IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GAZI ABDULHAY, M.D.; GYNECOLOGIC ONCOLOGY ASSOCIATES OF LEHIGH VALLEY, INC., trading as Lehigh Valley Women's Cancer Center; ABDULHAY ASSOCIATES, L.P.; and BETHLEHEM AMBULATORY SURGERY CENTER, LLC,	)	Civil Action No. 03-CV-04347
Plaintiffs	)	
vs.	)	
BETHLEHEM MEDICAL ARTS, L.P.; BETHLEHEM MEDICAL ARTS, LLC; KEVIN T. FOGARTY, M.D., Individually and as Managing Director of Bethlehem Medical Arts, L.P., and as President of Bethlehem Medical Arts, LLC; ROTH MARZ PARTNERSHIP, P.C.; MARK R. THOMPSON, Individually and as Vice President of Roth Marz Partnership, P.C.	)	
Defendants	)	

* * *

APPEARANCES:

JOAN R. SHEAK, ESQUIRE
On behalf of Plaintiffs

MAURA E. FAY, ESQUIRE
On behalf of Defendants, Bethlehem Medical Arts, L.P., Bethlehem Medical Arts, LLC, and Kevin T. Fogarty, M.D.

RICHARD A. O'HALLORAN, ESQUIRE
On behalf of Defendants, Roth Marz Partnership, P.C. and Mark R. Thompson

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Plaintiffs' Motion to Strike the Praecipe for Entry of Judgment of Non Pros filed by Defendants Roth Marz Partnership, P.C. and Mark R. Thompson, which motion was filed February 25, 2005. Defendants Roth Marz Partnership, P.C. and Mark R. Thompson's Response to Plaintiffs' Motion to Strike the Praecipe for Entry of Judgment of Non Pros was filed March 8, 2005.[1] For the reasons set forth below, we grant plaintiffs' motion and strike the praecipe.

JURISDICTION

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367.

VENUE

Venue is proper in the United States District Court for the Eastern District of Pennsylvania because the events and omissions giving rise plaintiffs' claims allegedly occurred within this district, namely, Northampton County, Pennsylvania See 28 U.S.C. §§ 118, 1391(b).

[1] Plaintiffs' Reply Brief in Response to Defendants' Opposition to Plaintiffs' Motion to Strike the Praecipe for Entry of Judgment of Non Pros was filed June 10, 2005.

STANDARD OF REVIEW

After a document not conforming to the Federal Rules of Civil Procedure is filed, it is within the court's discretion to strike the document. See 1-5 Moore's Federal Practice - Civil § 5.30[1][a][iii].

FACTS

According to plaintiffs' Amended Complaint, the matter before the court is a dispute over an agreement between the parties to design and construct medical offices in space leased by plaintiffs in a medical office building owned and managed by defendants.

Plaintiff Gazi Abdulhay, M.D. is a physician and surgeon with a specialty in gynecological oncology. He is President of plaintiff Gynecologic Oncology Associates of Lehigh Valley, Inc., trading as Lehigh Valley Women's Cancer Center. Dr. Abdulhay is also the President and Managing Partner of plaintiff Bethlehem Ambulatory Surgery Center, LLC and the General Partner of plaintiff Abdulhay Associates, L.P.

Plaintiff Abdulhay Associates was formed for the purpose of leasing space in a medical office building in Bethlehem, Northampton County, Pennsylvania, owned by defendant Bethlehem Medical Arts, L.P. and managed by defendants Bethlehem Medical Arts, LLC and Kevin T. Fogarty, M.D. Abdulhay Associates leased unfinished shell space in the building.

Plaintiffs hired an architectural firm, defendant Roth Marz Partnership, P.C., to design fit-out plans for the leased premises as medical offices and as an ambulatory surgery center to expand Dr. Abdulhay's medical practice and to expand Lehigh Valley Women's Cancer Center. Defendant Mark R. Thompson is Vice President of Roth Marz and was in charge of the project for Roth Marz.

PROCEDURAL HISTORY

Plaintiffs filed their original ten-count Complaint on July 25, 2003. In four counts of the Complaint, plaintiffs alleged violations 42 U.S.C. §§ 1981, 1982 and 1985(3), which give rise to federal question jurisdiction. In six counts plaintiffs raised pendent state-law claims.

On April 19, 2004, plaintiffs filed a 12-count Amended Complaint containing both federal civil rights claims and pendent state claims. In Counts One through Four[2] plaintiffs claim that defendants violated the civil rights of Dr. Abdulhay as an Arab-American of Turkish and Syrian descent, by treating him and his medical corporation differently than white tenants and occupants. The remaining counts are pendent state claims.

[2] Counts One and Two are brought pursuant to 42 U.S.C. § 1981. Count Three is brought pursuant to 42 U.S.C. § 1982. Count Four is brought pursuant to 42 U.S.C. § 1985(3).

Counts Five through Seven allege breach of contract.[3] Count Eight is a negligence claim alleging architectural malpractice against defendant Roth Marz Partnership, P.C. Specifically, plaintiffs allege that Roth Marz owed a duty of care to Lehigh Valley Women's Center and to Bethlehem Ambulatory Surgery Center. Plaintiffs contend that Roth Marz breached that duty by providing plans and drawings for the project that fell below acceptable standards of the architectural profession.[4]

Count Eight was raised for the first time in the Amended Complaint. It was not included in the original Complaint. Count Eight, the professional negligence count, is the only count in the Amended Complaint which triggers the requirement for the filing of a certificate of merit, discussed below.

