APPENDIX

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1620

HAROLD R. BERK,

Appellant

v.

WILSON C. CHOY, MD; BEEBE MEDICAL CENTER, INC.; ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC

On Appeal from the United States District Court
for the District of Delaware
(No. 1-22-cv-01506)
U.S. District Judge: Honorable Richard G. Andrews

Submitted Under Third Circuit L.A.R. 34.1(a)
July 11, 2024

Before: SHWARTZ, PHIPPS, and MONTGOMERY-REEVES, *Circuit Judges*.

(Filed: July 25, 2024)

OPINION[*]

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[*] This disposition is not an opinion of the full court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

SHWARTZ, *Circuit Judge*.

Harold Berk appeals the District Court's order dismissing his medical malpractice suit against his healthcare providers because he failed to provide an affidavit of merit ("AOM") as required under Delaware law. For the following reasons, we will affirm.

I

After allegedly receiving negligent care for an ankle injury, Berk sued Defendants[1] for medical malpractice under Delaware law. The District Court, sitting in diversity, dismissed Berk's complaint for failure to file an AOM as required by the Delaware Health-Care Negligence Insurance and Litigation Act, Del. Code Ann. tit. 18, § 6853.[2] Berk appeals.

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[1] Defendants are Wilson C. Choy, MD, Beebe Medical Center, Inc., and Encompass Health Rehabilitation Hospital of Middletown, LLC.

[2] The Delaware AOM statute provides:

> (a) No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:
>
> (1) An affidavit of merit as to each defendant signed by an expert witness, . . . stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant. If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (a)(2) of this section has not been filed with the court, then the Prothonotary or clerk of the court shall refused to file the complaint and it shall not be docketed with the court . . . .
>
> (2) The court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit of merit . . . .
>
> (3) A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend[.]

Del. Code Ann. tit. 18, § 6853(a)(1)-(3).

II[3]

The question before the Court is whether the Delaware AOM statute conflicts with the Federal Rules of Civil Procedure (the "Federal Rules") and if not, whether a federal court must apply the AOM statute as a substantive state law.

A

Under the *Erie* doctrine, "a federal court sitting in diversity must apply substantive state law and federal procedural law." *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 302 (3d Cir. 2012) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). To the extent a statute or rule determine the outcome of a case, Erie ensures that such an outcome would be the same regardless of whether the case is filed in federal or state court. *Chamberlain v. Giampapa*, 210 F.3d 154, 158-59 (3d Cir. 2000). Thus, when faced with whether to apply a state statute in a federal case, we must determine whether the state statute conflicts with the Federal Rules. If there is a conflict, then the federal court must apply the Federal Rule, so long as it "is authorized by the Rules Enabling Act[,] [28 U.S.C. § 2072,] and consistent with the Constitution." *Id.* at 159 (citing *Hanna v. Plumer*, 380 U.S. 460, 470

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[3] The District Court had jurisdiction under 28 U.S.C. § 1332 and we have jurisdiction under 28 U.S.C. § 1291. We review questions of law, like whether a state's AOM statute applies in federal courts sitting in diversity, de novo. *Schmigel v. Uchal*, 800 F.3d 113, 114 n.4 (3d Cir. 2015) (citation omitted).

(1965)).[4,5] If there is no conflict, we must consider whether (1) the state statute is outcome determinative, and (2) applying it would frustrate *Erie*. *Schmigel v. Uchal*, 800 F.3d 113, 119 (3d Cir. 2015).

A conflict exists when "the scope of [the] Federal Rule [] is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of [the state] law." *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1,

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[4] Because we conclude that there is no conflict between the Federal Rules and the Delaware AOM statute, we need not engage in the Rules Enabling Act and constitutional analysis.

[5] Contrary to Berk's argument, the plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* did not change what it described as the analytical framework for determining whether there is a conflict between a Federal Rule and state law. 559 U.S. 393, 398 (2010). The *Shady Grove* plurality described its conflict-of-law test as "familiar" and, by citing to *Burlington*, endorsed the *Burlington* test. *Id.* We have applied *Burlington* in our cases applying *Erie* to AOM statutes and, by consequence, we have examined the statutes consistent with *Shady Grove*. *See Liggon-Redding*, 659 F.3d at 262 ("[A] court must determine whether there is a direct collision between a federal rule and the state law rule that the court is being urged to apply."); *Chamberlain*, 210 F.3d at 160 (same).

Shady Grove simply clarified that, when there is a conflict, the Federal Rule preempts the state law, irrespective of whether the state law is of a "substantive nature" or serves a "substantive purpose[.]" 559 U.S. at 409; *Nuveen*, 692 F.3d at 302-04 (observing the limited import of the *Shady Grove* plurality: that after a court has identified a conflict, it matters not whether the state law is substantive or procedural, but, rather, whether the Federal Rule is truly procedural); *Schmigel v. Uchal*, 800 F.3d at 119 (same). A rule is procedural if it "really regulat[es] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them[.]'" *Shady Grove*, 559 U.S. at 410 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

4-5 (1987) (internal quotation marks omitted) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980); citing *Hanna*, 380 U.S. at 471-72)).

There is no conflict when a state statute and the Federal Rule "can exist side by side, . . . each controlling its own intended sphere of coverage without conflict." *Walker*, 446 U.S. at 752. Applying this standard, we have previously concluded that the analogous AOM statutes of Pennsylvania and New Jersey do not conflict with the Federal Rules. *See Liggon-Redding v. Est. of Sugarman*, 659 F.3d 258, 262-64 (3d Cir. 2011) (Pennsylvania's AOM statute); *Chamberlain*, 210 F.3d at 159-61 (New Jersey's AOM statute); *see also Nuveen*, 692 F.3d at 303-04 (affirming *Chamberlain* and concluding that *Shady Grove* and other intervening precedent did not render *Chamberlain*'s collision-of-law analysis invalid); *Schmigel*, 800 F.3d at 119 (requiring a federal court sitting in diversity to apply Pennsylvania's requirement that defendant give plaintiff notice about the absence of an AOM before moving to dismiss a complaint).[6]

[6] *Shady Grove* did not upend the "direct collision" test by instructing courts to consider whether the Federal Rule "answers the [same] question" as the state statute. 559 U.S. at 398. In fact, the phrase "answers the question in dispute" incorporates the standard articulated in *Burlington* (i.e., that there is a conflict when "the scope of [the] Federal Rule [] is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of that law"). *Burlington*, 480 U.S. at 4-5 (internal quotation marks and citations omitted); *accord CoreCivic, Inc. v. Candide Grp.*, LLC, 46 F.4th 1136, 1141 (9th Cir. 2022) ("[T]he [*Shady Grove*] majority opinion broke little new ground with respect to the standard for assessing a potential conflict between the [F]ederal [R]ules and state law."). Therefore, *Shady Grove* does not disturb the analysis in our precedent.

Like the Pennsylvania and New Jersey AOM statutes, Delaware's AOM statute does not conflict with any Federal Rule, including Rules 8, 9, 10, and 11.

