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**ATTORNEY FOR DEFENDANT,**  
**JOHN F. McCORMICK, M.D.**

**RUSSELL MILITELLO**

**:**

**PHILADELPHIA COUNTY**  
**COURT OF COMMON PLEAS**

**:**

**V.**

**:**

**FEBRUARY TERM, 2002**

**ST. AGNES MEDICAL CENTER, et al. :**

**:**

**NO. 1588**

**ORDER**

This matter having come before the Court upon the Motion for Summary Judgment of Defendant, John F. McCormick, M.D.; and the Court having considered the submissions in support of the Motion; and having considered the submissions in opposition thereto; and for good cause shown;

IT IS THIS \_\_\_\_\_ day of \_\_\_\_\_, 2004, hereby ORDERED, that the Motion for Summary Judgment of Defendant, McCormick, is hereby GRANTED, and summary judgment is entered in his favor and against the Plaintiff, and the Plaintiff's claims are therefore DISMISSED WITH PREJUDICE as against Dr. McCormick.

BY THE COURT:

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J.

**GOLD, BUTKOVITZ & ROBINS, P.C.**  
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**FEBRUARY TERM, 2002**

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**:**

**NO. 1588**

**MOTION FOR SUMMARY JUDGMENT OF**  
**DEFENDANT, JOHN F. MCCORMICK, M.D.**

Moving Defendant, John F. McCormick, M.D. (“McCormick”), by and through his attorneys, Gold, Butkovitz & Robins, P.C., hereby moves before this Honorable Court for an Order granting Summary Judgment in his favor, and against the Plaintiffs on their Third Amended Complaint, and in support whereof, state as follows:

1. This matter was commenced by the Plaintiffs with the filing of a Writ of Summons on February 12, 2002.
2. On February 26, 2002, a Praecipe and Rule to File Complaint were filed and served, and on or about March 21, 2002, the Plaintiffs filed a Complaint.
3. Preliminary Objections to the Plaintiffs Complaint were filed, to which Plaintiffs responded by filing an Amended Complaint, on or about May 30, 2003.
4. Preliminary Objections were thereafter filed as to Plaintiffs’ Amended Complaint, and on or about July 10, 2002, Plaintiffs filed a Second Amended Complaint.
5. Once more Preliminary Objections followed, as to Plaintiffs’ Second Amended Complaint, and once more Plaintiffs responded with the filing of a Third Amended Complaint on or about August 19, 2002. (A copy of the Plaintiffs’ Third Amended Complaint is attached hereto as Ex. “A”)

6. Preliminary Objections to the Plaintiffs' Third Amended Complaint were filed.

7. By Order dated October 24, 2003, the Court granted in part certain Preliminary Objections to the Plaintiffs' Third Amended Complaint, as follows:

...All references to: recklessness, conduct in reckless disregard, or willful and wanton conduct and all claims for punitive damages contained in paragraphs 53, 54, 57, 58, 59, 59(i), 60, 64, 65, 66, 66(i), 67, 98, 99, 102, 104, 105 and in the "wherefore" clause following paragraph 105 and all other claims for punitive damages are stricken; ...

8. Plaintiffs, in their Third Amended Complaint, attempt to set forth claims of medical malpractice and professional negligence as to each of the defendants: St. Agnes Medical Center ("St. Agnes"), Catholic Health East, Marc Christopher Petrone, M.D. ("Petrone"), as well as moving defendant, John F. McCormick, M.D.

9. Pennsylvania Rule of Civil Procedure 1035 sets forth the standard for granting summary judgment. It states in relevant part:

After the relevant pleadings are closed, but within such time as to not unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

10. In Ertel v. Patriot-News Co., 544 Pa. 93, 674 A.2d 1038, cert. denied, 519 U.S. 1008, 117 S.Ct. 512 (1996), the Supreme Court of Pennsylvania adopted the approach of the Supreme Court of the United States to summary judgment. It held that henceforth, in order to defeat a motion for summary judgment, the party against whom the motion is directed must submit sufficient evidence on every issue essential to his case on which he bears the burden of proof to support a jury verdict in his favor. Id. at 674 A.2d at 1042.

11. In this case, the Plaintiffs have presented insufficient evidence to support a jury verdict in their favor as to their claims of medical malpractice as against moving defendant, Dr. McCormick. To defeat Dr. McCormick's motion for summary judgment, the Plaintiffs must

establish the existence of sufficient evidence to support a jury verdict in their favor on all elements of the cause of action for which they have the burden of proof. Ertel, 544 Pa. 93, 674 A.2d at 1042.

12. Plaintiffs' allege that their decedent, Ms. Josephine Militello ("Militello"), was admitted to St. Agnes Medical Center on or about June 20, 2001 by her attending physician, defendant, Dr. Petrone, with admitting diagnoses of chronic renal failure, digoxin toxicity and insulin dependant diabetes mellitus. (Ex. "A", at ¶9)

13. Among various medications, Plaintiffs' allege that Ms. Militello was receiving Coumadin (an anticoagulant medication) at the time of her admission to St. Agnes. (Ex. "A", at ¶13)

14. Plaintiffs allege that on June 5, 2001, Ms. Militello's INR ratio (a measure of her blood's anticoagulation) was miscalculated as being 1.61, ... (Ex. "A", at ¶17)

15. Plaintiffs allege that on June 7, 2001, Ms. Militello's INR ratio was miscalculated as being 2.22, but that it was later determined to have actually been 5.25. (Ex. "A", at ¶¶21 and 23)

16. Plaintiffs allege that on June 8, 2001, Ms. Militello's INR ratio was miscalculated as being 2.42, but that it was later determined to have actually been 6.29. (Ex. "A", at ¶¶24 and 26)

17. Plaintiffs allege that on June 9, 2001, Ms. Militello's INR ratio was miscalculated as being 2.27, but that it was later determined to have actually been 5.51. (Ex. "A", at ¶¶27 and 29)

18. Plaintiffs allege that on June 10, 2001, Ms. Militello's INR ratio was miscalculated as being 2.18, but that it was later determined to have actually been 5.08. (Ex. "A", at ¶¶31 and 33)

19. Plaintiffs allege that on June 11, 2001, Ms. Militello's INR ratio was miscalculated as being 2.18, but that it was later determined to have actually been 5.04. (Ex. "A", at ¶¶34 and 36)

20. Plaintiffs allege that on June 12, 2001, Ms. Militello's INR ratio was miscalculated as being 2.06, but that it was later determined to have actually been 4.50. (Ex. "A", at ¶¶37 and 39)

21. Plaintiffs allege that on June 13, 2001, Ms. Militello's INR ratio was miscalculated as being 2.06 and 2.11, but that it was later determined to have actually been 4.50 and 4.74. (Ex. "A", at ¶¶40-41, 46 and 49)

22. Plaintiffs' allege that the improper calculations of Ms. Militello's INR ratio "contributed to [Ms. Militello's] demise and ultimate death." (Ex. "A", at ¶54)

23. Specifically with respect to moving defendant, McCormick, Plaintiffs allege in their Third Amended Complaint as follows:

7. At all times material hereto, Defendant John F. McCormick, M.D. ("Dr. McCormick") was a physician duly licensed to practice in the Commonwealth of Pennsylvania and was engaged in the practice of his profession in Philadelphia, Pennsylvania at SAMC.  
\* \* \*
79. Defendant, Dr. McCormick, was a physician who undertook to diagnose, treat and otherwise care for Decedent on or about June 2, 2001, in the course of his practice at SAMC.
80. Defendant, Dr. McCormick, undertook the aforesaid care of Decedent with the knowledge and intention that Plaintiff would rely on Defendant's opinions, training and experience in regard to the medical care rendered to her during the course of her care and treatment at SAMC.
81. Defendant, Dr. McCormick, undertook the aforesaid care of Decedent for compensation rendered by Decedent or on behalf of Decedent.
82. Defendant, Dr. McCormick, held himself out to Decedent and the public as an expert in medicine.  
\* \* \*
84. Defendant, Dr. McCormick, owed a duty of care to Decedent which was breached to Decedent's great detriment.
85. Defendant, Dr. McCormick, breached his duty of care to Decedent with knowledge and reckless disregard for her safety to her great detriment by numerous acts or omissions, in the following ways:
  - (a) failing to properly monitor Decedent's

laboratory values, including PT, INR and PTT, in that he failed to recognize that these values were improperly calculated and failed to ensure they were properly calculated so that the decedent would not be over-anticoagulated leading to her death;

(b) failing to take proper steps to ensure that Decedent's laboratory results were accurate by failing to recognize the miscalculations and failing to do anything to ensure the values were properly calculated and her clotting ability was increased;

(c) failing to properly interpret Decedent's laboratory results in light of inconsistent laboratory values;

(d) failing to repeat Decedent's erroneous laboratory tests including PT, PTT and INR ratios to ensure that she was not over-anticoagulated leading to her death;

