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1547 MDA 2021

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1547 MDA 2021

BOBBI ANN MERTIS,

Appellant/Respondent,

v.

DONG-JOON OH, M.D.,

Appellee/Applicant.

APPLICATION OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER AND IN SUPPORT OF REARGUMENT *EN BANC*

Petition for Reargument *en banc* of the August 2, 2022 Order of the Superior Court in Case No. 1547 MDA 2021, Reversing the October 28, 2021 Order of the Court of Common Pleas of Luzerne County in Case No. 201709655

FOWLER HIRTZEL MCNULTY & SPAULDING, LLP
MATTHEW D. VODZAK, ESQUIRE (309713)
THREE LOGAN SQUARE
1717 ARCH STREET, SUITE 1310
PHILADELPHIA, PA 19103
215-789-4848
mvodzak@fhmslaw.com
Attorney for Amici Curiae, The American Medical Association and The Pennsylvania Medical Society

Application for Leave to File *Amici Curiae* Brief

1. Petitioner, Jong-Doon Oh, M.D., seeks reargument *en* banc of this Court's published opinion, *Mertis v. Oh*, 2022 PA Super 128 (Aug. 2, 2022).

2. The American Medical Association ("AMA") and The Pennsylvania Medical Society ("PAMED") seek leave of Court to file an *Amici Curiae* Brief in support of Petitioner and in support of reargument *en banc*.

3. The proposed Brief is **Appendix A**.

4. This Court may grant leave to file an amicus brief under Pa.R.A.P. 531(b)(1)(iii).

5. Pa.R.A.P. 2544(b) (prohibiting supporting briefs in applications for reargument) does not prohibit this Court from permitting amici involvement in applications for reargument.

6. In fact, Rule 2544 is "virtually identical" to Rule 1115(c) (prohibiting supporting briefs in petitions for allowance of appeal), Darlington, et al., Pa. App. Prac. § 2544:3 n.1 (2018-19 ed.), and the Supreme Court continually accepts amici briefs in support of petitions for allowance of appeal.

7. The AMA is the largest professional association of physicians, residents, and medical students in the United States.

8. The AMA and PAMED frequently submit or join *amicus* briefs in the Supreme Court and this Court. *See, e.g.*, *Lageman v. Zepp*, No. 21 MAP 2021; *Leadbitter v. Keystone Anesthesia Consultants, Ltd.*, No. 19 WAP 2020; *Leight v. Univ. of Pittsburgh Physicians*, No. 35 WAP 2019; *Babb v. Geisinger Clinic*, Nos. 1229, 1314 MDA 2018; *Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys.*, Nos. 1064, 1075 WDA 2005; *Weiner v. Fisher*, No. 2563 EDA 2003.

9. The Panel's decision interprets a Rule of Civil Procedure in a way that negatively affects the ability of Pennsylvania medical professionals to hire counsel of their choosing when involved in litigation.

10. The decision thus affects all Pennsylvania members of the AMA and PAMED, any of whom could need counsel to represent them as a party or witness in medical-malpractice litigation.

11. Given the public importance of this high-profile issue, the AMA and PAMED respectfully request that this Court permit them to file an amici brief in support of Petitioner.

12. The AMA and PAMED further respectfully request that the Court grant leave under Pa.R.A.P. 531(b)(3) for a 3,000 word limit for the proposed brief.

13. The proposed brief attached as **Appendix A** meets that word limit.

Conclusion

The AMA and PAMED respectfully request that the Court permit the filing of the attached *Amici Curiae* Brief under Pa.R.A.P. 531(b)(1)(iii).

Respectfully submitted,

Dated: August 16, 2022

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLP

By: */s/ Matthew D. Vodzak*

MATTHEW D. VODZAK, ESQUIRE
Attorneys for *Amici Curiae*, The American Medical Association and The Pennsylvania Medical Society

Certificate of Compliance with Pa.R.A.P. 127

I certify that this Application complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information differently than non-confidential information.

Dated: August 16, 2022

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLP

By: */s/ Matthew D. Vodzak*

MATTHEW D. VODZAK, ESQUIRE
Attorneys for *Amici Curiae*, The American Medical Association and The Pennsylvania Medical Society

Certificate of Service

The Application is being filed by electronic filing under Pa.R.A.P. 125. This Application is being served on all counsel by electronic filing, which satisfies the requirements of Pa.R.A.P. 121.