A state AOM statute does not conflict with Federal Rules 8[7] or 9[8] if it (1) "does not require a plaintiff to set forth any factual averments upon which a claim is based," *Liggon-Redding*, 659 F.3d at 262; (2) "does not have any effect on what is included in the pleadings of a case or the specificity thereof[,]" *id.* at 263 (internal quotation marks and citations omitted); and (3) "is not a pleading and need not be filed until well after the complaint," *id.* at 263; *see also Chamberlain*, 210 F.3d at 160 (considering these factors while reviewing New Jersey's AOM statute).[9] The Delaware AOM statute (1) does not require a plaintiff to state any facts to support his claim and (2) has no impact on the contents of the pleadings or specificity of the allegations. *See* Del. Code Ann. tit. 18, § 6853(a); *see, e.g.*, *Dishmon v. Fucci*, 32 A.3d 338, 344 (Del. 2011) (holding that an AOM does not need a factual basis and need only contain the "functional equivalent of the statutory language"). Unlike Rules 8 and 9, which "dictate the content of the pleadings and the degree of specificity that is required," *Chamberlain*, 210 F.3d at 160, the Delaware statute functions simply "to reduce the filing of meritless medical negligence claims." *Dishmon*, 32 A.3d at 342. Furthermore, an AOM is not a pleading because it does

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[7] Rule 8 requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

[8] Rule 9 sets forth the pleading requirements for certain types of claims, but malpractice claims is not one of them. *See* Fed. R. Civ. P. 9.

[9] The Pennsylvania and New Jersey statutes require a plaintiff to file an AOM within sixty days after filing the complaint. Pa. R. Civ. P. 1042.3(a); N.J. Stat. Ann. § 2A:53A-27.

not provide notice of a claim or seek court intervention. *See CPR Mgmt., S.A. v. Devon Park Bioventures, L.P.*, 19 F.4th 236, 243 (3d Cir. 2021) (observing that pleadings are distinct filings that serve to "provide notice to an adverse party that it has a claim or defense and is seeking court intervention"); *see also* Fed. R. Civ. P. 7(a); 13(b), (g) (designating "[p]leadings" as a set of submissions—e.g., a complaint, answer, counterclaim, crossclaim—not including attachments). Finally, a plaintiff can seek permission to submit the AOM after he files his complaint, thereby demonstrating it is separate and distinct from the pleading. *See* Del. Code Ann. tit. 18, § 6853(a); *Nuveen*, 692 F.3d at 303 (explaining that there is no conflict between the state AOM statue and Rule 8 when the state AOM law permits "temporal separation of the filing of the complaint and the affidavit"). Because the AOM is not a pleading and serves a different purpose than pleadings do, there is no conflict between the Delaware statute and Rules 8 or 9.

The Delaware AOM statute also does not conflict with Rules 11 or 12. "Rule 11 requires an attorney to sign a pleading, thereby attesting that the complaint is meritorious." *Liggon-Redding*, 659 F.3d at 263; *see also* Fed R. Civ. P. 11(a). In contrast, the Delaware AOM statute requires a statement by "an expert witness" representing that "there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant." Del. Code Ann. tit. 18, § 6853(a)(1). Put differently, Rule 11 governs attorney conduct, whereas the Delaware statute governs what an expert must do in a particular type of case. These two rules therefore have different "sphere[s] of coverage" and do not conflict. *Walker*, 446 U.S. at 752.

Rule 12 also does not conflict with the Delaware AOM statute. Rule 12 provides litigants a mechanism to test

the sufficiency of a complaint's factual allegations and whether they provide a basis for relief. *See Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); Fed. R. Civ. P. 12(b)(6). Whether a complaint is sufficient, however, has no bearing on a court's decision to dismiss an action for failure to comply with an AOM statute. As stated previously, a state AOM statute "serves an entirely different purpose" from a pleading and contemplates a process for addressing noncompliance that differs from a motion to dismiss based on a pleading defect. *Liggon-Redding*, 659 F.3d at 264. Therefore, the Delaware AOM statute does not collide with Rule 12.[10]

B

Having identified no conflict, we next examine whether the Delaware statute is substantive (and therefore applicable here) or procedural (and therefore not applicable here) by assessing whether: (1) "the state law is outcome-determinative"; and (2) "failure to apply

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[10] Many of the out-of-circuit cases Berk cites, where courts have declined to enforce AOM statutes, involved actions brought by federal prisoners under the Federal Tort Claims Act ("FTCA") and thus are federal question cases. *See Corley v. United States*, 11 F.4th 79, 83 (2d Cir. 2021); *Pledger v. Lynch*, 5 F.4th 511, 515 (4th Cir. 2021); *Young v. United States*, 942 F.3d 349, 350 (7th Cir. 2019); *Gallivan v. United States*, 943 F.3d 291, 293-34 (6th Cir. 2019); *see also* Appellant Br. at 4. While state laws have a role in FTCA cases, the role of those laws address tort liability. *Wilson v. United States*, 79 F.4th 312, 318 (3d Cir. 2023). Other out-of-circuit cases that have declined to enforce AOM statutes are further distinguishable because they treat AOMs as pleadings, *see, e.g.*, *Martin v. Pierce Cnty.*, 34 F.4th 1125, 1129-30 (9th Cir. 2022); *Albright v. Christensen*, 24 F.4th 1039, 1045-46 (6th Cir. 2022), which is contrary to our conclusion that AOMs are not pleadings where, as here, the state AOM statute permits "temporal separation of the filing of the complaint and the [AOM]." *Nuveen*, 692 F.3d at 303.

the state law would frustrate the twin aims of [] *Erie*[,]" namely to (a) "discourage forum shopping" and (b) "avoid inequitable administration of the law." *Schmigel*, 800 F.3d at 119 (internal quotation marks and citation omitted). For the following reasons we conclude that application of the AOM is outcome determinative and failing to apply it would frustrate *Erie*.

First, in Delaware state court, a plaintiff's failure to comply with the AOM requirement can result in the dismissal of his case. *See, e.g.*, *Enhaili v. Patterson*, No. 272, 2018, 2018 WL 5877282, at *1 (Del. Nov. 7, 2018) (affirming an order dismissing a complaint alleging medical negligence for failing to file an AOM). "Dismissing a claim or case can certainly determine the outcome of the matter." *Liggon-Redding*, 659 F.3d at 264 (observing that "failing to apply the Pennsylvania [AOM] rule in a federal action where no certificate of merit was filed would 'produce a different outcome than that mandated in [a] state proceeding'" (quoting *Chamberlain*, 210 F.3d at 161)). Application of the Delaware statute is thus outcome determinative.