Count Nine alleges defamation. Counts Ten and Eleven allege intentional interference with the contract. Finally, Count Twelve alleges civil conspiracy.

On February 15, 2005, defendants filed a Praecipe for Entry of Judgment of Non Pros, pursuant to Pennsylvania Rule of Civil Procedure 1042.6. Thereafter, on February 25, 2005,

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[3] The breach of contract claim alleged in Count Six of the Amended Complaint was not included in the original Complaint.

[4] Count Eight of the Amended Complaint, alleging professional negligence, is brought by plaintiffs Gynecologic Oncology Associates of Lehigh Valley, Inc., trading as Lehigh Valley Women's Cancer Center and Bethlehem Ambulatory Surgery Center, LLC (and not by plaintiffs Gaxi Abdulhay, M.D. or Abdulhay Associates, L.P.) against defendant Roth Marz Parntership, P.C., only.

plaintiffs filed a Motion to Strike the Praecipe for Entry of Judgment of Non Pros.

Subsequently, on March 3, 2005, plaintiffs filed a Certificate of Merit regarding their state-law malpractice claims.[5] Finally, on March 7, 2005 in accordance with the deadline contained in the September 16, 2004 Rule 16 Status Conference Order of the undersigned, plaintiffs served defendants with copies of the written reports of plaintiffs' expert witnesses.

No judgment, either non pros or otherwise, has ever been entered in this case.

BACKGROUND

Pennsylvania Rule of Civil Procedure 1042.3 requires a plaintiff to file a certificate of merit within 60 days after filing a Complaint in a professional negligence case. The certificate of merit must state either that a licensed professional has supplied a written statement that defendant has deviated from an acceptable standard of professional care, or that expert testimony is unnecessary for prosecution of the claim.

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[5] Actually, plaintiffs filed two certificates of merit on March 3, 2005, one as to defendant Roth Marz Partnership, P.C., and one as to defendant Mark R. Thompson, individually and as Vice President of Roth Marz Partnership, P.C. However, as noted in footnote 4, above, defendant Thompson is not named in the professional negligence count.

Pennsylvania Rule 1042.6 provides that upon praecipe (request) of defendant, the Prothonotary (civil clerk of court) shall enter a judgment of non pros (dismissal for failure to prosecute) against the plaintiff for failure to either file a certificate of merit, or move for an extension of time to do so, within the required 60-day time.

Federal Rule of Civil Procedure 7(b) provides that an application to the court for an Order shall be by a written motion, stating with particularity the grounds and relief being sought.

Rule 7.1 of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania ("Local Rules") requires every motion to be accompanied by a proposed Order granting the relief sought.

Federal Rule of Civil Procedure 41(b) provides that a defendant may move for dismissal of an action or claim for failure of the plaintiff to prosecute, or to comply with the procedural rules or any Order.

The undisputed facts of record establish that plaintiffs failed to file either a certificate of merit or a motion to extend the time for filing such a certificate within the time allowed by the rule.

CONTENTIONS OF THE PARTIES

Defendants contend that both Pa.R.Civ.P. 1042.3, which requires the filing of a certificate of merit, and Pa.R.Civ.P. 1042.6, which authorizes the Prothonotary to enter a judgment non pros against plaintiff for failure to comply with Rule 1042.3, are state substantive rules of law which must be applied in this federal case.

Plaintiffs do not dispute that Rule 1042.3 is a rule of state substantive law applicable to this case. However, plaintiffs contend that Pa.R.Civ.P. 1042.6 is a state procedural rule which is inapplicable in federal court. Plaintiffs also argue that Fed.R.Civ.P. 7(b) and 41(b) and Local Rule 7.1, when read together, preclude the federal Clerk of Court from entering a judgment dismissing a case without a court Order.

Thus, plaintiffs contend that defendants should not have filed a Praecipe for Entry of Judgment of Non Pros. Rather, plaintiffs contend that if defendants wanted to enforce Pa.R.Civ.P. 1042.3, then defendants should have filed a motion and proposed Order in accordance with Federal Rules 7(b) and 41(b) and Local Rule 7.l. Because defendants did not do so, plaintiffs contend that plaintiffs' motion to strike defendants' praecipe for judgment should be granted, and defendants' praecipe should be stricken.

Defendants contend that a praecipe is the proper method of enforcing Pa.R.Civ.P. 1042.3. More specifically, defendants argue that Pa.R.Civ.P. 1042.3 and 1042.6 each constitute state substantive law and, therefore, must each be applied in federal court. Accordingly, defendants argue, the Praecipe for Entry of Judgment of Non Pros was the proper mechanism for entry of judgment of non pros in this court. Thus, defendants contend that plaintiffs' motion to strike the praecipe should be denied, and that the Clerk of Court should enter judgment against plaintiffs on plaintiffs' Amended Complaint.

For the following reasons, we agree with plaintiffs and strike defendants' praecipe for judgment.

DISCUSSION

Choice of Law

As noted above, this Court has pendent jurisdiction over all of the state law claims in this case, including the professional malpractice claims asserted in Count Eight of the Amended Complaint. Therefore, we are bound by the decision of the United States Supreme Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny. Erie requires us to apply Pennsylvania substantive law and federal procedural rules to the resolution of the state-law claims. See Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000).