(e) failing to consistently monitor Decedent's HGB and HCT levels during her admission to recognize the signs of excess anticoagulation;

(f) failing to timely diagnose and treat Decedent's bleeding in the face of miscalculated PT, PTT and INR ratios;

(g) failing to conduct an accurate and full medical assessment of Decedent including an evaluation of all of her laboratory results and clinical signs and symptoms which would have revealed that she was anemic and had been excessively anticoagulated given her actual INR ratios had they been properly calculated;

(h) failing to properly train and supervise the medical/surgical residents to appreciate the signs and symptoms of anemia and bleeding and recognize that the PT, PTT and INR ratios had been improperly calculated;

(I) failing to properly train and supervise the nursing staff to appreciate the clinical signs and symptoms of anemia and bleeding and recognize that the PT, PTT and INR ratios had been improperly calculated;

(j) failing to ensure that Decedent was stable prior to undergoing any surgical procedures, including her clotting factors;

(k) failing to conduct proper laboratory and

diagnostic tests prior to Decedent's surgical procedure on June 13, 2001 so as to recognize that she had been excessively anticoagulated and was at a significant risk for abnormal bleeding and death; and

(l) failing to conduct proper laboratory and diagnostic tests subsequent to Decedent's surgical procedure on June 13, 2001 to properly determine her clotting factors so that steps could have been taken to increase her coagulation and save her life.

24. The death certificate issued following Ms. Militello's death on June 13, 2001, however, indicates as her cause of death: "kidney failure." (See a copy of the Certificate of Death, attached hereto as Ex. "C")

25. The Philadelphia Medical Examiner, Haresh G. Mirchandani, M.D. reviewed Ms. Militello's death, its circumstances and her medical records, and concluded that her cause of death was renal failure. (Ex. "D", Deposition of Haresh G. Mirchandani, M.D., at 43; Ex. "E", Death Certificate Information, at 1 and 6) According to Dr. Mirchandani, "[t]here was no clinical evidence of bleeding" and that "[t]he death of this patient was not the result of treatment (coumadin) received." (Ex. "E", at 6; Ex. "D", at 31-32)

26. Likewise, Ms. Militello's attending physician, defendant, Dr. Petrone, who treated Ms. Militello during her hospitalization, testified that he found no clinical evidence of any bleeding, and that it was his opinion that she had died as a result of kidney failure, and not as a result of having been given too much coumadin. (See deposition of Dr. Petrone, Ex. "F", at 11) Dr. Petrone determined that Ms. Militello's death was caused by renal failure, and listed it as the cause of death on her death certificate. (Ex. "F", at 79-80) He was very certain that her death was caused by renal failure at the time, and he remains so to this day. The corrected INR values received at a later date do not change his mind. (Ex. "F", at 80)

27. Dr. Petrone testified that there is no clinical evidence that Ms. Militello was bleeding during her admission. (Ex. "F", at 81) Her hemoglobin and hematocrit results were stable throughout her admission. Dr. Petrone testified as to the one markedly low hemoglobin level on June 13, 2001, that:

It was not consistent with her other hemoglobin values and it was not consistent with her physical exam. So we repeated it, as we frequently do when there's a lab that looks like a quote, "red herring." And it came back actually, the repeat, in line with her previous hemoglobin. (Ex. "F", at 81-82)

28. Initially, to set forth a *prima facie* case of medical malpractice, a plaintiff must establish for things: (1) the existence of a duty owed by the physician to the patient, (2) a breach of that duty from the physician to the patient, (3) that the breach of that duty was the proximate cause, or a substantial factor, in bringing about the harm suffered by the patient, and (4) the existence of damages suffered by the patient that were the direct result of that harm. Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888, 891 (1990).

29. To establish a cause of action for medical malpractice based on negligence, the Supreme Court of Pennsylvania requires that plaintiffs present expert testimony, to a reasonable degree of medical certainty, that the acts of the physician-defendant deviated from the applicable standard of care, and that such deviation constituted the proximate cause of the harm suffered. Brannan v. Lankenau Hospital, 490 Pa. 588, 417 A.2d 196 (1980); Mitzelfelt, 526 Pa. 54, 584 A.2d at 892. A plaintiff in a medical malpractice action "must present expert testimony to establish that the care and treatment of the plaintiff fell short of the required standard of care and that the breach proximately caused the plaintiff's injury." Toogood v. Rogal, 573 Pa. 245, 824 A.2d 1140, 1145 (2003). The burden is upon the plaintiff to show, through expert testimony, that the physician in question "failed to employ the requisite degree of care and skill." Toogood, 573 Pa. 245, 824 A.2d at 1150.

30. As a general matter, a physician who is not a specialist, "is required to *possess* and *employ* in the treatment of a patient the skill and knowledge usually possessed by physicians in the same or a similar locality. Donaldson v. Maffucci, 397 Pa. 548, 156 A.2d 835, 838 (1959).

31. The Plaintiffs have failed to present any expert testimony whatsoever setting forth the standard of care applicable to a physician in Dr. McCormick's position, and opinion to a reasonable degree of medical certainty that the acts of Dr. McCormick constituted the proximate

cause of harm suffered by Ms. Militello. This failure is fatal to the Plaintiffs' claims against Dr. McCormick, and require a grant of summary judgment in Dr. McCormick's favor.

32. In Eddy v. Hamaty, 694 A.2d 639 (Pa. Super. 1997), the Court considered an appeal of the grant of summary judgment entered in favor of defendant-physician by the trial court. The trial court had granted summary judgment on the grounds that the opinion of plaintiff's expert therein failed to establish, to a reasonable degree of medical certainty, that the actions of the defendant breached the applicable standard of care as to his patient and that they were the proximate cause (or substantial factor) in bringing about the harm alleged. Id. at 642-643. The Superior Court found that the plaintiff's expert "did not express the requisite degree of medical certainty" and that the plaintiff therefore "failed to state a *prima facie* case of medical malpractice" as to the defendant-physician, Dr. Hamaty:

Dr. Mitchell [plaintiff's expert] opined with a reasonable degree of medical certainty that the steroids, in the absence of other causes, led to the development of avascular necrosis. He **did not identify any conduct on the part of the treating physician as a breach of duty**, *e.g.*, that Dr. Hamaty negligently overprescribed the medication, that he negligently prescribed Prednisone in light of other alternatives, or that he negligently prescribed Prednisone for an excessive period of time. **Nor did he identify any breach as a proximate cause of, or a substantial factor in, appellant's harm.** ... After reviewing the expert report in its entirety, we conclude that Dr. Mitchell did not express the requisite degree of medical certainty. Appellant therefore failed to state a *prima facie* case of medical malpractice. (Id. at 642.) (emphasis added)

While carefully and clearly determining that the Plaintiff in Eddy had failed to demonstrate a breach in the applicable standard of care by Dr. Hamaty due to the expert's failure to provide an opinion as to the actions of Dr. Hamaty, the Superior Court sent the matter back to the trial court solely upon a procedural technicality: the Court had ruled on the defendant's summary judgment motion without providing the Plaintiff with 30 days after service of the motion to file a response. Nonetheless, the holding is clear: If the plaintiff fails to provide an expert opinion as to whether and how the defendant-physician's actions have breached a duty to the patient, and that such breach was the proximate cause of or substantial factor in the resulting harm, the claim must fail.

33. The sole expert opinion presented by the Plaintiffs is that of Barry L. Singer,

M.D., who has provided an opinion as to the cause of death of Ms. Militello. Dr. Singer opines that Ms. Militello died as a result of a “sharp drop in hemoglobin which a woman this age with multiple medical problems could not tolerate.” (See Dr. Singer’s report, April 14, 2003, at 3; attached hereto as Ex. “B”)

34. Dr. Singer, in his report, states that he “reviewed records” pertaining to Ms. Militello’s admission to St. Agnes Medical Center, between June 3, 2001 and June 13, 2001. (Ex. “B”, at 1) Dr. Singer provides some overview of the course of Ms. Militello’s hospitalization (Ex. “B”, at 1-2), reviews briefly her INR results and briefly her hemoglobin levels, although fails to indicate a complete review of those results. (Ex. “B”, at 2) Dr. Singer states in his report that Ms. Militello was prescribed an excessive dose of Coumadin during her hospitalization, and that this was due to “erroneous INR’s.” (Ex. “B”, at 2)

35. Dr. Singer then concludes that Ms. Militello developed bleeding on June 13, 2001, after several days of “over anticoagulation” with Coumadin, and that she died from “cardiac arrest” because of the bleeding. (Ex. “B”, at 2-3) Dr. Singer’s sole basis for concluding that Ms. Militello “develop[ed] bleeding” is that on June 13, 2001, her Hemoglobin level “dropped from 12.4 to 7.8,” thus indicating a large loss of blood. (Ex. “B”, at 2-3)

36. The medical records upon which Dr. Singer relies, however, do not reflect the data upon which he relies. Even Plaintiffs’ Third Amended Complaint fails to reflect this data. The Plaintiffs’ allege that on June 13, 2001, Ms. Militello’s hemoglobin level was 7.8 at 12:30 pm. (Ex. “A”, at ¶47) The Plaintiffs further allege that her hemoglobin level was 12.4 at 2:00 pm. (Ex. “A”, at ¶48) Precisely the opposite of the readings upon which Dr. Singer relies entirely for his opinion.