Second, applying the statute would promote *Erie*'s twin aims. As to the question of forum shopping, "a plaintiff 'who [has] been unable to secure expert support for [his] claims and face[s] dismissal under [an AOM] statute in state court may, by filing in federal court, be able to survive beyond the pleading stage and secure discovery." *Id.* (first and second alterations in the original) (quoting *Chamberlain*, 210 F.3d at 161). Thus, allowing such a plaintiff to proceed in federal court would provide him an advantage that he would lack in state court and encourage him to find a way to seek relief in a federal court. As to the question of inequitable treatment, if we decline to apply the Delaware AOM statute, "a defendant in federal court would be forced to engage in additional

litigation and expense in a non-meritorious malpractice suit simply because the plaintiff was from a different state" and filed suit in federal court. *Id.* (citing *Chamberlain*, 210 F.3d at 161). Accordingly, both aims of *Erie* are satisfied by enforcing the Delaware AOM statute in federal court.[11]

Therefore, the Delaware AOM statute is substantive and must be enforced by a federal court sitting in diversity, and because Berk did not provide an AOM, the District Court correctly dismissed his complaint.

[11] Berk identifies no "countervailing federal interests [that] prevent the state law from being applied[.]" *Liggon-Redding*, 659 F.3d at 262 (citing *Chamberlain*, 210 at 159-61).

III

For the foregoing reasons, we will affirm.[12]

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[12] Judge Phipps agrees with the disposition of this appeal because he sees no persuasive grounds for preventing the legal reasoning in this Court's prior precedents, which hold that New Jersey's affidavit-of-merit statute, N.J. Stat. Ann. § 2A:53A-27, and Pennsylvania's certificate-of-merit rule, Pa. R. Civ. P. 1042.3(a)(1), apply as the substantive law in diversity suits, from also governing the applicability of the Delaware affidavit-of-merit statute, Del. Code Ann. tit. 18 § 6853(a)(1), in diversity suits. *See Schmigel*, 800 F.3d at 121–22 (concluding that Pennsylvania's certificate-of-merit statute did not conflict with Federal Rules of Civil Procedure 7(b) or 12(b) and that the rule applied since it was substantive); *Nuveen*, 692 F.3d at 302–03 (holding that there was no direct conflict between New Jersey's affidavit-of-merit statute and Federal Rules of Civil Procedure 8 and 9 and that New Jersey's statute applied because it was substantive); *Liggon-Redding*, 659 F.3d at 262, 264 (holding that Pennsylvania's certificate-of-merit statute did not directly conflict with Federal Rules of Civil Procedure 7, 8, 9, 11, or 41(b), and that Pennsylvania's rule applied as substantive); *Chamberlain*, 210 F.3d at 160–61 (concluding that there was no direct conflict between New Jersey's affidavit-of-merit statute and Federal Rules of Civil Procedure 8 and 9, and that New Jersey's rule applied since it was substantive). If writing on a clean slate, however, he may not arrive at that same conclusion, and thus he concurs in only the judgment. *See Schmigel*, 800 F.3d at 125–26 (Rendell, J., dissenting); Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 242–47, 251–56 (2010).

APPENDIX B

[FILED: APRIL 4, 2023]

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

Harold R. Berk, Plaintiff, v. Wilson C. Choy, M.D. et al., Defendant.	)))))))	No. 22-cv-1506 Judge Richard G. Andrews

MEMORANDUM

This is a medical malpractice case. (D.I. 1, ¶ 5). The original complaint alleged medical negligence against three defendants, each claim being in a separate count. Jurisdiction is based on diversity of citizenship. Defendants, a doctor and two hospitals, filed motions for in camera review of the "affidavit of merit" to determine whether Plaintiff had complied with the Delaware affidavit of merit statute. (D.I. 32, 33, 34). Upon cursory review of the two sealed filings (D.I. 23, 26), I did not see anything that looks like an affidavit, let alone an affidavit of merit. I issued an order to show cause to give Plaintiff an opportunity to direct me to any affidavits of merit. (D.I. 64). The deadline passed without any relevant response.

The legal issue is whether a federal court sitting in diversity is bound to apply the affidavit of merit statute as state substantive law. In the earlier briefing on the

motions, Plaintiff essentially conceded that the Court of Appeals has ruled on essentially the same issue in the context of the Pennsylvania "certificate of merit" statute. *See Liggon-Redding v. Estate of Robert Sugarman*, 659 F.3d 258, 259-65 (3d Cir. 2011) (legal malpractice). The Third Circuit has also ruled on the same issue in the context of the New Jersey "affidavit of merit" statute. *See Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 302-04 (3d Cir. 2012) (accounting malpractice; legal malpractice); *Chamberlain v. Giampapa*, 210 F.3d 154, 156-61 (3d Cir. 2000) (medical malpractice.).

The Delaware statute, 18 Del. C. § 6853, is essentially the same as its Pennsylvania and New Jersey counterparts. It states in relevant part:

> No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:
>
> > An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant. . . . The affidavit or affidavits of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint. An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has been engaged in the treatment of patients and/or in the

> teaching/academic side of medicine in the same or similar field of medicine as the defendant or defendants, and the expert shall be Board certified in the same or similar field of medicine if the defendant or defendants is Board certified.

18 Del. C. § 6853 (a)(1) & (c). Thus, the affidavit of merit at a minimum must be signed, sworn, and express relevant opinions about culpability.

Plaintiff's argument is that other circuits have ruled differently, and he predicts the Third Circuit will now hold that the affidavit of merit statutes are state procedural law, not state substantive law. In effect, Plaintiff argues that the Third Circuit will overrule its decisions in *Nuveen* and the earlier cases. I do not think that is likely, and, in any event, I cannot overrule Third Circuit cases. The Delaware statute is substantive law, and I need to apply it. Thus, I reject Plaintiff's main argument.

Plaintiff, in the alternative, states that he has complied with the affidavit of merit requirements by filing internet printouts about two doctors and some of Plaintiff's medical records. (D.I. 37 at 18). Plaintiff does not point to any signed and sworn opinions about culpability authored by his two named experts. Indeed, there is nothing to indicate that the two doctors even know that he has submitted them as experts in this case.

In the middle of the briefing on the motions for in camera review, Plaintiff filed an amended complaint. (D.I. 38). It added counts for assault and battery against two Defendants, and failure to train against the third Defendant. Plaintiff subsequently moved to withdraw the three additional counts. (D.I. 53). I do not see that the motion is opposed. I therefore will grant it.

I will enter a separate order dismissing Plaintiff's three medical negligence counts without prejudice.

Entered this 4th day of April 2023.

By: */s/*
Richard G. Andrews
United States District Judge

APPENDIX C

18 Del. C. § 6853
Affidavit of Merit, expert medical testimony

(a) No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:

> (1) An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant. If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (a)(2) of this section has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court. The affidavit of merit and curriculum vitae shall be filed with the court in a sealed envelope which envelope shall state on its face:
>
> "CONFIDENTIAL SUBJECT TO 18 DEL. C., SECTION 6853. THE CONTENTS OF THIS ENVELOPE MAY ONLY BE VIEWED BY A JUDGE OF THE SUPERIOR COURT."

Notwithstanding any law or rule to the contrary the affidavit of merit shall be and shall remain sealed and confidential, except as provided in subsection (d) of this section, shall not be a public record and is exempt from Chapter 100 of Title 29.

> (2) The court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit

of merit. Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review.

(3) A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend. The filing of a motion to extend the time for filing an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion.