Dated: August 16, 2022

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLP

By: */s/ Matthew D. Vodzak*

MATTHEW D. VODZAK, ESQUIRE
Attorneys for *Amici Curiae*, The American Medical Association and The Pennsylvania Medical Society

Appendix “A”

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1547 MDA 2021

BOBBI ANN MERTIS,

Appellant/Respondent,

v.

DONG-JOON OH, M.D.,

Appellee/Petitioner.

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND IN SUPPORT OF REARGUMENT *EN BANC*

Petition for Reargument *en banc* of the August 2, 2022 Order of the Superior Court in Case No. 1547 MDA 2021, Reversing the October 28, 2021 Order of the Court of Common Pleas of Luzerne County in Case No. 201709655

FOWLER HIRTZEL MCNULTY & SPAULDING, LLP
MATTHEW D. VODZAK, ESQUIRE (309713)
THREE LOGAN SQUARE
1717 ARCH STREET, SUITE 1310
PHILADELPHIA, PA 19103
215-789-4848
mvodzak@fhmslaw.com
Attorney for Amici Curiae, The American Medical Association and The Pennsylvania Medical Society

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Table of Authorities

Statement of Interest of *Amici Curiae*[1]

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Pennsylvania. In support of its mission, the AMA regularly participates as amicus curiae in state and federal courts, including Pennsylvania courts.

The Pennsylvania Medical Society ("PAMED") is a Pennsylvania nonprofit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. PAMED regularly participates as amicus curiae before the Pennsylvania Supreme Court

[1] No other person or entity other than the AMA or PAMED, their members, or their counsel, paid in whole or in part for preparing this *Amici Curiae* Brief. *See* Pa.R.A.P. 531(b)(2).

and this Court in cases raising important healthcare issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and PAMED appear for themselves and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of all states and the District of Columbia. The mission of the Litigation Center is to represent the interests of patients and physicians in the courts of the United States, according to policies of the AMA.

The AMA and PAMED submit this Brief in support of Petitioner, Dong-Joon Oh, M.D., and in support of reargument. Amici have a substantial interest in how courts apply procedural discovery rules in medical-malpractice litigation. Courts should apply procedural rules in a way that protects the right of physicians to choose counsel to represent them in medical malpractice litigation. Reargument is necessary in this important case to correct the Panel's misinterpretation and misapplication of Pa.R.Civ.P. 4003.6, which improperly cabins

physicians' right to choose counsel to represent them in medical-malpractice litigation.

Summary of the Reasons to Allow Reargument

The Court should grant reargument to stop the widespread, potential deleterious effects of the Panel's precedential decision.

First, the Panel's decision misinterprets Rule 4003.6, engrafts language onto its plain text, and transforms it from a discovery rule into a quasi-rule of professional conduct.

Second, the Panel's decision restricts the right and ability of Pennsylvania physicians to choose their attorneys.

Argument

This Court may permit reargument when "compelling reasons" exist. Pa.R.A.P. 2543. Those compelling reasons include a panel's misapprehension or overlooking of controlling authority and issues that have potential for a significant effect on developing law or public policy. Superior Court I.O.P. § 65.38(D)(3) and (5). This case meets that standard. The Panel's decision incorrectly applies a judicial gloss to otherwise straightforward language in a Rule of Civil Procedure. And its decision adversely affects the right of Pennsylvania physicians to

counsel of their choice when involved in litigation.

I. The Panel's decision misinterprets Rule 4003.6.

Rule 4003.6 is a procedural rule governing discovery. It does not limit the substantive scope of discovery, because a litigant who files suit for personal injuries waives the physician-patient privilege. 42 Pa.C.S. § 5929. Rule 4003.6 instead controls *how* parties may obtain discovery from treating physicians and aims to protect the physician-patient relationship. *Marek v. Ketyer*, 733 A.2d 1268, 1270 (Pa. Super. 1999). As a discovery rule, Rule 4003.6 does not regulate the practice of law. It neither suggests nor imposes ethical restraints on lawyers, who lawyers may take on as clients, or who physicians may choose as lawyers.