37. Ms. Militello’s Discharge Summary, likewise demonstrates the fallacy of the Dr. Singer’s opinion as to the cause of Ms. Militello’s death. (See copy of hemoglobin (“Hgb”) results summary from Ms. Militello’s Discharge Summary, attached hereto as Ex. “G”) Rather than demonstrating a “falling” hemoglobin level during her admission, leading to her death on June 13, 2001, nine out of the ten results during the June 2 through June 13, 2001 period

demonstrate a fairly stable hemoglobin level, of between 10.9 and 12.5, with a level of 12.4 being recorded as the result closest in time to Ms. Militello's death. (Ex. "G") In fact, about half of the hemoglobin results during her admission were **within the normal range** for hemoglobin ("12.0-16.0" according to the Discharge Summary, Ex. "G"), with the remaining results (excepting the 7.8 result) falling only slightly below the normal range.

38. A reading of the discharge summary (Ex. "G") demonstrates, as Dr. Petrone had testified, that the 7.8 hemoglobin level—upon which Dr. Singer relies entirely for his opinion as to Ms. Militello's cause of death—was indeed a "red herring." (Ex. "F", at 81-82) The summary shows that a specimen obtained at 12:30 pm on June 13, 2001, produced a hemoglobin result of 7.8. A notation appended to the result notes "Questionable results—requested new spec[imen]." The summary then shows that a new specimen was obtained at 2:00 pm, an hour-and-a-half later, on that same day, produced a result of 12.4 (again, within the normal range for hemoglobin). (Ex. "G")

39. It is clear and obvious based upon the records and Dr. Singer's report, that Dr. Singer's report must be rejected as flawed on its face, as there can be no dispute but that he misread the records. Dr. Singer makes the following unequivocal statement upon which he entire opinion hinges:

[O]n the day of June 13<sup>th</sup> [Ms. Militello's] hemoglobin dropped from 12.4 to 7.8 grams indicating that the patient had suffered a significant bleed. (Ex. "B", at 2)

Dr. Singer's preceding two sentences attempt to paint a picture of a patient whose hemoglobin level was trending downward throughout her admission until she dies from massive bleeding:

The patient's hemoglobin on admission was 10.9 grams. It rose as high as 12.5 grams during her admission by the time of her demise had dropped considerably to 7.8 grams. (Ex. "B", at 2)

Unfortunately, not only has Dr. Singer attempted to paint Ms. Militello's ten hemoglobin results as supportive of a conclusion that her hemoglobin level dropped throughout her stay to such a low level that it caused her death, but he has **read the results in the wrong order.**

40. Not only does Dr. Singer fail to note that the 12.4 result not only appears **after** the spurious 7.8 result, but he fails to note that it is a **normal** hemoglobin result, and he fails to note that this normal result is actually the **closest in time** to Ms. Militello's death. Likewise, Dr. Singer fails to note in his report that, other than the 7.8 result, all results both before and after this result, nine other results, are all either within the normal range for hemoglobin, or only slightly below. This failure is crucial because it demonstrates that the entire support for Dr. Singer's opinion that Ms. Militello, in essence, bled to death, is clearly and obviously flawed.

41. Even more telling is Dr. Singer's either failure to note the spurious nature of this result—as indicated in the very lab report itself, which terms the 7.8 result as being “questionable results, requested new spec[imen]”—or his intentional disregard of facts that cannot possibly fit within his “theory” as to Ms. Militello's cause of death.

42. Dr. Singer bases his opinion as to Militello's cause of death entirely upon one factual assumption which the medical records clearly demonstrates is false: The Ms. Militello's hemoglobin level dropped precipitously, suddenly and dangerously, from 12.4 (a normal result) to 7.8. From this he concludes that Ms. Militello was bleeding badly. From this he concludes that she suffered a loss of “at least ½ of her functioning red cells.” And from this he concludes that she developed cardiac arrest and died. The assumption, this one, crucial assumption, that Ms. Militello's hemoglobin dropped from 12.4 to 7.8, in a matter of hours, is simply, inescapably, and fatally **false**. It dooms Dr. Singer's opinion as to Ms. Militello's cause of death. His opinions must therefore be disregarded.

43. The opinion as to causation rendered by Dr. Singer is likewise fatally flawed because at no time does he state that the opinion that Ms. Militello died from cardiac arrest consequent to a massive loss of blood is rendered within a reasonable degree of medical certainty. Based upon the foregoing review of the facts before Dr. Singer and the facts upon which he relies for this opinion, it is clear that the opinions could not possibly have been rendered to a reasonable degree of medical certainty. Not only is his opinion flawed because it is predicated upon a clear misreading of the record, but his discussion of the apparent downward

trend of her hemoglobin during her stay is likewise based upon a flawed recitation of the record. Further, he opines that Ms. Militello's alleged massive bleeding sent her into cardiac arrest, causing her death. Not only does Dr. Singer fail to cite to a single shred of medical evidence in this case that Ms. Militello went into cardiac arrest at the time of her death, but the record contains no such evidence. His opinion must be disregarded as both flawed on its face, and because it is not given to a reasonable degree of medical certainty.

44. With respect to moving defendant, Dr. McCormick, the Plaintiffs' expert, Dr. Singer, **provides no opinion whatsoever**. Not only does Dr. Singer fail to opine as to the applicable standard of care (for any purpose and as to any defendant), but he specifically fails to opine as to the standard of medical care applicable to a physician in Dr. McCormick's position.

45. Dr. McCormick is a Pathologist. (Ex. "H", at ¶2) He is the medical director of the clinical laboratory at St. Agnes Medical Center, who has various administrative responsibilities with respect to the operation of the laboratory. (Ex. "H", at ¶¶3 and 12) He is not engaged in the practice of medicine at St. Agnes, nor does he provide any medical care or treatment to patients there. (Ex. "H", at ¶¶3-4) Neither does he perform any of the testing in the laboratory. (Ex. "H", at ¶¶3-7) Further, he did not perform any of testing on Ms. Militello, nor did he participate in any way in her care or treatment at St. Agnes. (Ex. "H", at ¶¶7-9)

46. Dr. Singer in no way addresses in his report any issues which pertain to any alleged actions or inactions on the part of Dr. McCormick. Dr. Singer does not address any standard of care applicable to Dr. McCormick, or even to the "medical director of the clinical laboratory." Dr. Singer does not even mention the actions of any one employed in the clinical laboratory, let alone any alleged actions or inactions by its medical director. Dr. Singer does not address either Dr. McCormick or his position. Period. There is no indication that Dr. Singer is even aware of Dr. McCormick's existence as a defendant in this matter, let alone have any information which would form the basis for providing any opinion as to McCormick's alleged actions or inactions. Singer's report, as discussed in detail above, speaks only to a "theory" of his as to the cause of Ms. Militello's death. He ignores the standard of care; he addresses it as to

no defendant, let alone as to Dr. McCormick, a Pathologist in an administrative position over the clinical laboratory at St. Agnes, who was not involved in providing medical care to Ms. Militello.

47. Finally, the Plaintiffs have presented no evidence from which a reasonable jury could conclude that the assessment of punitive damages as against Dr. McCormick were appropriate, and the punitive damages claim, if not already dismissed by this Court's previous order on Preliminary Objections, should be dismissed with prejudice.

Accordingly, and for the reasons herein and in the accompanying Memorandum of Law in support of Summary Judgment, it is respectfully requested that this Honorable Court grant the motion of defendant, John F. McCormick, M.D., and enter summary judgment in his favor, and against the Plaintiffs, and dismiss all of their claims against him with prejudice.

Respectfully submitted,

GOLD, BUTKOVITZ & ROBINS, P.C.

BY:

\_\_\_\_\_  
ALAN S. GOLD  
SEAN ROBINS  
Attorneys for defendant,  
John F. McCormick, M.D.