Although Erie is cited frequently in connection with diversity of citizenship actions, the Erie doctrine applies equally to state-law claims over which federal courts exercise supplemental jurisdiction. Therefore, federal courts with pendent jurisdiction are to apply the Erie doctrine to the same extent as if the court were sitting in a diversity case. Felder v. Casey, 487 U.S. 131, 151, 108 S.Ct. 2302, 2313, 101 L.Ed.2d 123, 146 (1988)[6]; see Houben v. Telular Corporation, 309 F.3d 1028 (7th Cir. 2002); Rodriquez v. Smith, 2005 U.S. Dist. LEXIS 12237, at *n.13 (E.D. Pa., June 21, 2005) (Padova, J.).

The reason for this substantive/procedural dichotomy is to ensure that, so far as legal rules determine the outcome of a litigation, the outcome of the litigation in the federal court will be substantially the same as it would be if tried in a state court. Guaranty Trust Co. v. York, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079, 2086 (1945); Chamberlain, 210 F.3d at 158-159.

[6] In Higgason v. Stogsdill, 818 N.E.2d 486, 489 (Ind. Ct. App. 2004), the First District of the Court of Appeals of Indiana questioned the decision in Felder on other grounds. Specifically, the Higgason court concluded that Felder is no longer good law on the question of exhaustion of administrative remedies by prisoners, before filing a lawsuit under 42 U.S.C. § 1983 claims, complaining of prison conditions. Id.

Substantive v. Procedural Law

Under the Erie doctrine, the outcome of this case is dependent upon whether Pennsylvania Rules of Civil Procedure 1042.3 and 1042.6 constitute state substantive or procedural law. For the reasons expressed below, we conclude that Rule 1042.3 requiring a certificate of merit constitutes Pennsylvania substantive law and Rule 1042.6 concerning enforcement of the certificate of merit requirements constitutes state procedural law.

Pennsylvania Rule 1042.3 - Certificate of Merit

We conclude that Pa.R.Civ.P. 1042.3 which requires certificates of merit is a state substantive rule for the following reasons.

First, there is no dispute between the parties that Rule 1042.3 is substantive law. Defendants contend that it is, and plaintiffs have expressed no opposition to that position.

Second, every federal district court, of which we are aware, that has ruled on this issue has found Pa.R.Civ.P. 1042.3 to be substantive. See Scaramuzza v. Sciolla, 345 F.Supp.2d 508 (E.D. Pa. 2004)(Baylson, J.); Velazquez v. UPMC Bedford Memorial Hospital, 328 F.Supp.2d 549 (W.D. Pa. 2004)(Gibson, J.), reversed in part on reconsideration, 338 F.Supp.2d 609 (2004); Rodriguez v. Smith, No. Civ.A. 03-3675, 2005 U.S. Dist. LEXIS 12237

(E.D. Pa. June 21, 2005)(Padova, J.); Hartman v. Low Security Correctional Institution Allenwood, No. Civ.A. 04-0209, 2005 WL 1259950 (M.D. Pa. May 27, 2005) (Muir, J.); and Schwalm v. Allstate Boiler & Construction, Inc., No. Civ.A. 04-593, 2005 U.S. Dist. LEXIS 12422 (M.D. Pa. May 17, 2005)(Caputo, J.).

Third, while confronted with somewhat different facts, the United States Court of Appeals for the Third Circuit in Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000) determined that a New Jersey statute requiring the filing of an affidavit of merit in professional malpractice cases was substantive state law.

Fourth, the Superior Court of Pennsylvania in Parkway Corporation v. Edelstein, 861 A.2d 264 (Pa.Super. 2004) suggested that Pa.R.C.P. 1042.3 has substantive components, when it stated that "[Appellant's] assertion of compliance is at odds with both the technical and substantive requirements of the Rule [1042.3]". (Emphasis added.) 861 A.2d at 269.

Fifth, the parties have cited no cases in any jurisdiction holding that Pa.R.Civ.P. 1042.3 is a purely procedural rule which does not constitute substantive law, nor is the court aware of any such authority.

Sixth, the state interests addressed in Pa.R.Civ.P. 1042.1 to 1042.8 (concerning professional liability actions) and

Pa.R.Civ.P. 1042.16 to 1042.72 (concerning pre-trial procedures in medical professional liability actions) are significant. These rules "were designed and adopted to directly confront the crisis surrounding medical malpractice claims in [Pennsylvania]." Hoover v. Davila, 64 D.&C.4th 449, 455-456 (Lawrence County 2003) (Cox, J.), reversed in part on other grounds, 862 A.2d 591, 594-595 (Pa.Super. 2004). Although they may have been adopted to confront a perceived medical malpractice crisis, these Pennsylvania Rules of Civil Procedure have substantially broader application because the rules cover many other professions, including architects. Pa.R.Civ.P. 1042(b)(1)(iii).

Seventh, applying the three-part test discussed in Chamberlain v. Giampapa, supra, we conclude that Pa.R.Civ.P. 1042.3 is substantive, rather than procedural, for purposes of compliance with the Erie Rule.

In Chamberlain v. Giampapa, supra, the United States Court of Appeals for the Third Circuit summarized the jurisprudence of the United States Supreme Court and other Courts concerning the Erie Rule. Based mainly upon the pronouncements of the United States Supreme Court in Hanna v. Plumer, supra, and Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), the Third Circuit distilled a three-part test to determine whether a state

law is substantive or procedural for purposes of compliance with the Erie Rule.