(4) The defendant or defendants not required to take any action with respect to the complaint in such cases until 20 days after plaintiff has filed the affidavit or affidavits of merit.

(b) An affidavit of merit shall be unnecessary if the complaint alleges a rebuttable inference of medical negligence, the grounds of which are set forth below in subsection (e) of this section.

(c) Qualifications of expert and contents of affidavit.--The affidavit or affidavits of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint. An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant

or defendants, and the expert shall be Board certified in the same or similar field of medicine if the defendant or defendants is Board certified. The Board Certification requirement shall not apply to an expert that began the practice of medicine prior to the existence of Board certification in the applicable specialty.

(d) Upon motion by the defendant the court shall determine in *camera* if the affidavit of merit complies with paragraph (a)(1) and subsection (c) of this section. The affidavit of merit shall not be discoverable in any medical negligence action. The affidavit of merit itself, and the fact that an expert has signed the affidavit of merit, shall not be admissible nor may the expert be questioned in any respect about the existence of said affidavit in the underlying medical negligence action or any subsequent unrelated medical negligence action in which that expert is a witness.

(e) No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death, except that such expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence; provided, however, that a rebuttable inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances:

(1) A foreign object was unintentionally left within the body of the patient following surgery;

(2) An explosion or fire originating in a substance used in treatment occurred in the course of treatment; or

(3) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body.

Except as otherwise provided herein, there shall be no inference or presumption of negligence on the part of a health-care provider.

APPENDIX D

Fed. R. Civ. P. 8. General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

> (1) *In General.* In responding to a pleading, a party must:
>
> > (A) state in short and plain terms its defenses to each claim asserted against it; and
> >
> > (B) admit or deny the allegations asserted against it by an opposing party.
>
> (2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.
>
> (3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or

generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* An allegation—other than one relating to the amount of damages— is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;

- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

APPENDIX E

Fed. R. Civ. P. 9. Pleading Special Matters

(a) CAPACITY OR AUTHORITY TO SUE; LEGAL EXISTENCE.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) CONDITIONS PRECEDENT. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) JUDGMENT. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the

judgment or decision without showing jurisdiction to render it.

(f) TIME AND PLACE. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) SPECIAL DAMAGES. If an item of special damage is claimed, it must be specifically stated.

(h) ADMIRALTY OR MARITIME CLAIM.

(1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) *Designation for Appeal.* A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

APPENDIX F

Fed. R. Civ. P. 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) SIGNATURE. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable

opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) SANCTIONS.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to

deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions*. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) INAPPLICABILITY TO DISCOVERY. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

APPENDIX G

Fed. R. Civ. P. 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint,

counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity*. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant,

immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading, or if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person

required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

APPENDIX H

[FILED: JANUARY 30, 2023]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Harold R. Berk, Plaintiff	:	Civil Action No.
v.	:	JURY TRIAL
Wilson C. Choy, M.D., Beebe Medical Center, Inc., and Encompass Health Rehabilitation Hospital of Middletown, LLC, Defendants	:	DEMANDED

AMENDED COMPLAINT

1. Plaintiff Harold R. Berk is a resident and citizen of the State of Florida who resides at 17000 SW Ambrose Way, Port St. Lucie, Florida 34986. He also owns, together with his wife, real property at 207 Samantha Drive, Lewes, Delaware 19958. Plaintiff was an attorney for 51 years and retired as of July 1, 2022.

2. Defendant Wilson C. Choy, M.D. is a licensed physician in and a citizen of the State of Delaware, who maintains offices at 8 N. Race Street, Georgetown, Delaware 19947.

3. Defendant Beebe Medical Center, Inc., is a Delaware corporation with offices, and facilities located at 424 Savannah Road, Lewes, Delaware 19958, and it employs physicians, nurses and technical staff and

consulting physicians who provide medical care and treatment, and it is a licensed medical provider facility in Delaware.

4. Defendant Encompass Health Rehabilitation Hospital of Middletown, LLC, is a Delaware corporation which maintains and operates rehabilitation hospital facilities located at 250 Hampden Road, Middletown, Delaware 19709 and it is a licensed rehabilitation hospital in Delaware.

5. This is an action for damages against each of the defendants for medical malpractice and negligence by causing additional injury to plaintiff beyond the ankle injury presented on Beebe Hospital admission and failing to properly examine, test, diagnose and treat the fractures of plaintiff's left leg and failing to follow ordered limitations on weight bearing.

6. This Court has jurisdiction over this matter under 28 U.S.C. §1332 as the matter is between citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs. Plaintiff gave defendants notice of his claims by letter dated January 15, 2021, and he further gave them notice, by a letter dated August 11, 2022, and sent by certified mail, of his intent to further investigate under 18 Del. Code §6856 (4) which provides a ninety-day extension of the two-year Statute of Limitations. Copy of the letter attached as Exhibit 1.

7. Venue is proper in this Court as each of the defendants maintains offices and their principal place of business in Delaware.

FACTS

8. On August 20, 2020, plaintiff fell out of bed and severely injured his left ankle and foot. He was taken by fire ambulance to the emergency room at defendant

Beebe Hospital owned and operated by defendant Beebe Medical Center, Inc. ("Beebe").

9. Plaintiff was taken to the emergency department where his injury was examined by doctors, nurses and other personnel employed by defendant Beebe, and X-rays were taken of his left ankle and foot.

10. A radiologist employed by defendant Beebe, Kimberly Gardner, M.D., examined the films from the Xrays, and in her report she stated her findings:'

> There is a mildly displaced fracture of the distal tibia involving the medial malleolus and posterior cortex. There is a mildly comminuted nondisplaced fracture of the distal fibula centered approximately 6 cm above the tibial plafond. There is mild widening at the ankle mortise, concerning for underlying ligamentous injury. The talar dome is smooth. Bone mineralization is within normal limits. No radiopaque foreign body in the soft tissues.
>
> Impression:
>
> 1. Mildly displaced fracture of the distal tibia as described.
>
> 2. Nondisplaced comminuted fracture of the distal fibula as described.

11. According to the Beebe medical records, there was a consultation with defendant Wilson Choy, M.D. on the same date, August 20, 2020, and the Beebe medical records state under a heading DOCTOR NOTES:

> Discussed with Dr. Choy and imaging results reviewed by him. Recommends splint, non-wt. bearing on affected side. f/u

> in the office next week. After additional discussion with Dr. Choy, due to pt.' chronic lower extremity wounds requiring wound center evaluation and dressing changes q 1-2 days, will place in CAM boot instead of orthoglass splint. Noted that pt's spouse and myself with concerns regarding his ambulatory status prior to injury, now with ankle fx/NWB status and pt. with reported chronic difficulties on contralateral side. AM meds ordered, plan to have PT eval. Pt. to determine if safe to go home with resources vs. alternative dispo plan. (Pg.31 Beebe records).