DATE: January 5, 2004

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**ATTORNEY FOR DEFENDANT,**  
**JOHN F. McCORMICK, M.D.**

**RUSSELL MILITELLO** : **PHILADELPHIA COUNTY**  
 : **COURT OF COMMON PLEAS**  
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**V.** : **FEBRUARY TERM, 2002**  
 :  
**ST. AGNES MEDICAL CENTER, et al.** : **NO. 1588**

**MEMORANDUM OF LAW IN SUPPORT OF**  
**MOTION FOR SUMMARY JUDGMENT OF**  
**DEFENDANT, JOHN F. MCCORMICK, M.D.**

**I. INTRODUCTION**

This matter was commenced by the Plaintiffs with the filing of a Writ of Summons on February 12, 2002. On February 26, 2002, a Praecipe and Rule to File Complaint were filed and served, and on or about March 21, 2002, the Plaintiffs filed a Complaint. Preliminary Objections to the Plaintiffs Complaint were filed, to which Plaintiffs responded by filing an Amended Complaint, on or about May 30, 2003.

Preliminary Objections were thereafter filed as to Plaintiffs' Amended Complaint, and on or about July 10, 2002, Plaintiffs filed a Second Amended Complaint. Once more Preliminary Objections followed, as to Plaintiffs' Second Amended Complaint, and once more Plaintiffs responded with the filing of a Third Amended Complaint on or about August 19, 2002. (A copy of the Plaintiffs' Third Amended Complaint is attached hereto as Ex. "A")

Preliminary Objections to the Plaintiffs' Third Amended Complaint were filed. By Order dated October 24, 2003, the Court granted in part certain Preliminary Objections to the Plaintiffs' Third Amended Complaint, as follows:

...All references to: recklessness, conduct in reckless disregard, or willful and wanton conduct and all claims for punitive damages contained in paragraphs 53, 54, 57, 58, 59, 59(i), 60, 64, 65, 66,

66(i), 67, 98, 99, 102, 104, 105 and in the “wherefore” clause following paragraph 105 and all other claims for punitive damages are stricken; ...

Plaintiffs, in their Third Amended Complaint, attempt to set forth claims of medical malpractice and professional negligence as to each of the defendants: St. Agnes Medical Center (“St. Agnes”), Catholic Health East, Marc Christopher Petrone, M.D. (“Petrone”), as well as moving defendant, John F. McCormick, M.D.

For the reasons set forth in his Motion for Summary Judgment, and in this Memorandum of Law in support thereof, moving defendant, John F. McCormick, M.D. (“McCormick”) respectfully requests that this Honorable Court grant his motion, and enter summary judgment in his favor and against the Plaintiffs.

## II. FACTUAL BACKGROUND

As noted, the Plaintiffs, in their Third Amended Complaint, attempt to set forth claims of medical malpractice and professional negligence as to each of the defendants: St. Agnes, Catholic Health East, Dr. Petrone and moving defendant, Dr. McCormick.

Plaintiffs’ allege that their decedent, Ms. Josephine Militello (“Militello”), was admitted to St. Agnes Medical Center on or about June 20, 2001 by her attending physician, defendant, Dr. Petrone, with admitting diagnoses of chronic renal failure, digoxin toxicity and insulin dependant diabetes mellitus. (Ex. “A”, at ¶9)

Among various medications, Plaintiffs’ allege that Ms. Militello was receiving Coumadin (an anticoagulant medication) at the time of her admission to St. Agnes. (Ex. “A”, at ¶13)

Plaintiffs allege that on June 5, 2001, Ms. Militello’s INR ratio (a measure of her blood’s anticoagulation) was miscalculated as being 1.61, ... (Ex. “A”, at ¶17)

Plaintiffs allege that on June 7, 2001, Ms. Militello’s INR ratio was miscalculated as being 2.22, but that it was later determined to have actually been 5.25. (Ex. “A”, at ¶¶21 and 23)

Plaintiffs allege that on June 8, 2001, Ms. Militello’s INR ratio was miscalculated as being 2.42, but that it was later determined to have actually been 6.29. (Ex. “A”, at ¶¶24 and 26)

Plaintiffs allege that on June 9, 2001, Ms. Militello’s INR ratio was miscalculated as

being 2.27, but that it was later determined to have actually been 5.51. (Ex. "A", at ¶¶27 and 29)

Plaintiffs allege that on June 10, 2001, Ms. Militello's INR ratio was miscalculated as being 2.18, but that it was later determined to have actually been 5.08. (Ex. "A", at ¶¶31 and 33)

Plaintiffs allege that on June 11, 2001, Ms. Militello's INR ratio was miscalculated as being 2.18, but that it was later determined to have actually been 5.04. (Ex. "A", at ¶¶34 and 36)

Plaintiffs allege that on June 12, 2001, Ms. Militello's INR ratio was miscalculated as being 2.06, but that it was later determined to have actually been 4.50. (Ex. "A", at ¶¶37 and 39)

Plaintiffs allege that on June 13, 2001, Ms. Militello's INR ratio was miscalculated as being 2.06 and 2.11, but that it was later determined to have actually been 4.50 and 4.74. (Ex. "A", at ¶¶40-41, 46 and 49)

Plaintiffs' allege that the improper calculations of Ms. Militello's INR ratio "contributed to [Ms. Militello's] demise and ultimate death." (Ex. "A", at ¶54)

Specifically with respect to moving defendant, McCormick, Plaintiffs allege in their Third Amended Complaint as follows:

7. At all times material hereto, Defendant John F. McCormick, M.D. ("Dr. McCormick") was a physician duly licensed to practice in the Commonwealth of Pennsylvania and was engaged in the practice of his profession in Philadelphia, Pennsylvania at SAMC.  
\* \* \*
79. Defendant, Dr. McCormick, was a physician who undertook to diagnose, treat and otherwise care for Decedent on or about June 2, 2001, in the course of his practice at SAMC.
80. Defendant, Dr. McCormick, undertook the aforesaid care of Decedent with the knowledge and intention that Plaintiff would rely on Defendant's opinions, training and experience in regard to the medical care rendered to her during the course of her care and treatment at SAMC.
81. Defendant, Dr. McCormick, undertook the aforesaid care of Decedent for compensation rendered by Decedent or on behalf of Decedent.
82. Defendant, Dr. McCormick, held himself out to Decedent and the public as an expert in medicine.  
\* \* \*

84. Defendant, Dr. McCormick, owed a duty of care to Decedent which was breached to Decedent's great detriment.
85. Defendant, Dr. McCormick, breached his duty of care to Decedent with knowledge and reckless disregard for her safety to her great detriment by numerous acts or omissions, in the following ways:
  - (a) failing to properly monitor Decedent's laboratory values, including PT, INR and PTT, in that he failed to recognize that these values were improperly calculated and failed to ensure they were properly calculated so that the decedent would not be over-anticoagulated leading to her death;
  - (b) failing to take proper steps to ensure that Decedent's laboratory results were accurate by failing to recognize the miscalculations and failing to do anything to ensure the values were properly calculated and her clotting ability was increased;
  - (c) failing to properly interpret Decedent's laboratory results in light of inconsistent laboratory values;
  - (d) failing to repeat Decedent's erroneous laboratory tests including PT, PTT and INR ratios to ensure that she was not over-anticoagulated leading to her death;
  - (e) failing to consistently monitor Decedent's HGB and HCT levels during her admission to recognize the signs of excess anticoagulation;
  - (f) failing to timely diagnose and treat Decedent's bleeding in the face of miscalculated PT, PTT and INR ratios;
  - (g) failing to conduct an accurate and full medical assessment of Decedent including an evaluation of all of her laboratory results and clinical signs and symptoms which would have revealed that she was anemic and had been excessively anticoagulated given her actual INR ratios had they been properly calculated;
  - (h) failing to properly train and supervise the medical/surgical residents to appreciate the signs and symptoms of anemia and bleeding and recognize that the PT, PTT and INR ratios had been improperly calculated;
  - (I) failing to properly train and supervise the

nursing staff to appreciate the clinical signs and symptoms of anemia and bleeding and recognize that the PT, PTT and INR ratios had been improperly calculated;

(j) failing to ensure that Decedent was stable prior to undergoing any surgical procedures, including her clotting factors;

(k) failing to conduct proper laboratory and diagnostic tests prior to Decedent's surgical procedure on June 13, 2001 so as to recognize that she had been excessively anticoagulated and was at a significant risk for abnormal bleeding and death; and

(l) failing to conduct proper laboratory and diagnostic tests subsequent to Decedent's surgical procedure on June 13, 2001 to properly determine her clotting factors so that steps could have been taken to increase her coagulation and save her life.