Before the Panel, Respondent, Bobbi Ann Mertis, contended that the Court should enforce the "purpose and spirit," or the "spirit and policy" of Rule 4003.6. This phrasing betrays Mertis's position. She argued for an interpretation of Rule 4003.6 not found its plain text. But a rule's plain text conveys its purpose, and courts cannot forsake that text to search for a rule's supposed spirit. Pa.R.Civ.P. 127(b). Simply put, Rule 4003.6 does not prohibit the same attorney from representing a physician-defendant and a physician-witness in connection with the

same lawsuit.

The Panel's decision also creates the potential for absurd results. It could prohibit the same attorney or law firm from representing two physician-*defendants* in the same lawsuit. If Rule 4003.6 never "envisioned" the same attorney representing a physician-defendant and a physician-witness, it also did not envision the same attorney representing two physician-defendants who are not employees or ostensible employees of the attorney's healthcare-provider client. The Panel's decision notably cited no authority for its interpretation of Rule 4003.6.

Finally, even taking as correct the Panel's interpretation of Rule 4003.6, the decision conflicts with prior case law, which requires actual prejudice before a Rule 4003.6 violation will result in a sanction. *Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605, 611 (Pa. Super. 2005). In *Alwine*, this Court refused to order a new trial even though defense counsel spoke *ex parte* to the plaintiff's treating physician. *Id.* The *Alwine* Court contrasted its holding with *Marek*, in which the plaintiff's treating physician testified as a defense expert at trial. *Id.* If prejudice is required for the routine remedy of evidentiary exclusion, it must be

required for the extreme sanction of disqualifying opposing counsel.

The Panel's decision warrants reargument. The ruling is a novel interpretation of a procedural rule. The Supreme Court, through the Civil Procedural Rules Committee, has the ultimate authority to promulgate these procedural rules. Pa. Const. art. V, § 10(c); 42 Pa.C.S. § 1722(a)(1); Pa.R.Civ.P. 127(a). Thus, any precedential decision imparting a new meaning to a procedural rule has clear public importance. In divining the supposed spirit of Rule 4003.6, the Panel erroneously engrafted extra-textual substance to that rule. This Court should allow reargument to correct that error.

II. The Panel's decision improperly restricts physicians' ability to choose counsel to represent them in litigation.

The First Amendment to the United States Constitution protects the right to consult and hire counsel of one's choosing in civil litigation. *Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 509 F. Supp. 3d 212, 230 & n.8 (M.D. Pa. 2020), *appeals pending*, No. 21-1099 (3d Cir. Jan. 19, 2021). This right flows from the constitutional guarantee of freedom of speech, association, and petition. *Denius v. Dunlap*, 209 F.3d 944, 953-54 (7th Cir. 2000). It protects the right of an individual or group to

speak to an attorney "on any legal matter." *Id.* at 954.

A state cannot arbitrarily restrict that right. In *Wolf*, for example, the court held that Pennsylvania could not require the Joint Underwriting Association to yield to representation by the Office of Attorney General in litigation.[2] *Wolf*, 509 F. Supp. 3d at 230-31. In other words, a state cannot use arbitrary standards to deny persons their right to consult and hire counsel of their choice in civil litigation.

Pennsylvania has also long recognized the right of litigants in civil cases to be represented by counsel as an "integral part" of due process. *Nestor v. George*, 46 A.2d 469, 473 (Pa. 1946). And the standard for disqualification dovetails with federal law. Disqualification is proper only when needed to "ensure that the parties receive the fair trial that due process requires." *McCarthy v. SEPTA*, 772 A.2d 987, 989 (Pa. Super. 2001). For this reason, disqualification almost always involves allegations of ethical lapses that affect the case. This situation existed

[2] The Joint Underwriting Association offers medical professional liability insurance to healthcare providers that cannot conveniently obtain such insurance through ordinary methods at market rates. *See* 40 P.S. § 1303.732(a). By the Act of June 28, 2019, P.L. 101, No. 15, § 7, the General Assembly sought to classify the Association as a Commonwealth agency, which required that the Office of Attorney General represent it in litigation. The *Wolf* court permanently enjoined this part of Act 15, holding that it violated the Association's "First Amendment to consult with and hire civil counsel of its choice." *Wolf*, 509 F. Supp. 3d at 231.

in *McCarthy*, where counsel obtained statements from employees of a represented party, a potential violation of Pa.R.P.C. 4.2. *McCarthy*, 772 A.2d at 991-92. Similarly, in *Rutalavage v. PPL Elec. Utils. Corp.*, 268 A.3d 470 (Pa. Super. 2022), which the Panel cited, a lawyer in the plaintiff's firm had formerly represented the defendant, a potential violation of Pa.R.P.C. 1.9 and 1.10(b). But even an alleged violation of ethics rules does not by itself require disqualification. *McCarthy*, 772 A.2d at 991-92. There is, of course, no suggestion of *ethical* impropriety in this case.