12. Under a heading of RE-EVALUATION NOTES, under the heading of DOCTOR NOTES, it states:

> Plan is for physical therapy evaluation pending discharge plan. Patient still with pain and unable to complete physical therapy evaluation. Concern for possible cellulitis, patient started on Ancef. **Unable to tolerate CAM boot secondary to open wounds.** Fiberglass posterior splint placed in order to stabilize joint and avoid contact with open wounds with slight improvement of pain. (Pg. 31 Beebe records) (emphasis added).

13. When the nurses and staff in the Beebe emergency department ("ED") attempted to put on the CAM boot, they twisted and turned plaintiff's left leg it and manipulated it in various directions attempting to get the CAM boot on plaintiff's leg, but by doing so they significantly altered the fractured ankle by their manipulation, twisting and turning. After they did push

the CAM boot in place, plaintiff was in intense pain and, after repeated complaints of extreme pain and crying, they finally removed the boot. The Beebe medical records confirm that plaintiff "could not tolerate the CAM boot." But no new Xray was taken in the emergency department after the attempt to put on the CAM boot despite the severe pain it caused plaintiff by the twisting and turning of the fractured left leg.

14. After staff in the emergency department struggled to put on the CAM boot, plaintiff was administered Dilaudid (Hydromorphone), an opiod pain reliever rated by the US Drug Enforcement Agency as "2-8x times more potent than morphine but shorter duration and greater sedation" "and has a rapid onset of action" (Pg. 33 Beebe records) (DEA Hydromorphone Fact Sheet).

15. Beebe ED nursing staff requested plaintiff do physical therapy only four hours after admission which plaintiff declined due to extreme pain in left leg. (Pg. 356 Beebe records).

16. Dr. Choy visited plaintiff for the first time at Midnight on August 20, 2020, and he advised that plaintiff did not require surgery for either the tibia or fibula fracture and that splinting or a CAM walker was all that was required, plaintiff should be non-weight bearing on left leg and "follow-up in two weeks to repeat Xrays of left ankle." (Pg.43 Beebe records signed by Dr. Choy at 11:59 pm August 20, 2020).

17. Apparently, Dr. Choy did not consult with the ED staff regarding their efforts to twist and turn the CAM boot that morning which resulted in the need to administer Dilaudid to plaintiff.

18. At some places in the Beebe records it states that plaintiff was to follow-up for Xrays with Dr. Choy in one week and other places it says two weeks.

19. Plaintiff was administered Oxycodone, another opiod based pain reliever, throughout his hospitalization at Beebe to reduce the severe pain he felt from the left leg injury.

20. The Beebe records state that plaintiff was to see Dr. Choy within two weeks or by September 6, 2020. (Pg. 234 Beebe records).

21. At no time prior to plaintiff's discharge from Beebe on August 23, 2020 was any additional Xray taken of plaintiff's leg besides the Xray taken on admission on August 20, 2020.

22. Beebe arranged a placement for plaintiff at Encompass Rehabilitation Hospital in Middletown, Delaware, owned by defendant Encompass Health Rehabilitation Hospital of Middletown, LLC ("Encompass").

23. While at Encompass plaintiff noticed a deformity in the positioning of his left leg as it was oriented to the left, and he pointed this out to staff at Encompass, but no Xray was taken of the left leg at Encompass despite the fact that there was a hospital immediately across the road from the Encompass facility.

24. Encompass had plaintiff engage in various physical and occupational therapy exercises including one where plaintiff was required to pull himself up into a standing position on parallel bars. This activity required plaintiff to be partially weight bearing on his left leg despite Beebe's orders to the contrary.

25. Page 379 of the Encompass records states,

> Plan the patient is to be nonweightbearing in the left lower extremity continue aggressive physical therapy mobilization DVT prophylaxis. Follow-up with primary orthopedic surgeon.

26. To plaintiff's knowledge, at no time during his hospitalization at Encompass did any staff person, nurse or doctor contact defendant Dr. Choy regarding plaintiff's condition or his perceived leg deformation.

27. Page 392 of Encompass records states that plaintiff is to be nonweight bearing for eight weeks, and this is exactly what Dr. Choy stated orally to plaintiff when they met at Midnight on August 20, 2020.

28. Page 522 of the Encompass records states as of August 26, 2020:

> Per physical therapy, patient had complaints of pain and concern regarding positioning of left ankle and splint. Ace wrap removed, splint noted to be aligned with heel, foot and calf, however foot does appear to be somewhat rotated externally. Ace wrap reapplied and patient concerns/ appearance of leg discussed with Dr. Khandewal.

29. To plaintiff's knowledge Dr. Khandewal did not examine the positioning of plaintiff's left leg nor did he contact Dr. Choy regarding the leg positioning.

30. Page 793 of the Encompass records states, "Educated that pt. had trialed (sic) standing in parallel bars in morning PT session today and was able to lift up buttocks but not yet achieving full standing position." This PT exercise was required even though it required plaintiff to be partially weight bearing on his left leg.

31. Page 801 of the Encompass records states that plaintiff received training in wheelchair operation and, on September 3, 3020, was handed a brochure describing types of ramps and measuring for them, but when plaintiff's wife contacted the ramp constructing company recommended by Encompass, they said they could not do a ramp at our house.

32. Plaintiff was discharged from Encompass on September 7, 2020 and taken by ambulance company to his house in Lewes, Delaware, but since plaintiff and his wife were not able to get a ramp constructed in the three days prior to discharge, three employees of the ambulance company had to carry plaintiff in his wheelchair into the house.

33. As soon as plaintiff and his wife got a local contractor to construct a ramp, plaintiff left their house, using a wheelchair, and went on or about September 15, 2020 to the offices of defendant Dr. Choy in Georgetown, Delaware.

34. Dr. Choy's physician's assistant had an Xray taken of plaintiff's left ankle and advised plaintiff that his left leg was severely deformed and the bones were actually going in three different directions. After he consulted with Dr. Choy over the telephone, as Dr. Choy was not present for plaintiff's appointment, the physician's assistant now told plaintiff that he required immediate surgery due to the now deformed ankle and leg, but Dr. Choy would not perform the surgery due to plaintiff's known heart conditions.

35. Plaintiff requested that Dr. Choy provide him a copy of his medical records concerning the Xray showing the deformities, but though a request was made for the records in January, 2021 and repeated again and most

recently on November 8, 2022, defendant has not provided those office records to plaintiff.

36. Plaintiff then contacted the head of the ankle and foot practice at Rothman Institute, Dr. Steven Raikin, and an appointment was promptly arranged.

37. Plaintiff met with Dr. Raikin on September 23, 2020, and when Dr. Raikin reviewed the Xrays taken at Dr. Choy's office, he was very upset with what he saw, as the Xray showed a major deformity of the left ankle.