First, the court must determine whether there is a direct collision between a federal rule and the state law or rule which the court is being urged to apply. If there is such a direct conflict, the federal court must apply the federal rule if it is constitutional, and reject the state rule. If a "direct collision" does not exist, then the court applies the Erie Rule to determine if state law should be applied, by evaluating the second and third prongs of the Chamberlain test.

In the second part of the Chamberlain test, the court must determine whether the state law is outcome-determinative and whether failure to apply the state law would frustrate the twin aims of the Erie Rule: discouragement of forum shopping and the inequitable administration of the law.

Third, the court must consider whether any countervailing federal interests prevent the state law from being applied in federal court. Chamberlain, 210 F.3d at 159-161.

Because we have determined that there is no conflict between Pennsylvania Rule of Civil Procedure 1042.3 and Federal Rules of Civil Procedure 7(b), 41(b) or Local Rule 7.1; that Pennsylvania Rule 1042.3 is outcome-determinative; that failure to apply Pa.R.Civ.P. 1042.3 would frustrate the twin aims of the Erie Rule; and that no competing federal interests prevent the

state rule from being applied in federal court, we conclude that Pa.R.Civ.P. 1042.3 constitutes substantive Pennsylvania law which is applicable in federal courts.

We conclude that Federal Rule of Civil Procedure 7(b) does not conflict with Pennsylvania Rule 1042.3. Specifically, Federal Rule 7(b) governs the application to the court for an Order. That provision of the federal rules requires that any application to the court for an Order be by motion. Unlike the Federal Rule 7(b), Pennsylvania Rule 1042.3 requires a certificate of merit to be filed within 60 days of filing a professional negligence claim.

Filing a certificate of merit, and the application for an Order are different and unrelated. Specifically, filing a certificate of merit is not an application to the court for an Order because, when one files a certificate, one is merely adding to the record and not requesting any relief or action by the court. Therefore, we conclude that Federal Rule 7(b) and Pennsylvania Rule 1042.3 do not directly collide.

Likewise, Federal Rule 41(b) does not directly collide with Pennsylvania Rule 1042.3. Federal Rule 41(b) governs involuntary dismissals. Pennsylvania Rule 1042.3 does not address any form of dismissal. Filing a certificate of merit does not result in any dismissal. Therefore, because filing a

certificate of merit is different than an involuntary dismissal, we conclude that these rules do not directly collide.

Finally, Local Rule 7.1 does not directly collide with Pennsylvania Rule 1042.3. Local Rule 7.1 controls motion practice before the court in this judicial district. The requirement to file a certificate of merit does not affect motion practice. Therefore, we conclude that Local Rule 7.1 does not directly collide with Pennsylvania Rule 1042.3.

The second part of the Chamberlain test requires that the court determine whether Pennsylvania Rule 1042.3 is outcome-determinative and whether failure to apply the Pennsylvania Rule would frustrate the twin aims of the Erie Rule. 210 F.3d at 161. We conclude that failure to apply Pa.R.Civ.P. 1042.3 is outcome-determinative and would frustrate the twin aims of the Erie Rule. Specifically, in Pennsylvania state court, failure to comply with Pennsylvania Rule 1042.3 allows a defendant to file a Praecipe for Entry of Judgment of Non Pros. Dismissal of a claim or case can easily determine the outcome of the matter.[7]

Further, if we were not to apply Pennsylvania Rule 1042.3 we would frustrate the twin aims of Erie. On the other hand, application of Pennsylvania Rule 1042.3 to federal diversity and supplemental pendent jurisdiction cases will serve the dual purposes of the Erie doctrine. The purposes of the Erie

[7] We note that such dismissal can be particularly determinative if the dismissal occurs after the statute of limitations has expired.

doctrine are to end discrimination against citizens by non-citizens and to discourage forum shopping. Hanna v. Plumer, 380 U.S. 460, 467, 85 S.Ct. 1136, 1141-1142, 14 L.Ed.2d 8, 14 (1965); Bullins v. City of Philadelphia, 516 F.Supp. 728, 730 (E.D. Pa. 1981) (Lord, C.J.).

Application of Pennsylvania Rule 1042.3 to federal cases will avoid the "harshness of disparate results between federal and state courts within the same state adjudicating similar claims." Renner v. Lichtenwalner, 513 F.Supp. 271, 273 (E.D. Pa. 1981).

If Pa.R.Civ.P. 1042.3 is considered procedural, and thus inapplicable in federal courts, it would be theoretically easier to pursue frivolous or meritless professional malpractice cases in federal court (without a certificate of merit requirement) in diversity and pendent jurisdiction cases, then in Pennsylvania state courts (with such a requirement).

Additionally, inequitable administration of the laws would result because a defendant who was in a federal court that did not require a certificate of merit, would be unfairly exposed to additional litigation time and expense before the dismissal of a non-meritorious lawsuit. Chamberlain, supra.

Finally, we must consider whether any countervailing federal interests prevent the state law from being applied in federal court. In plaintiffs' memorandum of law in support of

their motion, they assert no countervailing federal interest. Furthermore, no countervailing federal interest has been identified, nor can we conceive of any federal interest that would prevent the application of the Pennsylvania Rule 1042.3.

