. Malaisrie negligently attempted to reinsert a larger endo–tracheal tube into Mr. Fusco's neck, rather than properly reinserting an endo–tracheal tube through his mouth. R.404a–05a. Plaintiffs' medical expert testified that it is clear negligence to attempt to reinsert a trach tube through a fresh trach site, because there is a high probability that the tube will not end up in the trachea but rather will be misplaced into the thorax. R.411a. Because Dr. Malaisrie negligently reinserted the trach tube back through Mr. Fusco's neck, the trach tube did not end up in Mr. Fusco's trachea, but instead was misplaced into his thorax. R.423a–25a. This resulted in a large volume of air being forced outside and around Mr. Fusco's trachea while the medical team was "ambu bagging" him, causing his trachea to collapse. R.388a, 412a, 417a. Mr. Fusco was ultimately asphyxiated to death, before which his internal organs were crushed over a period of two hours, resulting in his being pronounced dead at approximately 6:36 p.m. on January 10, 2009. R.411a–13a, 427a.

Based on these facts and the legal principles described above, a reasonable jury could have found, and should have been allowed to decide whether to find, that

Dr. Malaisrie was negligent and that Dr. Malaisrie's negligence was a cause in fact of the harm that resulted in Mr. Fusco's untimely death.

Judge Platt's memorandum opinion announcing the judgment of the court on this issue essentially concludes that for a plaintiff to establish that "a reasonably prudent person in the patient's position would be justified in the belief that the care in question was being rendered by the hospital or its agents" under subsection (a)(1) of the statute, the plaintiff must also come forward with evidence that "the care in question was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents" under subsection (a)(2) of the statute. *See* Exhibit A hereto at 8–9. What that conclusion overlooks is that subsections (a)(1) and (a)(2), separated by "or," provide two entirely separate ways for a plaintiff to establish a hospital's vicarious liability on the theory of ostensible agency, and a plaintiff does not need to pursue both prongs in order to reach the jury under one of the two available theories.

Judge Shogan, herself a longtime former nurse, recognized this in her dissent, writing that "I conclude that the question as to whether a prudent person in Decedent's position would be justified in the belief that the care in question was being rendered by the hospital or its agents, should have survived the motion for non–suit and been decided by the jury." *See* Exhibit B hereto at 3. Judge Shogan's record of rulings in personal injury appeals establishes that she is far from the Superior Court's most plaintiff–friendly jurist, and thus her dissent in favor of the

plaintiff in this case speaks volumes in support of the suitability of this case and this issue for review by means of allowance of appeal.

C. This Court Should Also Grant Review To Determine Whether An Expert Witness Nurse Is Permitted To Give Causation Testimony Against A Defendant Nurse In A Case Where Doctors Have Also Been Sued For Their Own Negligence

When the trial court entered a nonsuit in favor of Nurse Yakish based on the absence of any evidence before the jury to establish that Nurse Yakish's negligence was a cause of Mr. Fusco's pain, suffering, and resulting death, the trial court was undeniably correct that any such causation evidence was lacking in plaintiff's presentation to the jury. However, the reason why the necessary causation evidence was not presented to the jury was due to the trial court's earlier, clearly erroneous decision on defendants' motion in limine to preclude plaintiff's expert nursing witness, Nurse Pierce, from testifying to that portion of his expert witness report (R.273a) opining that Nurse Yakish's negligence was indeed a cause of Mr. Fusco's deteriorating condition and resulting damages. *See* Exhibit F hereto.

In granting defendants' motion in limine to preclude Nurse Pierce's causation testimony against Nurse Yakish, the trial court relied on that court's legally erroneous understanding of an inapplicable provision of the MCARE statute. The provision of the MCARE law on which the trial court appears to have relied, 40 Pa. Stat. Ann. §1303.512 (titled "Expert qualifications"), specifies that a non–physician is not permitted to offer causation testimony in a medical professional liability action *against a physician* unless the trial court specifically concludes that the non–

physician is qualified to offer such causation testimony. *See* 40 Pa. Stat. Ann. §1303.512(a) & (b).

When the parties argued defendants' motion in limine to preclude the expert causation testimony of Nurse Pierce against Nurse Yakish, the parties addressed the applicability of this Court's ruling in *Freed* v. *Geisinger Medical Ctr.*, 971 A.2d 1202 (Pa. 2009). R.751a–52a. In *Freed*, this Court recognized that under Pennsylvania common law a nurse was not precluded from offering expert testimony on issues of causation if the trial court found that the nurse was otherwise qualified to offer expert testimony on that issue. *Id.* at 1210.

Because the MCARE statute was not applicable to the specific claims before this Court in *Freed*, even though the MCARE law was in existence at the time *Freed* was decided, the majority opinion in *Freed* explained that the outcome of that case might be different if the MCARE Act had been applicable. However, in the second to last paragraph of footnote 8 of the majority opinion in *Freed*, the majority specifically recognized that the MCARE Act has no applicability to claims "against non–physician health care providers" such as nurses. *Freed*, 971 A.2d at 1212 n.8.

