

# The Certificate of Merit Status Quo Has to Go

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A certificate of merit is a procedural requirement applicable in medical liability actions wherein it is alleged that licensed professionals deviated from the acceptable standards of professional conduct and responsibility. A defendant is not required to file an answer to the complaint until the certificate of merit is filed, per Pennsylvania Rule of Civil Procedure 1042.4. The purpose of the certificate of merit is to confirm that an appropriately licensed professional (certifying expert) has reviewed the medical records and supports the plaintiff's allegation that the medical care at issue fell below the applicable standards of care. The certificate of merit serves to promptly identify and weed out cases that have no merit.

Rule 1042.3 provides the requirements for certificates of merit in professional liability cases. Pursuant to Rule 1042.3(a)(1) and the corresponding note, while the certifying expert chosen by the plaintiff does not need to be the expert that testifies at trial, the expert must still meet the qualifications set forth in 40 P.S. Section 1303.512 of the Medical Care Availability and Reduction of Error Act. Therefore, if a plaintiff files a complaint against a radiologist and cardiologist, the certifying expert supporting the certificate of merit for each defendant must have sufficient experience in those areas of medicine that would permit them to act as the testifying expert at trial. This is straightforward.

There has been some confusion, however, where a complaint includes or is limited to

allegations of vicarious liability against a hospital for the actions of unidentified agents or identified agents who are not individually named as defendants.

When Rule 1042.3 was originally drafted in January 2003, the note to Rule 1042.3(a)(2), regarding certificates of merit for claims sounding in vicarious liability, read: "Certificates of merit must be filed as to the other licensed professionals whether or not they are named defendants in this action." This language was generally understood to require a plaintiff to file a certificate of merit as to "other licensed professionals" for whom a defendant is allegedly liable even where those "other licensed professionals" are not individually named as defendants. However, on Feb. 11, 2005, the state Supreme Court issued an amendment to the note that follows Rule 1042.3(a)(2). This muddied the waters. Some argue that the first sentence and the second sentence of the amended note conflict:

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.

While the note indicates that the plaintiff must file Rule 1042.3(a)(1) certificates of merit for

the other licensed professionals for whom the plaintiff deems the hospital vicariously liable, it also indicates that the plaintiff is not required to identify the specific licensed professionals who deviated from an acceptable standard of care. So, the question that presents itself is what exactly the plaintiff is required to file, if anything, by way of a certificate of merit in order to certify the vicarious liability claim alleged against the hospital for the actions of the unidentified/identified agents, or other licensed professionals, not named as defendants in the complaint. As set forth below, the answer to this question often depends on what jurisdiction the case was filed in.

The court is normally faced with this issue after the defendant files a notice of intent to enter judgment of non pros on the vicarious liability claim for the plaintiff's failure to file appropriate certificates of merit and the plaintiff responds with a motion to determine necessity to file additional certificates of merit. In some instances, the defendant will file preliminary objections to the plaintiff's complaint requesting that the vague allegations of agency be stricken and that the vicarious liability be limited to the individuals for whom the plaintiff filed certificates of merit.

The defense interpretation of the note to Rule 1042.3(a)(2) is twofold:

- If the plaintiff files a complaint solely against a hospital and the complaint includes the names of the alleged agents for whom the plaintiff deems the hospital vicariously liable, then the certificates of merit should be filed confirming the negligence of the alleged agents identified in the complaint. For example, if the plaintiff is alleging that a cardiologist and neurologist were the agents of the hospital and that their medical care was negligent, Rule 1042.3(a)(1) certificates of merit need to be filed for those individuals.

- If the plaintiff files a complaint solely against a hospital and the complaint only includes allegations of vicarious liability for the actions of unidentified agents, while the second sentence of the note to Rule 1042.3(a)(2) indicates that the statement of the certifying expert need not identify the specific licensed professional by name, the certifying expert must nevertheless refer to a class of individuals such as radiologists, cardiologists or nursing care when identifying the care that deviated from the acceptable standard of care. For example, a cardiology expert can author a statement which says that he or she believes based upon knowledge and experience that the cardiology care or treatment at issue fell below the standard of care, rather than saying Dr. X and Dr. Y breached the radiology standard of care.

This interpretation follows the previously noted spirit and purpose behind the certificate of merit and is consistent with the plain language of the amended note. If the plaintiff files a complaint with the hospital being the only defendant, alleging that it is vicariously liable for anyone and everyone that provided medical care to the plaintiff during several hospital admissions, does one certificate of merit filed against the hospital permit the case to move forward? If the plaintiff is claiming that the medical treatment provided by a cardiologist, radiologist, neurologist, hematologist, infectious disease specialist, surgeon and nurse were all negligent, how can one certificate of merit against the hospital satisfy all of the medical specialties at issue?

Many courts of this state presented with the question as to whether Rule 1042.3(b)(1) certificates of merit are required for the other licensed professionals for whom a plaintiff deems a defendant vicariously liable have held that where a plaintiff bases his or her claim on vicarious liability, a certificate of merit must be filed as to each licensed professional for whom

the defendant is allegedly responsible, whether they are named or unnamed. These include:

- *Watson v. Jeanes Hospital*, Philadelphia Court of Common Pleas, October Term 2011, No. 01838.
- *Summerford v. Abington Memorial Hospital*, Montgomery County Court of Common Pleas, No. 2010-25494.
- *Lockhart v. LeBoutillier*, Chester County Court of Common Pleas, No. 10-08673.
- *Hamilton v. Abington Memorial Hospital*, Montgomery County Court of Common Pleas, No. 2010-02073.
- *Montagna v. Bhatt*, Luzerne County Court of Common Pleas, No. 11360 of 2009.
- *Demshick v. Kahn*, Montour County Court of Common Pleas, No. 307 of 2009.
- The courts that have struck vague allegations of agency and limited plaintiffs' vicarious liability claims to only those individuals for whom certificates of merit were filed include:
- *Gradwell v. Abington Memorial Hospital*, Montgomery County Court of Common Pleas, No. 2012-18221.
- *Giberson v. Grand View Hospital*, Bucks County Court of Common Pleas, No. 2013-04574.

The courts that have denied motions requesting additional certificates of merit to be filed include:

- *Chapin v. DeMario*, Delaware County Court of Common Pleas, No. 12-8438.
- *Stewart v. Taylor Hospital*, Delaware County Court of Common Pleas, No. 12-9066.
- *Cordes v. Crozer Chester Medical Center*, Delaware County Court of Common Pleas, No. 12-007512.
- *Brooker v. Abington Memorial Hospital*, Philadelphia Court of Common Pleas, April Term 2012, No. 3783.

- *Morrison v. Whitemarsh Continuing Care Retirement Community*, Philadelphia Court of Common Pleas, November Term 2011, No. 01860.
- *Thach v. Abington Memorial Hospital*, Philadelphia Court of Common Pleas, March Term 2014, No. 000609.

Until our appellate courts provide guidance as to the correct interpretation of the arguably conflicting language included in the amended note to Rule 1042.3(a)(2) or the Supreme Court amends the rule to resolve any confusion, plaintiffs and defendants will continue to struggle with the appropriate application of the rule in cases involving claims of vicarious liability. A clear interpretation would be beneficial to both sides of the bar as well as the courts of this state, because the proper certification of the merits of a professional liability case should not depend on the county where the case is filed.

I respectfully suggest that the purpose behind enactment of the rule in 2003, along with the subsequent amendments, was to promote specificity and threshold criteria with respect to the type of medicine being criticized. Generalized or catch-all certifications in matters involving multiple medical disciplines serve to run counter to this intended effect.



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