Accordingly, we conclude that Pennsylvania Rule 1042.3 mandating a certificate of merit in professional negligence claims, is substantive under the Erie Rule and must be applied as such by the court.

Constitutionality of Pennsylvania Rule 1042.3

There is an argument that if Pa.R.Civ.P. 1042.3 is substantive law, then it violates Article 5, Section 10(c) of the Pennsylvania Constitution. Const. Art. 5, § 10(c). Bullins v. City of Philadelphia, 516 F.Supp. 728, 730 (E.D. Pa. 1981); Velazquez v. UPMC Bedford Memorial Hospital, 328 F.Supp.2d 549, 559 (W.D. Pa. 2004), reversed in part on reconsideration, 338 F.Supp.2d 609 (2004); Jarvis v. Johnson, 491 F.Supp. 389 (W.D. Pa. 1980), reversed 668 F.2d 740 (3d Cir. 1982); Laudenberger v. Port Authority of Allegheny County, No. GD 78-5062 (C.P. Allegheny Co. July 25, 1980), reversed 496 Pa. 52, 436 A.2d 147 (1981).

Under Article 5, Section 10(c) of the Pennsylvania Constitution, the Supreme Court of Pennsylvania has authority to issue only procedural rules which do not abridge, enlarge, or modify substantive rights of any litigant. Therefore, according

to the argument, the Pennsylvania Supreme Court had no authority to promulgate Rule 1042.3 as a substantive rule of law. (And, indeed, the rule is designated a Pennsylvania Rule of Civil Procedure.)

According to former Chief Judge Joseph S. Lord, III of this court, in Bullins v. City of Philadelphia, supra,[8] this argument confuses two very different issues. One issue is whether the state rule is procedural or substantive for the purpose of determining the power of the Supreme Court of Pennsylvania to issue the rule under the Pennsylvania Constitution. This, however, does not provide the answer to the other issue: the question of whether the rule is bound up with the definition of the substantive rights of the parties needed for the Erie determination. 560 F.Supp. at 730.

In other words, although the Supreme Court of Pennsylvania promulgated the Pennsylvania Rules of Civil Procedure, and under the Pennsylvania Constitution the state Supreme Court cannot enlarge substantive rights, we are required to separately consider how the Erie rule applies in this case. See Jarvis v. Johnson, 668 F.2d 740, 747-748 (3d Cir. 1982). We have done this; and, for the foregoing reasons, have concluded that Pennsylvania Rule 1042.3 is substantive.

[8] Bullins v. City of Philadelphia, 516 F.Supp. 728 (E.D. Pa. 1981) concerned the status of Pa.R.Civ.P. 238 as procedural or substantive. Rule 238 deals with the award of pre-judgment interest.

Pennsylvania Rule 1042.6 - Enforcement of Certificate of Merit Rule

Having determined that Pa.R.Civ.P. 1042.3 is substantive, we next address the critical question of whether Rule 1042.6 concerning enforcement of the certificate-of-merit requirement is substantive or procedural. For the following reasons we conclude that Pennsylvania Rule 1042.6 is procedural; and, therefore, its enforcement remedies are not available in federal courts.

First, Pa.R.Civ.P. 1042.6 is procedural because it is merely the form and mode of enforcing the substantive certificate of merit right. Where a requirement is merely a form and mode of enforcing a right or obligation and is not bound up with the definition of the right or obligation, it is a procedural matter, and federal rules control. Byrd v. Blue Ridge Electric Cooperative, Inc., 356 U.S. at 536, 78 S.Ct. at 900, 2 L.Ed.2d at 962; Bullins v. City of Philadelphia, 516 F.Supp. at 729.

Here Pa.R.Civ.P. 1042.3 expresses the substantive obligation for plaintiffs to file a certificate of merit as a condition of continuing a professional negligence suit, and the substantive right of the defendant to not have to defend a meritless suit. Pennsylvania Rule 1042.6 is merely the procedural form and mode of enforcing that right and obligation, and is not bound up with the definition of the right or obligation.

Second, no federal court, of which we are aware, has ruled that Pennsylvania Rule 1042.6 constitutes Pennsylvania substantive, as opposed to procedural, law for purposes of the Erie Rule.

Third, no federal court, of which we are aware, has applied Pennsylvania Rule of Civil Procedure 1042.6 in a federal diversity or pendent state jurisdiction action, as a Pennsylvania state court would in a state action.

Fourth, no federal court, of which we are aware, has recognized a Praecipe for Entry of Judgment of Non Pros as a legitimate procedure in federal practice.

Fifth, no federal court, of which we are aware, has concluded that the federal Clerk of Court should abide by Pennsylvania Rule 1042.6 and automatically enter a Judgment of Non Pros on the record, upon receiving a Praecipe from a defendant, in the absence of a court Order directing the Clerk to do so.

Specifically, in Velazquez, supra, it was the court, not the Clerk, which denied the defendant's praecipe. 328 F.Supp.2d at 566. In Hartman, supra, the court ordered the praecipe to be construed as a motion to dismiss. 2005 WL 1259950 at *1. In Rodriquez, supra, the court ruled on the matter as a motion to dismiss. 2005 U.S. Dist. LEXIS at *36. In Scaramuzza, supra, the court applied Pa.R.Civ.P. 1042.3 as substantive law in

the context of ruling on a motion to dismiss. 345 F.Supp. at 512. And in Schwalm, supra, the court examined the Pennsylvania Rules in the context of a motion to dismiss. 2005 U.S. Dist. LEXIS 12422 at *5.