To be sure, the right to choose counsel is not unlimited. Amici acknowledge that courts may restrict a person's ability to choose a lawyer by "regulation designed to provide for overriding state interest." *Powell v. Unemp. Comp. Bd. of Rev.*, 157 A.3d 884, 894 (Pa. 2017). The *Powell* Court held that a claimant in unemployment-compensation proceedings could not choose as his counsel an attorney suspended from the practice of law. There, though, the proposed representation specifically violated Rule of Disciplinary Enforcement 217(j), under which suspended attorneys cannot practice law.

Unlike *Powell*, *Rutalavage*, and *McCarthy*, this case involves a

procedural discovery rule. No "overriding state interest" to justify restrictions on the right to choose counsel appears in Rule 4003.6's plain text. That text instead places no restrictions on attorneys' ability to represent clients, or on prospective clients' right to choose attorneys to represent them.

Dr. Eugene Kim, the orthopedic surgeon who performed Mertis's knee surgery, is not a defendant. But Mertis implicated him in her second amended complaint. It is understandable why Dr. Kim wanted an attorney present when questioned under oath about his treatment of Mertis. It is also understandable why Dr. Kim wanted the same lawyer who represented him in another matter to represent him in this case. The Panel's decision prevents Dr. Kim from exercising his right to counsel of his choice.

The decision also prevents Dr. Oh's counsel—who have been his attorneys for years of litigation—from continuing to represent him.

Unfortunately, the Panel glossed over Dr. Kim's choice of counsel, remarking in passing that his choice "should be afforded appropriate deference." In fact, the Panel gave no deference to Dr. Kim's choice. Appropriate, actual deference to a physician's choice of counsel would

account for several factors.

First, medical-malpractice litigation is a specialized field. The healthcare industry is highly regulated. Physicians are subject to innumerable laws and regulations. Pennsylvania has specific statutes that apply to medical-malpractice litigation, like the MCARE Act.[3] Besides statutory law, special procedural rules apply only to medical-malpractice cases. *See, e.g.*, Pa.R.Civ.P. 1042.21 (special rule permitting settlement conference or mediation before exchange of expert reports); Pa.R.Civ.P. 1042.71 (special rule for a jury's damages finding); *see also* Pa.R.Civ.P. 1042.3 (certificate of merit rule for all professional liability cases). And medical-malpractice plaintiffs almost always need expert testimony to prove liability. *See Fessenden v. Robert Packer Hosp.*, 97 A.3d 1225, 1230 (Pa. Super. 2014) (citing *Jones v. Harrisburg Polyclinic Hosp.*, 437 A.2d 1134, 1137 (Pa. 1981)).

Second, physicians implicated in a lawsuit (whether directly like Dr. Oh, or indirectly like Dr. Kim) have a lot at stake. Along with the obvious stress of litigation, even a meritless malpractice claim could

[3] Medical Care Availability and Reduction of Error (MCARE) Act, Act of Mar, 20, 2002, P.L. 14, No. 13, *as amended*, 40 P.S. § 1303.101, *et seq.*

raise a physician's insurance premiums. Such claims could also make a physician less attractive to retain or employ. For this reason, many medical professional liability insurance policies require the physician's consent to settle a claim. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 837 (3d Cir. 1995). Plus, federal and state law mandate reporting of settlements of all medical-malpractice claims. 42 U.S.C. § 11131; 40 P.S. § 1303.746.

Third, becoming a physician is no small thing. People who want to go to medical school must graduate from a four-year college and take the Medical College Admission Test. Then, they must apply and be accepted to a medical school and undergo another four years of education. Prospective physicians must pass the United States Medical Licensing Examination or the Comprehensive Osteopathic Medical Licensing Examination, match with a residency, graduate from medical school and serve three to five years as a resident. Residents generally work long hours and earn less than attending physicians or general practitioners. Becoming a physician is a journey that requires significant time and investment.