The death certificate issued following Ms. Militello's death on June 13, 2001, however, indicates as her cause of death: "kidney failure." (See a copy of the Certificate of Death, attached hereto as Ex. "C")

The Philadelphia Medical Examiner, Haresh G. Mirchandani, M.D. reviewed Ms. Militello's death, its circumstances and her medical records, and concluded that her cause of death was renal failure. (Ex. "D", Deposition of Haresh G. Mirchandani, M.D., at 43; Ex. "E", Death Certificate Information, at 1 and 6) According to Dr. Mirchandani, "[t]here was no clinical evidence of bleeding" and that "[t]he death of this patient was not the result of treatment (coumadin) received." (Ex. "E", at 6; Ex. "D", at 31-32)

Likewise, Ms. Militello's attending physician, defendant, Dr. Petrone, who treated Ms. Militello during her hospitalization, testified that he found no clinical evidence of any bleeding, and that it was his opinion that she had died as a result of kidney failure, and not as a result of having been given too much coumadin. (See deposition of Dr. Petrone, Ex. "F", at 11) Dr. Petrone determined that Ms. Militello's death was caused by renal failure, and listed it as the cause of death on her death certificate. (Ex. "F", at 79-80) He was very certain that her death was caused by renal failure at the time, and he remains so to this day. The corrected INR values

received at a later date do not change his mind. (Ex. "F", at 80)

Dr. Petrone testified that there is no clinical evidence that Ms. Militello was bleeding during her admission. (Ex. "F", at 81) Her hemoglobin and hematocrit results were stable throughout her admission. Dr. Petrone testified as to the one markedly low hemoglobin level on June 13, 2001, that:

It was not consistent with her other hemoglobin values and it was not consistent with her physical exam. So we repeated it, as we frequently do when there's a lab that looks like a quote, "red herring." And it came back actually, the repeat, in line with her previous hemoglobin. (Ex. "F", at 81-82)

asdasd

### III. ARGUMENT

#### A. Standard to Be Utilized in Deciding the Motion for Summary Judgment of Defendant, John F. McCormick, M.D.

Pennsylvania Rule of Civil Procedure 1035 sets forth the standard for granting summary judgment. It states in relevant part:

After the relevant pleadings are closed, but within such time as to not unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

In Ertel v. Patriot-News Co., 544 Pa. 93, 674 A.2d 1038, cert. denied, 519 U.S. 1008, 117 S.Ct. 512 (1996), the Supreme Court of Pennsylvania adopted the approach of the Supreme Court of the United States to summary judgment. It held that henceforth, in order to defeat a motion for summary judgment, the party against whom the motion is directed must submit sufficient evidence on every issue essential to his case on which he bears the burden of proof to support a jury verdict in his favor. Id. at 674 A.2d at 1042.

In this case, the Plaintiffs have presented insufficient evidence to support a jury verdict in their favor as to their claims of medical malpractice as against moving defendant, Dr. McCormick. To defeat Dr. McCormick's motion for summary judgment, the Plaintiffs must establish the existence of sufficient evidence to support a jury verdict in their favor on all elements of the cause of action for which they have the burden of proof. Ertel, 544 Pa. 93, 674 A.2d at 1042.

#### B. The Plaintiffs Have Failed to Establish the Existence of a Duty on the Part of Moving Defendant, Dr. McCormick, as to Plaintiff's Decedent, Ms. Militello

Initially, in order to set forth a *prima facie* case of medical malpractice, a plaintiff must establish for things: (1) the existence of a duty owed by the physician to the patient, (2) a breach of that duty from the physician to the patient, (3) that the breach of that duty was the proximate

cause, or a substantial factor, in bringing about the harm suffered by the patient, and (4) the existence of damages suffered by the patient that were the direct result of that harm. Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888, 891 (1990).

Plaintiff's, both in their allegations as against Dr. McCormick in their Third Amended Complaint, and via their expert (through his silence on the matter), seem simply to assume that whatever standard of care is applicable to the physician's who provided medical treatment to Ms. Militello, apply to any physician named in their complaint, regardless of whether that physician treated Ms. Militello, whether that physician is engaged in a medical practice at St. Agnes, and whatever the duties or functions of that physician might be at St. Agnes Medical Center. The problem with this assumption, as discussed below, is two fold.

First, Dr. McCormick's duties at St. Agnes are very different from those of any physician who might have been involved in Ms. Militello's treatment: He is the medical director of the clinical laboratory, and functions as an administrator, and not a treating physician. The Plaintiffs' expert, as discussed below, appears unaware of this and, in fact, appears unaware of Dr. McCormick's very existence, which leads to the second problem. Plaintiffs' expert not only fails to discuss or even mention Dr. McCormick or his position of medical director of the laboratory, completely fails to articulate any standard of care applicable to him or to someone in his position.

Plaintiff's sole expert in this matter, Dr. Singer, as discussed below, has provided no testimony whatsoever pertaining to Dr. McCormick (or even as to the "medical director" of the clinical laboratory). It does not even appear from his report that Dr. Singer is aware of the existence of Dr. McCormick (or the "medical director" of the clinical laboratory) as a defendant in this matter. Dr. Singer does not opine as to any of the essential issues that Plaintiffs must prove in prevailing in a malpractice claim against Dr. McCormick. (See Ex. "B", throughout)

First, Dr. Singer provides no opinion as to what, if any, duty Dr. McCormick possesses with regard to the care and treatment of the decedent, Ms. Militello. It is beyond dispute in this matter, that Dr. McCormick was not Ms. Militello's treating physician; she was not his patient,

he was not consulted concerning her care or treatment and, in fact, he had no knowledge of Ms. Militello whatsoever during the time she was a patient at St. Agnes. (Ex. "H", Affidavit of Dr. McCormick, at ¶9)

Dr. McCormick was, at all times relevant to this matter, the medical director of the clinical laboratory at St. Agnes Medical Center. (Ex. "H", at ¶2) While he is a licensed physician, he is not engaged in the practice of medicine at St. Agnes, and does not personally provide any medical care to any patients. (Ex. "H", at ¶¶3-4 and 10) It is not his duty to review, recommend, provide or be involved in the provision of medical care to any of St. Agnes' patients. (Ex. "H", at ¶11) It is not his duty to review, recommend or order any medication, medical treatment, surgical procedure or testing of patients, nor is it his duty to supervise or monitor the provision or progress of any of these. (Ex. "H", at ¶11)

At issue in this matter, *inter alia*, is certain laboratory testing (prothrombin time testing, or "PT" testing). All such testing performed on patients at St. Agnes is performed by employees of St. Agnes, including laboratory technicians, medical technologists as well as laboratory supervisors (who are also medical teshnologists). (Ex. "H", at ¶5) These individuals are employees of St. Agnes, and not of Dr. McCormick. (Ex. "H", at ¶14)

As medical director of the laboratory, Dr. McCormick's duties are administrative in nature, and not medical. (Ex. "H", at ¶3) Dr. McCormick's duties pertain to the operation and administration of the laboratory as a whole. (Ex. "H", at ¶12) He does not perform any of the laboratory's clinical testing, and he performed no such testing on Ms. Militello. (Ex. "H", at ¶¶6-7) Neither is it Dr. McCormick's duty to supervise the day-to-day performance of patient testing in the laboratory. This responsibility rests with the clinical supervisors of the individual departments in the laboratory. (Ex. "H", at 8)

Nor, as medical director of the laboratory, is it Dr. McCormick's duty to supervise or train medical personnel, medical staff, medical or surgical residents, or nursing staff, in the performance of their duties. (Ex. "H", at ¶16) At no time did Dr. McCormick hold himself out in any respect or in any manner to the general public as a physician involved in providing

medical care to patients at St. Agnes. (Ex. "H", at ¶15) His duties did not include the interaction or interfacing with inpatients or outpatients of the hospital, or with their families, or members of the general public. (Ex. "H", at ¶15)

At no time does Dr. Singer refer or relate to, in any way, Dr. McCormick, or the position which he occupied as medical director of the clinical laboratory at St. Agnes. He does not discuss Dr. McCormick or his duties as medical director of the laboratory, nor does he even indicate that he is aware of what those duties are, or what the standard of care might be with respect to the performance of those duties. Consequently, the Plaintiffs have provided no expert testimony whatsoever as to what Dr. McCormick's duties were in regard to Ms. Militello, if any, let alone testimony from which a jury could conclude that any such duties had been breached by Dr. McCormick. It is clear and unambiguous from the record in this matter, that Dr. McCormick was not a treating physician of Ms. Militello. In fact, it is undisputed in the record that he had no knowledge of her while she was an inpatient at St. Agnes. There is no evidence that Dr. McCormick ever treated her or was involved in Ms. Militello's treatment. Without this, without evidence that he had such a duty, without expert testimony demonstrating the existence of such a duty (let alone testimony of a breach of such a duty), the Plaintiffs' claims as against Dr. McCormick must fail.

Dr. Singer addresses none of these issues pertaining to the question of whether or what duty Dr. McCormick had with respect to Ms. Militello. Dr. Singer does not address either Dr. McCormick, or the position which he occupies, as medical director of the clinical laboratory. There is no indication that Dr. Singer ever considered Dr. McCormick, his actions or any standard of care with respect to Dr. McCormick. There is no indication that Dr. Singer is even aware of Dr. McCormick's existence. Dr. McCormick appears nowhere in Dr. Singer's report, nor is he addressed in any manner whatsoever.