Sixth, applying the same three-part Chamberlain test discussed above in connection with Pennsylvania Rule 1042.3, leads to the conclusion that Pennsylvania Rule 1042.6 is procedural rather than substantive for purposes of compliance with the Erie Rule.

Because we have concluded that a direct collision exists between Pa.R.Civ.P. 1042.6 and both Fed.R.Civ.P. 7(b) and 41(b), and because those federal rules have not been declared unconstitutional, we are required to apply the federal rules and reject the state rule. Therefore, we are not required to address the second and third parts of the Chamberlain test.

Addressing the first prong of the Chamberlain test, we now consider whether Pennsylvania Rule 1042.6, requiring the Prothonotary to enter judgment of non pros upon praecipe by a defendant, directly collides with Federal Rules 7(b) or 41(b) and Local Rule 7.1. In deciding whether a federal rule "directly collides" with a state law, the federal court must consider whether the scope of the federal rule is sufficiently broad to control the issue before the court. In addition, it is necessary to give the Federal Rules of Civil Procedure their plain meaning.

Finally, the court must take into account the significance of the state law. Chamberlain, 210 F.3d at 159.

Initially, we note that defendants have not demonstrated that praecipes for non pros exist in federal practice.[9]

Federal Rules of Civil Procedure 7(b) and 41(b) each conflict with Pennsylvania Rule 1042.6 because the Pennsylvania Rule is within the procedural practice governed by each federal rule. Federal Rule 7(b) requires that any application to the court for an Order be presented by written motion, stating with particularity the grounds and relief being sought. By contrast, Pennsylvania Rule 1042.6 mandates that the Prothonotary enter a judgment of non pros upon receiving a praecipe for such a judgment from the defendant, provided that plaintiff has not complied with Pennsylvania Rule 1042.3.

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[9] In defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Strike, defendant asked the court to note that the Electronic Filing System in the United States District Court for the Eastern District ("Pacer") lists "Praecipe" as a "filing option". Defense counsel asserted that this is grounds for the court to conclude that praecipes exist in federal practice and therefore praecipes for entry of judgment of non pros should also exist in federal practice.

However, at argument defense counsel stated that he had no personal knowledge of such a filing option. Furthermore, we have been unable to find such a filing option on Pacer.

Nevertheless, the court does note that if a defendant describes a filing as a "Praecipe" the Clerk of Court will manually enter such a Praecipe, but the Clerk cannot refuse to accept any paper for filing even if not in proper form, unless a specific rule or instruction not to accept such documents exists. See Fed.R.Civ.P. 5(e); 1-5 Moore's Federal Practice - Civil § 5.30[1][a][iii]. Therefore, just because an entry of a praecipe occurs, does not mean that a praecipe conforms to the Federal Rules of Civil Procedure.

More specifically, in federal practice, no Prothonotary exists. Instead, there is a Clerk of Court. Further, although Fed.R.Civ.P. 41(b) provides that a defendant may move the court for dismissal of a claim for failure of the plaintiff to prosecute, in federal practice an entry of judgment of non pros does not exist. Because no such judgment exists, the Clerk does not have the authority to enter a judgment of non pros pursuant to a praecipe.[10]

Thus, in order for the Clerk to enter such a judgment, the Clerk must receive an Order from the court to enter a judgment. Before this can happen, the defendant is required by Federal Rule 7(b) to make a motion to the court, not the Clerk. Local Rule 7.1 requires every motion to be accompanied by a proposed Order granting the relief sought.

Therefore, because judgment would require an Order from the court and a praecipe to the Clerk is not a motion to the court for such an Order, and does not constitute a court Order, we conclude that the scope of Federal Rule 7(b) is sufficiently broad to control the issue before the court. As a result, and for the foregoing reasons, we also conclude that Fed.R.Civ.P.

[10] Indeed, in this case, the Clerk of Court did not enter a judgment of non pros, presumably because the Clerk recognized that no authority existed for such an entry. Instead, the Clerk noted on the docket that the defendants filed a praecipe for entry of judgment of non pros. Furthermore, at oral argument counsel for plaintiffs stated that the Clerk asked the undersigned what should be done regarding the Praecipe. Until the oral argument, we were unaware of the any such request. In addition, we are currently unaware of any request made by the Clerk to the chambers of the undersigned.

7(b) and Pa.R.Civ.P. 1042.6 directly collide. Therefore, Federal Rule 7(b) must be applied, and Pennsylvania Rule 1042.6 cannot be applied.

Similarly, Federal Rule 41(b) is broad enough to prevent the application of Pennsylvania Rule 1042.6. Federal Rule 41(b) governs involuntary dismissals. Specifically, Federal Rule 41(b) states that if a plaintiff fails to prosecute, or to comply with the federal procedural rules or any Order of court, a defendant may move for dismissal of an action or of any claim against the defendant.[11]

A judgment of non pros is a judgment for failure to prosecute a case. See Bucci v. Detroit Fire & Marine Ins. Co., 109 Pa.Super. 167, 167 A. 425 (1933).[12] Thus, in essence, a judgment of non pros is an involuntary dismissal for failure to prosecute, which under federal practice is governed by Federal Rule 41(b). Therefore, Federal Rule 41(b) and Pennsylvania Rule 1042.6 directly collide. Accordingly, Federal Rule 41(b) must be applied, and Pennsylvania Rule 1042.6 cannot be applied.