38. Dr. Raikin's medical notes of September 23, 2020 state the following:

> Today's visit was a 60-minute plus face-to-face evaluation more than 50% of which discussed the complexity of his current problems combining his medical comorbidities and his unstable trimalleolar ankle fracture with tenting of the skin and a precarious open fracture configuration. Treatment options at this time include either repeat attempted manipulation and splinting or attempted casting with concerns regarding this becoming an open fracture, inability to maintain alignment, nonunion, deformity, and risk for ulcerative infection. The next alternative would be to go to the operating room and do an open reduction internal fixation with high risk for wound complications based on his skin quality around the ankle region. The final option would be to go to the operating room and do a more limited open reduction and definitive stabilization with a multiplane external fixator to hold the ankle in alignment while healing or at least long

> enough to allow medical optimization and preanesthetic clearance. I discussed these options with the patient and his wife. They have elected to proceed with the external fixation option which I think is the right management. This would depend on medical optimization and preanesthetic clearance. We did contact his cardiologist at Jefferson today Dr. Bravetti who has agreed to accept him into his service. Today. Prior to this I personally manipulated the fracture into an improved alignment to take the pressure off the medial malleolus and personally applied a well-padded posterior and U-splint to the region. Patient would like to proceed with the surgery. I discussed the surgical procedure, including but not exclusively related to the patients comorbidities, the post operative rehabilitation, the operative and non operative alternatives and the risks and benefits of these alternative options, as well as the expected prognosis of the above-mentioned procedure with the patient in detail. … [risks] … Additionally, the post operative pain protocol was discussed, with an emphasis on minimizing the use of narcotic medications. … [patient understanding] … In my medical opinion, the patient has an orthopedic problem that requires surgical intervention and that is now time sensitive.

39. Plaintiff was immediately taken to Jefferson Hospital in Philadelphia and admitted on September 23, 2022.

40. After procedures and medications to reduce fluid in plaintiff's lungs and to obtain an opinion from Dr. Bravetti on suitability for surgery, Dr. Raikin performed the surgery, manipulating the bones of the ankle into better position and installing the external fixator as discussed.

41. Plaintiff was discharged to home about a week later.

42. Though necessary, the external fixator was very difficult and pain inducing. Plaintiff could not straighten his leg, and the large external rods and clamps made it difficult to lie in bed as it was very difficult to move plaintiff's leg with the external fixator attached.

43. The external fixator caused daily pain while lying in bed. When plaintiff's wife drove him places, he had to lift his leg off the floor of the car if he saw a bump ahead as the impact to a bump was transmitted by the external fixator into the bone causing pain and agony.

44. Plaintiff attended sessions at the Beebe wound management service to treat his leg ulcers caused by chronic venous insufficiency and to treat the left leg after surgery.

45. Plaintiff also had home wound care, physical and occupational therapy, but there was little plaintiff could do in the way of physical therapy while the external fixator was attached.

46. Though Dr. Raikin did not want plaintiff to take narcotic pain relievers, there was constant pain with the external fixator and plaintiff had to do the best he could with over the counter pain relievers.

47. After four months with the external fixator, plaintiff was readmitted to Jefferson Hospital in late

January, 2021 to remove the external fixator, and Dr. Raikin did remove it at that time.

48. Plaintiff was then discharged from Jefferson after about a week and was taken directly to Magee Rehabilitation Hospital in Philadelphia for physical and occupational therapy. Plaintiff was still non-weight bearing, and at first he was transferred from the bed to a wheelchair in a mechanical hoist device, but later he was trained in use of transfer boards to get from the bed to a wheelchair.

49. With the extensive and expert physical and occupational therapy at Magee, and after Dr. Raikin permitted him to be weight bearing in March, 2021, plaintiff was able to walk short steps using a walker. Plaintiff continued to gain strength at Magee.

50. Plaintiff was discharged from Magee on or about March 15, 2021, and he then commenced physical and occupational therapy at Elite Rehab in Rehoboth, Delaware. For the first months, plaintiff arrived at Elite in a wheelchair.

51. Elite Rehab also did expert physical and occupational therapy. Gradually, they improved his walking ability, his use of a walker and cane, and after about seven months of physical therapy at Elite, plaintiff was able to walk short distances using a cane.

52. Plaintiff still, as of November, 2022, has balance problems and some weakness in the legs, and he must still use a cane for balance and mobilization.

**FIRST CAUSE OF ACTION -
MEDICAL NEGLIGENCE BEEBE
MEDICAL CENTER, INC.**

53. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 52 above.

54. Beebe, and its physicians, nurses, physicians' assistants and employees owed plaintiff a duty to diagnose and treat plaintiff according to the appropriate medical standard of care.

55. Though the one and only Xray of plaintiff's left ankle taken by Beebe showed what the radiologist described as a mild fracture of the tibia and fibula, Beebe's employees in its emergency department, undertook to and did manipulate, turn and twist plaintiff's leg in order to make several efforts to install a CAM boot on plaintiff's leg, but in doing so they deformed, injured, and aggravated the fractures causing them to be more severe.

56. As the Beebe emergency department personnel manipulated, turned and twisted the boot on plaintiff's leg, he was caused great and severe pain and discomfort and cried out in pain at the continued twisting and turning of his leg and which extreme pain continued as long as the ED personnel kept the CAM boot in place.

57. Plaintiff's pain was so severe that the Beebe emergency department personnel had to administer several doses of Dilautid (hydromorphone), a powerful pain reliever that is 2 to 8 times more powerful than morphine according to the Drug Enforcement Agency.

58. The actions of the Beebe emergency department personnel aggravated the ankle fractures deemed minor on admission which were now were severe injuries to plaintiff's ankle and more severe than the condition of the

leg when the initial and only Xray was taken at 5:30 a.m. after admission to the hospital.

59. Despite the fact that plaintiff was in severe pain and discomfort as a result of the emergency personnel actions, no one at Beebe ordered any additional Xrays of the ankle after the manipulation, turning and twisting of the leg performed by the emergency department personnel.

60. Beebe did not do an additional Xray of plaintiff's leg prior to discharge on August 23, 2020 despite the fact that the emergency department personnel caused additional injury to plaintiff's leg, which injury should have been known to them by plaintiff crying out in pain and requiring hydromorphone to reduce the pain level.

61. Beebe's actions in causing additional injury and not doing a post injury Xray was not in accordance with the standard of care of a medical hospital licensed in Delaware.

62. The failure to do a post-admission Xray also deprived medical staff of Beebe with important information they should have obtained regarding the actual condition of plaintiff's leg at the time of discharge. The actual condition was only revealed when Dr. Choy's staff did an Xray at his office in September, 2020, which Xray was reviewed by Dr. Raikin on September 23, 2020 showing a major deformity of the leg as he described in his notes and which required emergency attention.

63. Defendant Beebe caused additional injury and magnified the injury to plaintiff's ankle, and caused additional injury by not doing a follow-up Xrays, all of which is below and not in accordance with the standard of care for physicians and hospital facilities in Delaware.

64. As a proximate result of defendant Beebe's aggravating and worsening plaintiff's ankle injury, plaintiff was caused to suffer pain, suffering and discomfort then and for years thereafter, and it has caused plaintiff to incur medical expenses for care and treatment by Dr. Raikin, Rothman Institute, Jefferson Hospital, Magee Rehab Hospital and Elite Rehab.

WHEREFORE, plaintiff prays that judgment be entered in his favor for compensatory damages in an amount in excess of $75,000.