Plaintiffs' claims against Dr. McCormick fail to satisfy even the threshold question of the existence of a duty as between himself and the decedent, Ms. Militello. Accordingly, the Plaintiffs' claims against Dr. McCormick must fail, and summary judgment should be entered in

favor of Dr. McCormick, and against the Plaintiffs.

- C. The Plaintiffs Have Failed to Submit Expert Testimony Setting Forth the Applicable Standard of Care as to Moving Defendant, Dr. McCormick, and Setting Forth, to a Reasonable Degree of Medical Certainty, that the Actions of Dr. McCormick Breached that Standard of Care and Were the Proximate Cause of, or a Substantial Factor in Bringing About, the Harm Alleged as to Ms. Militello

To establish a cause of action for medical malpractice based on negligence, the Supreme Court of Pennsylvania requires that plaintiffs present expert expert testimony, to a reasonable degree of medical certainty, that the acts of the physician-defendant deviated from the applicable standard of care, and that such deviation constituted the proximate cause of the harm suffered. Brannan v. Lankenau Hospital, 490 Pa. 588, 417 A.2d 196 (1980); Mitzelfelt, 526 Pa. 54, 584 A.2d at 892. A plaintiff in a medical malpractice action “must present expert testimony to establish that the care and treatment of the plaintiff fell short of the required standard of care and that the breach proximately caused the plaintiff’s injury.” Toogood v. Rogal, 573 Pa. 245, 824 A.2d 1140, 1145 (2003). The burden is upon the plaintiff to show, through expert testimony, that the physician in question “failed to employ the requisite degree of care and skill.” Toogood, 573 Pa. 245, 824 A.2d at 1150.

As a general matter, a physician who is not a specialist, “is required to *possess* and *employ* in the treatment of a patient the skill and knowledge usually possessed by physicians in the same or a similar locality. Donaldson v. Maffucci, 397 Pa. 548, 156 A.2d 835, 838 (1959).

The Plaintiffs have failed to present any expert testimony whatsoever setting forth the standard of care applicable to a physician in Dr. McCormick’s position, and opinion to a reasonable degree of medical certainty that the acts of Dr. McCormick constituted the proximate cause of harm suffered by Ms. Militello. This failure is fatal to the Plaintiffs’ claims against Dr. McCromick, and require a grant of summary judgment in Dr. McCormick’s favor.

In Eddy v. Hamaty, 694 A.2d 639 (Pa. Super. 1997), the Court considered an appeal of the grant of summary judgment entered in favor of defendant-physician by the trial court. The trial court had granted summary judgment on the grounds that the opinion of plaintiff’s expert

therein failed to establish, to a reasonable degree of medical certainty, that the actions of the defendant breached the applicable standard of care as to his patient and that they were the proximate cause (or substantial factor) in bringing about the harm alleged. *Id.* at 642-643. The Superior Court found that the plaintiff's expert "did not express the requisite degree of medical certainty" and that the plaintiff therefore "failed to state a *prima facie* case of medical malpractice" as to the defendant-physician, Dr. Hamaty:

Dr. Mitchell [plaintiff's expert] opined with a reasonable degree of medical certainty that the steroids, in the absence of other causes, led to the development of avascular necrosis. He **did not identify any contact on the part of the treating physician as a breach of duty**, *e.g.*, that Dr. Hamaty negligently overprescribed the medication, that he negligently prescribed Prednisone in light of other alternatives, or that he negligently prescribed Prednisone for an excessive period of time. **Nor did he identify any breach as a proximate cause of, or a substantial factor in, appellant's harm.** ... After reviewing the expert report in its entirety, we conclude that Dr. Mitchell did not express the requisite degree of medical certainty. Appellant therefore failed to state a *prima facie* case of medical malpractice. (*Id.* at 642.) (emphasis added)

While carefully and clearly determining that the Plaintiff in Eaddy had failed to demonstrate a breach in the applicable standard of care by Dr. Hamaty due to the expert's failure to provide an opinion as to the actions of Dr. Hamity, the Superior Court sent the matter back to the trial court solely upon a procedural technicality: the Court had ruled on the defendant's summary judgment motion without providing the Plaintiff with 30 days after service of the motion to file a response. Nonetheless, the holding is clear: If the plaintiff fails to provide an expert opinion as to whether and how the defendant-physician's actions have breached a duty to the patient, and that such breach was the proximate cause of or substantial factor in the resulting harm, the claim must fail.

The situation in this case is even starker than that presented in Eaddy. In Eaddy, the plaintiff's expert did discuss the standard of care which would have been applicable to the defendant-physician seeking summary judgment. The expert provided an opinion as to a standard of care involved in the medical treatment of the patient, medical treatment that involved, at least allegedly, the defendant-moving physician in that case. The problem was, however, that the expert failed to complete his job, and failed to draw a connection between the actions of the

physician and the harm to the patient. In Eaddy, the expert failed completely to discuss any of the actions or conduct of the physician who was seeking summary judgment. Consequently, summary judgment was granted in his favor.<sup>1</sup> Here, Plaintiffs' expert fails not only to discuss the actions and conduct of Dr. McCormick, and fails to discuss him at all, but he fails to articulate any standard of care that would be applicable to McCormick.

Dr. McCormick is a Pathologist. (Ex. "H", at ¶2) He is the medical director of the clinical laboratory at St. Agnes Medical Center, who has various administrative responsibilities with respect to the operation of the laboratory. (Ex. "H", at ¶¶3 and 12) He is not engaged in the practice of medicine at St. Agnes, nor does he provide any medical care or treatment to patients there. (Ex. "H", at ¶¶3-4) Neither does he perform any of the testing in the laboratory. (Ex. "H", at ¶¶3-7) Further, he did not perform any of testing on Ms. Militello, nor did he participate in any way in her care or treatment at St. Agnes. (Ex. "H", at ¶¶7-9)

Dr. Singer in no way addresses in his report any issues which pertain to any alleged actions or inactions on the part of Dr. McCormick. Dr. Singer does not address any standard of care applicable to Dr. McCormick, or even to the "medical director of the clinical laboratory." Dr. Singer does not even mention the actions of any one employed in the clinical laboratory, let alone any alleged actions or inactions by its medical director. Dr. Singer does not address either Dr. McCormick or his position. Period. There is no indication that Dr. Singer is even aware of Dr. McCormick's existence as a defendant in this matter, let alone have any information which would form the basis for providing any opinion as to McCormick's alleged actions or inactions. Singer's report, as discussed in detail above, speaks only to a "theory" of his as to the cause of Ms. Militello's death. He ignores the standard of care; he addresses it as to no defendant, let alone as to Dr. McCormick, a Pathologist in an administrative position over the clinical

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<sup>1</sup> Again, it must be stressed, that the appellate court in Eaddy agreed with the trial court that the expert report failed to express the requisite degree of medical certainty as to the defendant-moving physician's actions, and that the plaintiff had therefore failed to state a *prima facie* case of medical malpractice. The Superior Court vacated the entry of summary judgment, however, solely on the procedural grounds that the trial court had failed to accord the plaintiff 30 days to respond to the motion.

laboratory at St. Agnes, who was not involved in providing medical care to Ms. Militello.

Dr. Singer's expert report (Ex. "B") speaks for itself in this regard. A thorough review of the report and its three pages of discussion, demonstrates that he fails completely to discuss any of the follow: Dr. McCormick or his actions, or Plaintiffs' allegations against Dr. McCormick; the actions of the "medical director" of the clinical laboratory (the position occupied by Dr. McCormick); or the duties of Dr. McCormick as medical director of the laboratory, or any issues relating thereto. (See also discussion of Dr. Singer's opinions rendered, in Section "C", below) Without the discussion of any of these topics, it is clear that the Plaintiffs have failed to submit any expert testimony whatsoever that addresses Dr. McCormick, and thus cannot prevail in a medical malpractice claim against him. Summary judgment, accordingly, should be entered in favor of Dr. McCormick.

C. Dr. Singer's Expert Report and Opinions Must Be Rejected for Any Purpose Whatsoever as Flawed on the Face of the Report

The sole expert opinion presented by the Plaintiffs is that of Barry L. Singer, M.D., who has provided an opinion as to the cause of death of Ms. Militello. Dr. Singer opines that Ms. Militello died as a result of a "sharp drop in hemoglobin which a woman this age with multiple medical problems could not tolerate." (See Dr. Singer's report, April 14, 2003, at 3; attached hereto as Ex. "B")

Dr. Singer, in his report, states that he "reviewed records" pertaining to Ms. Militello's admission to St. Agnes Medical Center, between June 3, 2001 and June 13, 2001. (Ex. "B", at 1) Dr. Singer provides some overview of the course of Ms. Militello's hospitalization (Ex. "B", at 1-2), reviews briefly her INR results and briefly her hemoglobin levels, although fails to indicate a complete review of those results. (Ex. "B", at 2) Dr. Singer states in his report that Ms. Militello was prescribed an excessive dose of Coumadin during her hospitalization, and that this was due to "erroneous INR's." (Ex. "B", at 2)

Dr. Singer then concludes that Ms. Militello developed bleeding on June 13, 2001, after several days of "over anticoagulation" with Coumadin, and that she died from "cardiac arrest" because of the bleeding. (Ex. "B", at 2-3) Dr. Singer's sole basis for concluding that Ms.