Malpractice claims threaten that investment, so physicians have a

vested interest in aggressively defending against those claims. They also have many reasons to want a good lawyer. Dr. Kim performed the knee surgery on Mertis. She did not sue him, but her second amended complaint criticizes Dr. Kim's care. (R. 86a-87a, 91a.) For example, in ¶ 42, Mertis claims that Dr. Kim never informed her of the risks associated with femoral nerve blocks, the specific procedure that Mertis claims led to her injuries. (R. 86a.)

Dr. Kim requested that his insurance carrier appoint Dr. Oh's attorney not for some nefarious reason, but because those attorneys had represented him in another matter. The record contains no evidence that Dr. Oh's lawyers agreed to represent Dr. Kim to gain an advantage in this case. The record also contains no evidence that Dr. Oh's lawyers engaged in witness tampering, Mertis's salacious speculation notwithstanding. In this regard, the Panel's decision conflicts with *Alwine*, a case with an actual Rule 4003.6 violation, and suggests a sanction more severe than in *Marek*, a case with an actual violation plus actual prejudice.

Despite no evidentiary record, the Panel overruled Dr. Kim's request that Dr. Oh's law firm represent him at his deposition. The

Panel's decision forecloses Dr. Kim from having his counsel of choice. The Panel's decision threatens to remove Dr. Oh's lawyers even though they have represented him for years of litigation. The Panel's decision upends the ability of physicians to have the lawyer of their choice at their side when their livelihoods and professional reputations are at stake.

Besides the plain text of Rule 4003.6, proper analysis of a disqualification request should include a regard for physicians' choice of counsel for litigation. Physicians have that right, and nothing in Rule 4003.6 limits it. This Court should allow reargument to evaluate the policy effects of the Panel's decision.

Conclusion

The Superior Court should grant reargument en banc.

Respectfully submitted,

Dated: August 16, 2022

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLP

By: */s/ Matthew D. Vodzak*

MATTHEW D. VODZAK, ESQUIRE
Attorneys for *Amici Curiae*, The Pennsylvania Medical Society and the American Medical Association

Combined Certificates of Compliance

This Brief contains 2,421 words (exclusive of supplementary matter). In preparing this certification, I relied on the word count of the word processing system used to prepare the brief.

I certify that this Brief complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information differently than non-confidential information.

Dated: August 16, 2022

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLP

By: */s/ Matthew D. Vodzak*

MATTHEW D. VODZAK, ESQUIRE
Attorneys for *Amici Curiae*, The Pennsylvania Medical Society and the American Medical Association

Certificate of Service

The Brief of *Amici Curiae*, The Pennsylvania Medical Society and the American Medical Association, is being filed by electronically under Pa.R.A.P. 125.

This Brief is being served on all counsel of record by first-class mail, electronic filing, facsimile, or email, which satisfies the requirements of Pa.R.A.P. 121.

Dated: August 16, 2022

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLP

By: */s/ Matthew D. Vodzak*

MATTHEW D. VODZAK, ESQUIRE
Attorneys for *Amici Curiae*, The Pennsylvania Medical Society and the American Medical Association

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ENTRY OF APPEARANCE

Petition for Rehearing or Reargument of the August 2, 2022 Order of the Superior Court in Case No. 1547 MDA 2021, Reversing the October 28, 2021 Order of the Court of Common Pleas of Luzerne County in Case No. 201709655

Please enter the appearance of Matthew D. Vodzak as counsel for *Amici Curiae*, the American Medical Association and The Pennsylvania Medical Society, in this matter.