With regard to the first part of the Chamberlain test, the Third Circuit recognized that, if there is a direct conflict,

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[11] Federal Rule 41(b) provides that unless the court specifies otherwise, dismissals pursuant to Federal Rule 41(b) operate as an adjudication upon the merits.

[12] In Bucci, the Court stated that a non pros was an abbrieviation of non prosequitur, meaning “he does not pursue”. Further, the Court stated that a judgment of non pros occurs where the plaintiff fails to prosecute his case. Bucci, 109 Pa.Super. at 171.

the federal rule must be applied if it is constitutional and within the scope of the Rules Enabling Act. See Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 427 n.7, 116 S.Ct. 2211, 2219, 135 L.Ed.2d 659, 674 (1996). Neither Federal Rule 7(b) nor 41(b) has been declared unconstitutional. In addition, no constitutional or Rules Enabling Act issues have been raised; and, therefore, the court will not address those issues.

Even though the court has determined that Pennsylvania Rule 1042.6 directly collides with Federal Rules 7(b) and 41(b), the court will analyze whether Pennsylvania Rule 1042.6 directly collides with Local Rule 7.1.

Local Rule 7.1 is not sufficiently broad to prevent the application of Pennsylvania Rule 1042.6. Unlike Local Rule 7.1, which governs motion practice, Pa.R.Civ.P. 1042.6 requires that the Prothonotary enter judgment of non pros upon request by a defendant. A praecipe for judgment non pros is not a motion recognized by the Federal Rules of Civil Procedure.[13] Therefore, because a praecipe is not a recognized motion and Local Rule 7.1 governs motions, Local Rule 7.1 and Pennsylvania Rule 1042.6 do not directly collide.

[13] Above, we determined that a Praecipe for Entry of Judgment of Non Pros does not exist in Federal Practice. Nevertheless, we conclude that if Federal Rules 7(b) and 41(b) did not preclude the application of 1042.6, Local Rule 7.1 would not preclude the application of the Pennsylvania Rule 1042.6.

As noted above, because we have determined that Pennsylvania Rule 1042.6 directly collides with Federal Rules 7(b) and 41(b), we do not need to address the second and third parts of the Chamberlain test.

Prejudice

Plaintiffs maintain that even if we were to conclude that Pa.R.Civ.P. 1042.6 trumps the process and procedure mandated by Federal Rules 7(b) and 41(b) and Local Rule 7.1, dismissal of plaintiffs' professional malpractice and negligence claims would still be inappropriate. Plaintiffs maintain that in order to obtain a judgment non pros, defendants must demonstrate that they suffered prejudice as a result of plaintiffs' failure to file a certificate of merit within 60 days of filing the Amended Complaint in this matter.

With respect to plaintiffs' contention that defendants must demonstrate prejudice, defendants aver that whether a defendant has been prejudiced is immaterial to the decision to open a non pros. Instead, if plaintiffs fail to comply with the certificate-of-merit Rule, as is the case here, the Complaint should be dismissed.

In this regard plaintiffs rely upon Scaramuzza v. Sciolla, 345 F.Supp.2d 508 (E.D. Pa. 2004). In Scaramuzza the district court concluded that dismissal of a Complaint with

prejudice for failure to comply with Pa.R.Civ.P. 1042.3 would be improper where defendant did not establish prejudice.
345 F.Supp.2d at 510.

On the other hand, defendants rely upon Hartman v. Low Security Correctional Institution Allenwood, No. Civ.A. 04-0209, 2005 WL 1259950 (M.D.Pa. May 27, 2005). In Hartman the district court rejected the Scaramuzza determination that a finding of prejudice was necessary. The Hartman court reasoned that "[t]he only reported Pennsylvania court decisions of which we are aware have held that such prejudice is immaterial when considering whether a plaintiff's claims should be dismissed for failure to comply with Rule 1042.3. See Parkway Corp. v. Edelstein, 861 A.2d 264, 269 (Pa.Super. 2004); Helfrick v. UPMC Shady Side Hospital, 65 D.&C.4th 420, 424-425 (Allegheny Co. 2003)."
2005 WL 1259950 at *4.

In Parkway Corporation v. Edelstein the Superior Court of Pennsylvania suggests that the absence of prejudice is immaterial when considering whether a plaintiff's claims should be dismissed for failure to comply with Rule 1042.3. 861 A.2d at 269. In Helfrick v. UPMC Shadyside Hospital Judge Wettick concludes, after a thorough analysis of Pennsylvania law, that the use of a prejudice standard is inappropriate and would emasculate Pennsylvania Rule 1042.3. 65 D.&C.4th 424-425.

Because we have concluded that Pa.R.Civ.P. 1042.6 is inapplicable in federal court, it may be unnecessary to resolve this dispute concerning prejudice. Nevertheless, while we agree with plaintiffs that defendants have not demonstrated prejudice, we agree with defendants that they do not have to.

Defendants offered no evidence or examples of prejudice, either in their brief or at oral argument. We believe that one of the purposes of Pa.R.Civ.P. 1042.3 is to require plaintiffs to have a sound basis, butressed by supportive professional opinion, for commencing a professional malpractice lawsuit, and to protect defendants in such cases from having to defend frivolous or meritless lawsuits.