SECOND CAUSE OF ACTION –
MEDICAL NEGLIGENCE
WILSON C. CHOY, M.D.

65. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 64 above.

66. Defendant Choy reviewed the initial Xray of plaintiff's leg taken at 5:30 a.m. on August 20, 2020, but he failed to order any additional Xrays after the emergency department personnel turned and twisted and manipulated the CAM boot, prescribed by defendant Choy, on plaintiff's leg aggravating and increasing the instability of the fracture of the tibia and fibula as described in Dr. Raikin's notes.

67. Though the emergency department personnel included notes of their efforts to put the CAM boot on plaintiff and the severe pain caused by the CAM boot which they concluded plaintiff could not tolerate, and which notes show the administration of hydromorphone, defendant Choy failed to order any additional Xrays of plaintiff's ankle. Dr. Choy's failure to order additional Xrays in order to properly diagnose and treat plaintiff's ankle was below the standard of care required of licensed physicians in Delaware.

68. Defendant Choy's diagnosis and treatment orders for plaintiff were incorrect in light of the aggravation of the ankle injury by the emergency department personnel, of which he was apparently unaware, and the failure to properly examine, test, diagnose and order treatment for plaintiff's ankle was below the standard of care for physicians licensed in Delaware.

69. Though the emergency department notes stated they had to administer multiple doses of hydromorphone to plaintiff after they twisted, turned and manipulated his leg, defendant Choy was negligent in not reviewing those notes or questioning the emergency department personnel about what happened.

70. When defendant Choy saw plaintiff at Midnight he was apparently unaware of the emergency department actions and failed to question them on what occurred.

71. Defendant Choy told plaintiff that he did not require surgery, but he offered no explanations for that conclusion. In light of plaintiff's actual condition, as revealed in the Xray taken at Dr. Choy's office a month later, and as discussed in Dr. Raikin's notes, Dr. Choy's failure to properly examine and diagnose plaintiff's actual condition and order required medical treatment and surgery, was beneath the standard of care for a licensed physician in Delaware.

72. As a direct and proximate result of defendant Choy's failure to accurately diagnose and treat plaintiff while he was at Beebe, and then sending him for physical therapy at Encompass, without proper required treatment, plaintiff was caused to endure additional pain and suffering by the aggravation of the initial injury, and it caused plaintiff to incur additional medical expenses for care and treatment by Dr. Raikin, Rothman Institute,

Jefferson Hospital, Magee Rehab Hospital and Elite Rehab.

73. Defendant Choy told plaintiff at Midnight on August 20, 2020 that he did not require surgery, would have stabilization of the leg by a splint and needed to stay non-weight bearing for only eight weeks, but none of his treatment plan was accurate or in accordance with medical standards in light of the additional injuries that would have been revealed if an Xray were ordered by Dr. Choy and taken at Beebe before discharge.

WHEREFORE, plaintiff prays that judgment be entered in his favor and against defendant Wilson Choy, M.D. for compensatory damages in an amount in excess of $75,000.

THIRD CAUSE OF ACTION—
MEDICAL NEGLIGENCE
ENCOMPASS HEALTH
REHABILITATION HOSPITAL OF
MIDDLETOWN, LLC

74. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 73 above.

75. Defendant Encompass received extensive medical records from Beebe on plaintiff's admission regarding his examination and treatment at Beebe.

76. Defendant Encompass knew that plaintiff was to be non-weight bearing on his left leg, but nevertheless they directed him to multiple times attempt to stand up on both legs using parallel bars. This required plaintiff to apply weight to the left leg in order to stand or attempt to stand which was contraindicated by Beebe's orders and notes.

77. Plaintiff also observed on August 26, 2020 to nurse Michael Labaraca that his left leg was improperly positioned, and nurse Labaraca wrote that the "foot does appear to be somewhat rotated externally" and that he would discuss it with Dr. Khandelwal, but Dr. Khandelwal failed to examine plaintiff's leg, he did not write any note that he performed any examination and he did not contact Dr. Choy.

78. Defendant Encompass did not perform an Xray of plaintiff's leg, and they did not take him to the hospital across the street to have an Xray taken.

79. Defendant Encompass is a licensed health care provider in Delaware, but it failed to meet the standard of care applicable to a rehabilitation hospital in that it ordered plaintiff to perform a physical therapy exercise that required him to be weight bearing against orders, Dr. Khandelwal did not follow-up on the report of the rotated positioning of plaintiff's leg, and he did not order an Xray of plaintiff's leg despite the report of nurse Labaraca and he had extensive records on the care and treatment of plaintiff at Beebe where additional injury to the ankle occurred.

80. As a direct and proximate result of the failure of Encompass to meet the required medical standard of care, plaintiff was caused to suffer additional pain and suffering and incur additional medical expenses for care and treatment by Dr. Raikin, Rothman Institute, Jefferson Hospital, Magee Rehab Hospital and Elite Rehab.

WHEREFORE, plaintiff prays that judgment be entered in his favor and against defendant Encompass Health Rehabilitation Hospital of Middletown, LLC for an amount in excess of $75,000.

FOURTH CAUSE OF ACTION -
ASSAULT AND BATTERY
BEEBE MEDICAL CENTER, INC.

81. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 80 as if set forth fully herein.

82. According to the Beebe medical records, there was a consultation with defendant Wilson Choy, M.D. on the same date, August 20, 2020, and the Beebe medical records state under a heading DOCTOR NOTES:

> Discussed with Dr. Choy and imaging results reviewed by him. Recommends splint, non-wt. bearing on affected side. f/u in the office next week. After additional discussion with Dr. Choy, due to pt.' chronic lower extremity wounds requiring wound center evaluation and dressing changes q 1-2 days, will place in CAM boot instead of orthoglass splint. Noted that pt's spouse and myself with concerns regarding his ambulatory status prior to injury, now with ankle fx/NWB status and pt. with reported chronic difficulties on contralateral side. AM meds ordered, plan to have PT eval. Pt. to determine if safe to go home with resources vs. alternative dispo plan. (Pg.31 Beebe records).

83. Under a heading of RE-EVALUATION NOTES, under the heading of DOCTOR NOTES, it states:

> Plan is for physical therapy evaluation pending discharge plan. Patient still with pain and unable to complete physical therapy evaluation. Concern for possible

> cellulitis, patient started on Ancef. Unable to tolerate CAM boot secondary to open wounds. Fiberglass posterior splint placed in order to stabilize joint and avoid contact with open wounds with slight improvement of pain. (Pg. 31 Beebe records) (emphasis added).

84. When the nurses and staff in the Beebe emergency department ("ED") attempted to put on the CAM boot, they twisted and turned plaintiff's left leg and manipulated it in various directions attempting to get the CAM boot on plaintiff's leg, but by doing so they significantly altered the fractured ankle by their manipulation, twisting and turning. After they did push the CAM boot in place, plaintiff was in intense pain and, after repeated complaints of extreme pain and crying, they finally removed the boot. The Beebe medical records confirm that plaintiff "could not tolerate the CAM boot." But no new Xray was taken in the emergency department or elsewhere in Beebe after the attempt to put on the CAM boot despite the severe pain it caused plaintiff by the twisting and turning of the fractured left leg.