Date: August 16, 2022

FOWLER HIRTZEL MCNULTY & SPAULDING, LLP
MATTHEW D. VODZAK, ESQUIRE
(309713)
THREE LOGAN SQUARE
1717 ARCH STREET, SUITE 1310
PHILADELPHIA, PA 19103
215-789-4848
mvodzak@fhmslaw.com

Attorney for Amici Curiae, the American Medical Association and The Pennsylvania Medical Society

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IN THE SUPERIOR COURT OF PENNSYLVANIA

Bobbi Ann Mertis Appellant	:	1547 MDA 2021
v. Dong-Joon Oh, M.D., North American Partners in Anesthesia (Pennsylvania), LLC, Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital and Commonwealth Health	:	

PROOF OF SERVICE

I hereby certify that this 16th day of August, 2022, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Brian Joseph Dougherty
Service Method:	eService
Email:	briandougherty14@gmail.com
Service Date:	8/16/2022
Address:	124 Franklin Street Dunmore, PA 18512
Phone:	(57-0) -561-5741
Representing:	Appellee Dong-Joon Oh Appellee North American Partners in Anesthesia (Pennsylvania), LLC

Served:	Evangelo M. Theodosopoulos
Service Method:	eService
Email:	atheodosopoulos@messalaw.com
Service Date:	8/16/2022
Address:	123 South 22nd Street Philadelphia, PA 19103
Phone:	215--56-8-3500
Representing:	Appellant Bobbi Ann Mertis

IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Grace Elizabeth Doherty
Service Method:	eService
Email:	gdoherty@shdlawfirm.com
Service Date:	8/16/2022
Address:	217 wyoming avenue scranton, PA 18503
Phone:	570-346-7651
Representing:	Appellee Dong-Joon Oh Appellee North American Partners in Anesthesia (Pennsylvania), LLC

Served:	James Andrew Doherty III
Service Method:	eService
Email:	jadoherty@shdlawfirm.com
Service Date:	8/16/2022
Address:	217 Wyoming Avenue Scranton, PA 18503
Phone:	570--34-6-7651
Representing:	Appellee Dong-Joon Oh Appellee North American Partners in Anesthesia (Pennsylvania), LLC

Served:	Jamie Lyn Davis
Service Method:	eService
Email:	jdavis@c-wlaw.com
Service Date:	8/16/2022
Address:	415 Wyoming Avenue Scranton, PA 18503
Phone:	570-374-0600
Representing:	Appellee Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital and Commonweal

Served:	Joseph L. Messa Jr.
Service Method:	eService
Email:	JMessa@messalaw.com
Service Date:	8/16/2022
Address:	123 South 22nd Street Philadelphia, PA 19103
Phone:	215--56-8-3500
Representing:	Appellant Bobbi Ann Mertis

IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Kevin Corbett Hayes
Service Method:	eService
Email:	khayes@shdlawfirm.com
Service Date:	8/16/2022
Address:	217 Wyoming Avenue Scranton, PA 18503
Phone:	570-346-7651
Representing:	Appellee Dong-Joon Oh Appellee North American Partners in Anesthesia (Pennsylvania), LLC

Served:	Maureen Murphy McBride
Service Method:	eService
Email:	mmcbride@lambmcerlane.com
Service Date:	8/16/2022
Address:	24 East Market Street P.O. Box 565 West Chester, PA 19381
Phone:	610-430-8000
Representing:	Appellee Dong-Joon Oh

Served:	Melissa Ann Dziak
Service Method:	eService
Email:	madziak@mdwcg.com
Service Date:	8/16/2022
Address:	P.O. Box 3118 Scranton, PA 18505-3118
Phone:	570-496-4618
Representing:	Appellee North American Partners in Anesthesia (Pennsylvania), LLC

Served:	Philip Anthony Davolos III
Service Method:	eService
Email:	pdavolos@c-wlaw.com
Service Date:	8/16/2022
Address:	415 Wyoming Ave Scranton, PA 18503
Phone:	570-347-0600
Representing:	Appellee North American Partners in Anesthesia (Pennsylvania), LLC

IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Stuart Turville O'Neal III
Service Method:	eService
Email:	soneal@burnswhite.com
Service Date:	8/16/2022
Address:	100 Four Falls, Suite 515 1001 Conshohocken State Road W. Conshohocken, PA 19428
Phone:	484-567-5747
Representing:	Appellee Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital and Commonweal

/s/ Matthew Daniel Vodzak

(Signature of Person Serving)

Person Serving:	Vodzak, Matthew Daniel
Attorney Registration No:	309713
Law Firm:	Fowler Hirtzel McNulty & Spaulding, LLP
Address:	Fowler Hirtzel Mcnulty & Spaulding Llp Three Logan Square 1717 Arch Street Suite 1310 Philadelphia, PA 19103
Representing:	Amicus The American Medical Association Amicus The Pennsylvania Medical Society