Accordingly, we agree with plaintiffs that because they have filed certificates of merit (albeit late) on March 3, 2005 as to both defendants Roth Marz Partnership and Mark R. Thompson, and because they have complied with this court's September 16, 2004 Rule 16 Scheduling Order and served copies of their expert reports upon defendants (timely) on March 7, 2005, defendants cannot demonstrate that they have suffered any prejudice in this matter.

In this regard, Judge Wettick in Helfrick v. UPMC Shadyside Hospital, supra, stated:

> If a court were to [grant] a petition to open a judgment of non pros for failure to file a certificate of merit unless the defendant can show prejudice, the petition would almost always be

> granted. Defendants are not going to be able to show that they were prejudiced by the late filing of a certificate of merit regardless of whether the delay involves 10 days, 30 days, or 90 days. Consequently, the use of a prejudice standard would eliminate the rule's deadlines for filing certificates of merit.

65 D.&C.4th at 424-425.[14]

As noted above, while we agree with plaintiffs that defendants have not demonstrated prejudice, we agree with defendants that they do not have to. As framed by the parties, the prejudice argument presupposes that Pa.R.Civ.P. 1042.6 concerning the filing of a praecipe for judgment of non pros applies in federal court (which we have concluded it does not).

For the Rule 1042.6 procedure to apply in federal court, the state rule would have to be considered substantive state law. If Rule 1042.6 were substantive, then Pennsylvania law would govern its application. As we have noted, the Pennsylvania courts have concluded that prejudice is immaterial

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[14] See also Newell v. Ruiz, 286 F.3d 166, 169 (3d Cir. 2002) which concerned the New Jersey affidavit of merit statute. There the Third Circuit ruled that there was no legal prejudice to the defendants in a medical malpractice case where plaintiff supplied defendants with copies of her mammograms and took a series of steps that notified defendants about the merits of the malpractice claims filed against them. The Court cited with approval the following language of the New Jersey Superior Court:

> [There is] no prejudice whatever than that they would have to defend against a potentially meritorious claim, which is not legal prejudice. Certainly, there has been no showing of prejudice to defendants that would outweigh the strong preference for adjudication on the merits rather than final disposition for procedural reasons.

Mayfield v. Cmty. Med. Assocs., 335 N.J.Super. 198, 762 A.2d 237, 243 (N.J.Super.Ct. 2000) (citations omitted). Quoted in Newell v. Ruiz, 286 F.3d at 169.

when considering whether plaintiff's professional negligence claims should be dismissed for violation of the certificate of merit rule. Therefore, prejudice would be immaterial in determining in federal court whether to strike a judgment non pros entered pursuant to Pennsylvania Rule 1042.6.

Policy Consideration

In addition to the foregoing reasons, we conclude that the policy behind the Pennsylvania certificate-of-merit rule would not be served by dismissing plaintiffs' professional negligence claim. We believe that the Pennsylvania rule is designed to dismiss unfounded, meritless professional negligence cases at an early stage.

Because plaintiffs produced expert reports supporting their malpractice claims in a timely fashion under the court's discovery Order, we believe that their negligence case is neither meritless nor frivolous. Accordingly, the purpose of the Pennsylvania certificate-of-merit rule will not be served by dismissing plaintiffs' Complaint.

CONCLUSION

For all the foregoing reasons we grant Plaintiffs' Motion to Strike the Praecipe for Entry of Judgment of Non Pros Filed by Defendants Roth Marz Partnership, P.C. and Mark R. Thompson, and we strike the Praecipe.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GAZI ABDULHAY, M.D.;	)	
GYNECOLOGIC ONCOLOGY	)	
ASSOCIATES OF LEHIGH VALLEY,	)	Civil Action
INC., trading as Lehigh Valley	)	No. 03-CV-04347
Women's Cancer Center;	)	
ABDULHAY ASSOCIATES, L.P.; and	)	
BETHLEHEM AMBULATORY SURGERY	)	
CENTER, LLC,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
BETHLEHEM MEDICAL ARTS, L.P.;	)	
BETHLEHEM MEDICAL ARTS, LLC;	)	
KEVIN T. FOGARTY, M.D.,	)	
Individually and as Managing	)	
Director of Bethlehem Medical	)	
Arts, L.P., and as President	)	
of Bethlehem Medical Arts, LLC;	)	
ROTH MARZ PARTNERSHIP, P.C.;	)	

MARK R. THOMPSON, Individually)
and as Vice President of)
Roth Marz Partnership, P.C.)
)
Defendants)

O R D E R

NOW, this 27th day of September, 2005, upon consideration of Plaintiffs' Motion to Strike the Praecipe for Entry of Judgment of Non Pros Filed by Defendants Roth Marz Partnership, P.C. and Mark R. Thompson, which motion was filed February 25, 2005; upon consideration of Defendants, Roth Marz Partnership, P.C. and Mark R. Thompson's, Response to Plaintiffs' Motion to Strike the Praecipe for Entry of Judgment of Non Pros, which response was filed March 8, 2005; upon consideration of briefs of parties; after oral argument before the undersigned on July 28, 2005; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that plaintiffs' motion to strike is granted.

IT IS FURTHER ORDERED that defendants' Praecipe for Entry of Judgment of Non Pros is stricken from the record.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner

United States District Judge