85. After staff in the emergency department struggled to put on the CAM boot, plaintiff was administered Dilaudid (Hydromorphone), an opiod pain reliever rated by the US Drug Enforcement Agency as "2-8x times more potent than morphine but shorter duration and greater sedation" "and has a rapid onset of action" (Pg. 33 Beebe records) (DEA Hydromorphone Fact Sheet).

86. Beebe ED nursing staff requested plaintiff do physical therapy only four hours after admission which plaintiff declined due to extreme pain in left leg. (Pg. 356 Beebe records).

87. Nurses and other staff of defendant Beebe manipulated, twisted and turned Plaintiff's leg within hours of the fracture causing Plaintiff extreme pain and which caused him to call out loudly in pain with crying and tears from the action of the nurses and other staff.

88. Nurses and other staff of Beebe aggravated, extended, and caused additional injury to Plaintiff's leg all without justification or authorization.

89. Instead of putting a splint on Plaintiff's leg, Beebe staff insisted on manipulating, turning and twisting Plaintiff's leg to put it in a CAM boot instead of a splint thereby aggravating and worsening the fracture to Plaintiff's leg.

90. Plaintiff and Plaintiff's wife, Joan McClure, asked the staff to stop turning, twisting and manipulating Plaintiff's leg but they persisted nevertheless without authorization or right causing additional injury to Plaintiff.

91. The staff of Beebe in the emergency department committed an assault and battery on Plaintiff by the unjustified and unauthorized additional injury to Plaintiff's left leg that had just been fractured causing Plaintiff extreme pain requiring the administration of the opiod pain medication hydromorphone which is eight times stronger than morphine.

92. Though Plaintiff asked the Beebe staff to stop manipulating, turning and twisting Plaintiff's left leg they continued their assault and battery without authorization or right to do so.

93. Plaintiff did not consent to the manipulation, turning and twisting of his fractured leg.

94. The manipulation, turning and twisting of Plaintiff's fractured leg was intentional and done without care or concern for the aggravation caused to Plaintiff's injury.

95. Plaintiff is entitled to compensatory damages and punitive damages against defendant Beebe for this malicious, heinous and unauthorized additional injury to Plaintiff's fractured leg which caused the need for emergency surgery at the Rothman Institute in September, 2020 and the installation of a painful external fixator screwed into Plaintiff's leg bones.

WHEREFORE, Plaintiff prays that judgment be entered in his favor and against defendant

Beebe Medical Center, Inc. for compensatory and punitive damages and his costs of this action

in an amount in excess of $75,000.

FIFTH CAUSE OF ACTION -
FAILURE TO TRAIN
BEEBE MEDICAL CENTER, INC.

96. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 95 as if set forth fully herein.

97. Defendant Beebe failed to properly train the nursing and other staff working in the emergency department so that they would not undertake actions to aggravate, extend and intensity injuries of patients who were brought to the emergency department.

98. Defendant Beebe failed to train the nursing and other staff in the emergency department to properly and speedily document events that occurred in the emergency department so that doctors and other staff would be advised of additional aggravating injuries occurring to

Plaintiff after his initial admission and initial XRays, and those staff were not trained to order additional Xrays after they manipulated, turned and twisted Plaintiff's fractured leg, and they did not order any additional XRays of Plaintiff's leg which had now an aggravated injury at the hands of defendant Beebe.

99. Plaintiff is entitled to compensatory and punitive damages for the failure to train Beebe staff in the emergency department not to aggravate injuries and to fail to order additional XRays after Plaintiff cried out in extreme pain from the manipulating, turning and twisting Plaintiff's fractured leg.

100. Plaintiff's wife was, until her retirement, the senior vice president of the National Comprehensive Cancer Network, an amalgam of the 30 largest academic cancer centers in the United States, and she with 1,5000 physicians developed and published the clinical practice guidelines for diagnosis and treatment of all forms of cancer, and in that capacity she studied and wrote about pain caused by various cancers, but nevertheless she was brought to tears by the assault and battery committed by Beebe staff on Plaintiff arising from the failure of Beebe to properly train the emergency room staff to avoid aggravating patient injuries.

WHEREFORE, Plaintiff prays that judgment be entered in his favor and against defendant Beebe Medical Center, Inc. for compensatory and punitive damages and his costs of this action in an amount in excess of $75,000.

SIXTH CAUSE OF ACTION -
ASSAULT AND BATTERY
ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC

101. Plaintiff realleges and incorporates herein the allegations of paragraphs 1 though 100 as if set forth fully herein.

102. As alleged at paragraph 30 above, Page 793 of the Encompass records states, "Educated that pt. had trialed (sic) [failed] standing in parallel bars in morning PT session today and was able to lift up buttocks but not yet achieving full standing position." This PT exercise was required even though it required plaintiff to be partially weight bearing on his left leg.

103. Dr. Choy had ordered Plaintiff to be non-weight bearing on his left leg for 8 weeks.

104. The order from the Encompass physical training staff was in violation of Dr. Choy's orders, but Plaintiff attempted standing with the parallel bars as he was told it was a condition for discharge. Attempting to stand with the parallel bars was painful and should not have been attempted, but defendant Encompass did not follow doctor's orders that Plaintiff remain non-weight bearing for eight weeks from August 20, 2020.

105. Plaintiff acceded to the Encompass staff orders as he was like in a Skinner experiment and listened to and followed the commands of the Encompass staff as they were in authority. (In the Skinner experiment in the 1960s, students were told they controlled a dial that administered electrical shocks to a person they could not see, and after they obeyed commands to keep increasing the voltage though the "patients" cried out in pain, and the supervisors told them to keep increasing the voltage

despite the patient's pain, and the students nevertheless obeyed the commands of the supervisors as they were in authority.)

106. The Encompass physical training staff committed an assault and battery on Plaintiff by ordering him to stand with the aid of the parallel bars even though they knew that Plaintiff was on doctor orders to remain completely non-weight bearing for eight weeks from August 20, 2020.

107. Plaintiff was further injured by being forced to attempt to stand with aid of the parallel bars all against doctor orders.

108. Plaintiff is entitled to compensatory and punitive damages for the assault and battery ordered by Encompass and against explicit doctor orders.

WHEREFORE, Plaintiff prays that judgment be enters for him and against Encompass Health Rehabilitation Hospital of Middletown, LLC for compensatory and punitive damages in an amount in excess of $75,000 together with his costs.

Respectfully submitted,

Harold R. Berk

Harold R. Berk, Pro Se.
17000 SW Ambrose Way
Port St. Lucie, Florida 34986
215-896-2882
haroldberk@gmail.com

DECLARATION

Plaintiff Harold R. Berk hereby declares, under penalty of perjury, that the above and foregoing statements of fact are true and correct to the best of his knowledge, information and belief.

Harold R. Berk

Harold R. Berk, Plaintiff Pro Se