Militello “develop[ed] bleeding” is that on June 13, 2001, her Hemoglobin level “dropped from 12.4 to 7.8,” thus indicating a large loss of blood. (Ex. “B”, at 2-3)

The medical records upon which Dr. Singer relies, however, do not reflect the data upon which he relies. Even Plaintiffs’ Third Amended Complaint fails to reflect this data. The Plaintiffs’ allege that on June 13, 2001, Ms. Militello’s hemoglobin level was 7.8 at 12:30 pm. (Ex. “A”, at ¶47) The Plaintiffs further allege that her hemoglobin level was 12.4 at 2:00 pm. (Ex. “A”, at ¶48) Precisely the opposite of the readings upon which Dr. Singer relies entirely for his opinion.

Ms. Militello’s Discharge Summary, likewise demonstrates the fallacy of the Dr. Singer’s opinion as to the cause of Ms. Militello’s death. (See copy of hemoglobin (“Hgb”) results summary from Ms. Militello’s Discharge Summary, attached hereto as Ex. “G”) Rather than demonstrating a “falling” hemoglobin level during her admission, leading to her death on June 13, 2001, nine out of the ten results during the June 2 through June 13, 2001 period demonstrate a fairly stable hemoglobin level, of between 10.9 and 12.5, with a level of 12.4 being recorded as the result closest in time to Ms. Militello’s death. (Ex. “G”) In fact, about half of the hemoglobin results during her admission were **within the normal range** for hemoglobin (“12.0-16.0” according to the Discharge Summary, Ex. “G”), with the remaining results (excepting the 7.8 result) falling only slightly below the normal range.

A reading of the discharge summary (Ex. “G”) demonstrates, as Dr. Petrone had testified, that the 7.8 hemoglobin level—upon which Dr. Singer relies entirely for his opinion as to Ms. Militello’s cause of death—was indeed a “red herring.” (Ex. “F”, at 81-82) The summary shows that a specimen obtained at 12:30 pm on June 13, 2001, produced a hemoglobin result of 7.8. A notation appended to the result notes “Questionable results—requested new spec[imen].” The summary then shows that a new specimen was obtained at 2:00 pm, an hour-and-a-half later, on that same day, produced a result of 12.4 (again, within the normal range for hemoglobin). (Ex. “G”)

It is clear and obvious based upon the records and Dr. Singer’s report, that Dr. Singer’s

report must be rejected as flawed on its face, as there can be no dispute but that he mis-read the records. Dr. Singer makes the following unequivocal statement upon which he entire opinion hinges:

[O]n the day of June 13<sup>th</sup> [Ms. Militello's] hemoglobin dropped from 12.4 to 7.8 grams indicating that the patient had suffered a significant bleed. (Ex. "B", at 2)

Dr. Singer's preceding two sentences attempt to paint a picture of a patient whose hemoglobin level was trending downward throughout her admission until she dies from massive bleeding:

The patient's hemoglobin on admission was 10.9 grams. It rose as high as 12.5 grams during her admission by the time of her demise had dropped considerably to 7.8 grams. (Ex. "B", at 2)

Unfortunately, not only has Dr. Singer attempted to paint Ms. Militello's ten hemoglobin results as supportive of a conclusion that her hemoglobin level dropped throughout her stay to such a low level that it caused her death, but he has **read the results in the wrong order.**

Not only does Dr. Singer fail to note that the 12.4 result not only appears **after** the spurious 7.8 result, but he fails to note that it is a **normal** hemoglobin result, and he fails to note that this normal result is actually the **closest in time** to Ms. Militello's death. Likewise, Dr. Singer fails to note in his report that, other than the 7.8 result, all results both before and after this result, nine other results, are all either within the normal range for hemoglobin, or only slightly below. This failure is crucial because it demonstrates that the entire support for Dr. Singer's opinion that Ms. Militello, in essence, bled to death, is clearly and obviously flawed.

Even more telling is Dr. Singer's either failure to note the spurious nature of this result—as indicated in the very lab report itself, which terms the 7.8 result as being “questionable results, requested new spec[imen]”—or his intentional disregard of facts that cannot possibly fit within his “theory” as to Ms. Militello's cause of death.

Dr. Singer bases his opinion as to Militello's cause of death entirely upon one factual assumption which the medical records clearly demonstrates is false: The Ms. Militello's hemoglobin level dropped precipitously, suddenly and dangerously, from 12.4 (a normal result)

to 7.8. From this he concludes that Ms. Militello was bleeding badly. From this he concludes that she suffered a loss of “at least ½ of her functioning red cells.” And from this he concludes that she developed cardiac arrest and died. The assumption, this one, crucial assumption, that Ms. Militello’s hemoglobin dropped from 12.4 to 7.8, in a matter of hours, is simply, inescapably, and fatally **false**. It dooms Dr. Singer’s opinion as to Ms. Militello’s cause of death. His opinions must therefore be disregarded.

The opinion as to causation rendered by Dr. Singer is likewise fatally flawed because at no time does he state that the opinion that Ms. Militello died from cardiac arrest consequent to a massive loss of blood is rendered within a reasonable degree of medical certainty. Based upon the foregoing review of the facts before Dr. Singer and the facts upon which he relies for this opinion, it is clear that the opinions could not possibly have been rendered to a reasonable degree of medical certainty. Not only is his opinion flawed because it is predicated upon a clear misreading of the record, but his discussion of the apparent downward trend of her hemoglobin during her stay is likewise based upon a flawed recitation of the record. Further, he opines that Ms. Militello’s alleged massive bleeding sent her into cardiac arrest, causing her death. Not only does Dr. Singer fail to cite to a single shred of medical evidence in this case that Ms. Militello went into cardiac arrest at the time of her death, but the record contains no such evidence. It is sheer theory and speculation, based upon a flawed reading of the medical record before him. His opinion must be disregarded as both flawed on its face, and because it is not given to a reasonable degree of medical certainty.

Plaintiff’s claims as against Dr. McCormick, accordingly, should be dismissed.

D. Plaintiffs Have Failed to Adduce any Evidence Whatsoever from Which a Reasonably Jury Could Conclude that moving defendant, Dr. McCormick, acted with Recklessness, or acted Wantonly or Wilfully, and therefore, Any Claims for Punitive Damages Must be Dismissed.

Even if claims for punitive damages had not already been dismissed by the Court via its October 24, 2003 ruling granting certain Preliminary Objections to the Plaintiff’s Third Amended Complaint, the Plaintiffs have presented no evidence whatsoever from which a reasonable jury could conclude that punitive damages could appropriately be assessed against

moving defendant, Dr. McCormick.

In Davis v. Park, et al., 45 Somerset Legal Journal 1, 5 (1985) the court stated:

But a punitive damage claim requires more than negligence, fraud or bad faith to support it; it requires conduct that is outrageous, that is acts done with an evil motive or reckless indifference to the rights of others. (citations omitted) But the bad motive or reckless indifference must be such as to horrify or shock the sensibilities of an ordinary and average person. (emphasis in original).

In Albright v. Gadiparthi, et al., 50 Somerset Legal Journal 355, 366 (1991) President Judge Fike stated:

The indispensable ingredients of a case for punitive damages are: (1) a tort cause of action...(citation omitted), and (2) conduct which because of its evil motive or reckless indifference reaches a level of being outrageous. So, it is not every tort committed with a bad motive or reckless indifference that warrants punitive damages; those criteria are overlaid with the additional and controlling requirements of outrage. This is clear from the wording of §908(2) supra, and from the emphasis on 'conscious action and deliberate disregard' of rights and the description of reckless indifference quoted above from Comment b and because of the following additional statement from Comment b. 'Since the purpose of punitive damages is not compensation of the plaintiff but punishment of defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate - which is to say, conduct involving some element of outrage similar to that usually found in crime. (emphasis added). Id. at 366.

In Brenckle v. Arblaster, 320 Pa. Super. 87, 94, 466 A.2d 1075 (1983) the Superior Court of Pennsylvania stated:

Punitive damages are allowed when 'the act which creates actual damages also imports insult or outrage and is committed with a view to oppress, or appears to have been committed in contempt of [the other's] rights.'