Here, plaintiff's claims against Nurse Yakish are precisely the type of claims as to which the majority opinion in *Freed* expressly recognized that the MCARE law's limitations on expert testimony *does not* apply. Defendants' motion in limine relied heavily on the MCARE statute in arguing that the trial court should preclude Nurse Pierce from offering any opinion testimony concerning causation, even pertaining to the negligence of Nurse Yakish, and the trial court likewise relied on

the MCARE statute in precluding Nurse Pierce from offering causation testimony against Nurse Yakish. R.210a–11a, 219a–21a; *see also* Exhibit F hereto.

Because, as this Court recognized in *Freed*, 971 A.2d at 1212 n.8, the MCARE statute *does not* preclude an expert witness nurse from offering causation testimony on a negligence claim against a nurse, and because the trial court's ruling excluding Nurse Pierce's causation testimony against Nurse Yakish was not predicated on and cannot be justified by any other basis, the trial court erred in refusing to remove its nonsuit as to Nurse Yakish.

On appeal, the Superior Court concluded that where a plaintiff sues both a nurse and physicians in the same lawsuit, *Freed*'s recognition that an expert witness nurse may give causation testimony against a defendant nurse without running afoul of MCARE does not apply. *See* Exhibit A hereto at 14–15. Because *Freed*, however, did not expressly address whether its holding would or would not apply in a case where both a nurse and a physician were sued for their separate acts of negligence, this issue presents an important question of first impression for this Court to consider and decide.

It is a commonly recognized principle of negligence that if someone negligently injures another causing the injured person to need medical attention, and if the medical attention is then negligently administered, thereby causing further injury, the injured person can recover for all of his damages against the person whose negligent conduct originally triggered this chain of unfortunate events. *Cf. People* v. *Kane*, 107 N.E. 655 (N.Y. 1915) ("If a felonious assault is

operative as a cause of death, the causal co-operation of erroneous surgical or medical treatment does not relieve the assailant from liability for the homicide. It is only where the death is solely attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense."). For example, assume that a drunk driver negligently collides with a woman driving another automobile, causing the woman's leg to be injured. Assume further that the woman's doctor negligently treats the woman's leg wound, resulting in the need for the leg to be amputated above the knee. If the woman had an expert witness to testify that the drunk driver was negligent, no one could say that just because a doctor was also being sued in the case for the doctor's separate negligence that the expert witness on the issue of drunk driving could not testify against the defendant drunk driver.

Plaintiff respectfully submits that this case presents a similar scenario. Plaintiff's expert witness nurse was not going to testify that the doctors were negligent or that the doctors' negligence caused Mr. Fusco's injuries and damages. Rather, plaintiff's expert witness nurse was only intending to testify that Nurse Yakish's negligence was a cause of Mr. Fusco's deteriorating condition and resulting damages. What the trial court should have done was to instruct plaintiff's nurse expert witness and the parties that this expert witness was only being permitted to give causation testimony against Nurse Yakish. The trial court then could have further given the jury a limiting instruction that plaintiff's nurse expert witness was only qualified to give opinion testimony with regard to Nurse Yakish, and that

the witness's testimony could not be used by the jury to establish causation with regard to any of the physician defendants. As his Court has recognized, a presumption exists that the jury will follow proper limiting instructions received from the trial judge regarding the limited use of evidence. *See Commonwealth* v. *Tedford*, 960 A.2d 1, 37 (Pa. 2008). Had the trial court followed this approach, as it should have, sufficient causation evidence against Nurse Yakish would have existed in the trial record to preclude any nonsuit.

Only this Court is capable of conclusively establishing the scope of this Court's recognition in *Freed*, 971 A.2d at 1212 n.8, that the MCARE statute *does not* preclude an expert witness nurse from offering causation testimony on a negligence claim against a nurse. Whether that statement from *Freed* applies in the typical case, such as this, where a nurse is sued together with a doctor for their separate acts of negligence causing harm to a patient cries out for this Court's resolution. Because this is an important and unsettled question of first impression, this Court should grant allowance of appeal to decide this issue as well.

VI. CONCLUSION

For the reasons set forth above, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: March 3, 2014

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Exhibits Attached to Petition for Allowance of Appeal in Accordance with the Pa. Rules of Appellate Procedure

Memorandum opinion announcing the judgment of the Superior Court of Pennsylvania filed January 30, 2014 ..... Exhibit A

Concurring and dissenting memorandum of Judge Jacqueline O. Shogan filed January 30, 2014 ..... Exhibit B

Trial court's Pa. R. App. P. 1925(a) opinion dated April 15, 2013 ..... Exhibit C

Trial court's order dated August 21, 2012 denying plaintiff's motion for post–trial relief ..... Exhibit D

Trial court's entry of nonsuit on June 8, 2012 ..... Exhibit E

Trial court's order dated June 4, 2012 precluding plaintiff's nursing expert William K. Pierce, R.N. from offering his opinion on the issue of causation ..... Exhibit F

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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