The focus must be on the conduct of the actor not the result. Albright v. Gadiparthi, et al., supra, 50 Somerset Legal Journal at 367. In determining whether a defendant's conduct was outrageous a court does not look at the end result. Rather the court must consider the state of mind of the actor. Feld v. Merrian, 506 Pa. 383, 396, 485 A.2d 742, 748 (1984).

Although having an ample opportunity to engage in discovery, the Plaintiffs have failed to "discover" any evidence which would substantiate a claim for punitive damages. No issues to be tried on this issue exist.

Pennsylvania courts utilize punitive damages to punish and deter egregious conduct. Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1088, 1096 (1985). "Punitive damages are appropriate to punish and deter only extreme behavior and, even in the rare instances in which they are justified, are subject to strict judicial controls". Id at 1096.

The defendant's state of mind constitutes the central determination of whether a court or a jury should assess punitive damages. Feld v. Merriam, 506 Pa. 383, 396, 485 A.2d 742, 748 (1984). The act, or failure to act must be intentional, reckless or malicious. Id. Punitive damages may not be awarded for misconduct which constitutes only ordinary negligence, such as inadvertence or errors in judgment. Martin, supra, 494 A.2d at 1098, citing Restatement of Torts (Second) §908, comment b; McDaniel v. Merck, Sharp & Dohme, 367 Pa. Super. 600, 533 A.2d 436, 447 (1987) app'l. denied, 520 Pa. 589, 551 A.2d 215 (1988). Moreover, as the Pennsylvania Supreme Court stated in its decision in Martin, supra, the requisite intent for any award of punitive damages is not satisfied by "wanton" misconduct, defined as conduct where the actor "does not realize or appreciate the high degree of risk [of physical harm to another], although a reasonable man in his position would do so". Martin, supra, 494 A.2d at 1097. See also Burke v. Maassen, 904 F.2d 178, 181 (3d Cir. 1990).

Thus, unless defendant's mental state exceeds that required for gross negligence, the issue of punitive damages cannot be submitted for the jury's consideration. Martin, supra, 494 A.2d at 1098. Rather, an actual knowledge standard applies, requiring that the plaintiff demonstrate that the defendant actually realized the particular risk to the plaintiff and defendant nonetheless proceeded to act in conscious disregard or indifference to the risk to plaintiff. Burke, supra, 904 F.2d at 181.

The Plaintiff's have no evidence whatsoever that Dr. McCormick, who did not even know of the existence of Ms. Militello until some time after her death, who did not treat her, who did not perform or supervise the performance of any of the laboratory testing in question, knew that his conduct created a high degree of risk of harm to her, of that he deliberately proceeded to act or fail to act in conscious disregard of or indifference or indifference to any such risk. See,

Martin, supra, 494 A.2d at 1098.

Accordingly, even if a claim for punitive damages remained in this matter as against Dr. McCormick, the Plaintiffs have failed to adduce sufficient evidence to support a jury verdict, and summary judgment as to punitive damages should be granted in Dr. McCormick's favor.

IV. CONCLUSION

Accordingly, and in light of the forgoing arguments and discussion, it is respectfully requested that this Honorable Court grant the motion of defendant, John F. McCormick, M.D., and enter summary judgment in his favor, and against the Plaintiffs, and dismiss all of their claims against him with prejudice.

Respectfully submitted,

GOLD, BUTKOVITZ & ROBINS, P.C.

BY:

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ALAN S. GOLD  
SEAN ROBINS  
Attorneys for defendant,  
John F. McCormick, M.D.

DATE: January 5, 2004

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that true and correct copies of defendant's, John F. McCormick, M.D., Motion for Summary Judgment, Memorandum of Law in support thereof and proposed Order, were served upon the following, via U.S. Mail, First Class, postage pre-paid, on this date:

Joseph L. Messa, Jr., Esquire  
Messa & Associates, P.C.  
123 South 22<sup>nd</sup> Street  
Philadelphia, PA 19103

James M. Connello, Esquire  
McKissock & Hoffman, P.C.  
1818 Market Street  
13<sup>th</sup> Floor  
Philadelphia, PA 19103

Alexander R. Ferrante, Esquire  
Monaghan, Ferrante & Fortin, P.C.  
7837 Old York Road  
Elkins Park, PA 19027

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ALAN S. GOLD

DATE: January 5, 2004

**GOLD, BUTKOVITZ & ROBINS, P.C.**  
**BY: ALAN S. GOLD**  
**ATTY. ID. NO. 23400**  
**BY: SEAN ROBINS**  
**ATTY.ID.NO. 68828**  
**7837 OLD YORK ROAD**  
**ELKINS PARK, PA 19027**  
**(215)635-2000**

**ATTORNEY FOR DEFENDANT,**  
**JOHN F. McCORMICK, M.D.**

**RUSSELL MILITELLO** : **PHILADELPHIA COUNTY**  
 : **COURT OF COMMON PLEAS**  
 :  
 **V.** : **FEBRUARY TERM, 2002**  
 **ST. AGNES MEDICAL CENTER, et al.** : **NO. 1588**

**AFFIDAVIT OF JOHN F. MCCORMICK, M.D.**

I, John F. McCormick, M.D., being of full age, do hereby depose and state as follows:

1. I am a defendant in the above-captioned matter, and if called to testify in the trial of this matter, would testify as follows, under oath.

2. I am, and have been at all times relevant to this matter, the medical director of the clinical laboratory at St. Agnes Medical Center, in Philadelphia, Pennsylvania. I am licensed as a physician in the Commonwealth of Pennsylvania, and am a pathologist.

3. My duties as medical director of the St. Agnes clinical laboratory are administrative rather than medical in nature. I am not engaged in the practice of medicine at St. Agnes Medical Center.

4. As medical director of the clinical laboratory, I do not personally provide any medical care to any patients at St. Agnes Medical Center. As medical director, I do not perform laboratory testing for patients.

5. All laboratory testing for patients at St. Agnes Medical Center is performed by employees of the hospital, including laboratory technicians and medical technologists as well as laboratory supervisory personnel, who are also medical technologists.

6. The testing at issue in this matter, prothrombin time testing (also known as "PT" testing), was performed by laboratory technicians, medical technologists and their clinical

supervisors in the St. Agnes laboratory, who are also medical technologists. At no time did I perform any of this testing.

7. I did not perform any of the clinical laboratory testing on the decedent in this matter, Josephine Militello.

8. As medical director of the clinical laboratory at St. Agnes Medical Center, it is not my duty to supervise the day-to-day performance of patient testing. This is and was the duty of the supervisors of the individual departments.

9. Josephine Militello was not my patient, and I did not treat her, or provide her with any medical care whatsoever. At no time was I consulted as to Ms. Militello's care or treatment, nor at any time was I in contact with any of her treating physicians or treating medical personnel concerning her care, diagnosis or treatment. At no time did I have any knowledge concerning Ms. Militello's inpatient or outpatient care or treatment, her medical condition or diagnosis, the progress of her care and treatment while an inpatient at St. Agnes, or have any knowledge whatsoever concerning Ms. Militello during her hospitalization at St. Agnes.

10. As medical director of the clinical laboratory, I am not involved in the provision of medical care for patients, nor is it my duty to in any way monitor or follow the care or progress of any patients.

11. Medical care of patients is provided by their attending and/or personal physicians during their stay at St. Agnes Medical Center. As medical director of the clinical laboratory, it is not my duty to review, recommend, provide or be involved in the medical care of any particular patients whatsoever. Neither is it my duty to review, recommend or order any medication, medical treatment, surgical procedure or testing of patients, nor to supervise or monitor the provision or progress of any of these.

12. As medical directory of the clinical laboratory at St. Agnes Medical Center, my duties are entirely administrative in nature, pertaining to the operation and administration of the clinical laboratory as a whole.

13. The duties of the actual performance and implementation of individual testing protocols is delegated to the clinical employees of the laboratory, including, as noted, laboratory technicians, medical technologists, and departmental supervisors for each of the laboratory's departments, who are also medical technologists. The day-to-day supervision of the performance of all laboratory testing falls within the duties of these departmental supervisors.

14. The technicians, technologists and supervisors employed in the clinical laboratory at St. Agnes are employees of St. Agnes Medical Center and not of myself.

15. At no time did I hold myself out in any respect or in any manner to the general public as a physician involved in providing medical care to patients. My duties do not include the interaction or interfacing with inpatients or outpatients of the hospital, or with their families, or members of the general public.

16. As medical director of the clinical laboratory, it was not my duty to supervise or train medical personnel, medical staff, medical or surgical residents or nursing staff for any purpose whatsoever.

---

JOHN F. MCCORMICK, M.D.

COMMONWEALTH OF PENNSYLVANIA  
: SS.  
COUNTY OF PHILADELPHIA

On this \_\_\_\_ day of \_\_\_\_\_, 2004, before me personally came JOHN F. MCCORMICK, M.D., to me known and known to me to be the person who is described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

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NOTARY PUBLIC