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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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Opinions

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COMMONWEALTH OF PENNSYLVANIA vs. KEITH HICKS

Sentencing

Resentencing was flawed because the court failed to provide a statement of reasons identifying how Section 1102.1 (d) factors support sentence imposed.

CC# 199510400. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Howsie, J.

OPINION

Procedural Background

On April 1, 1996, a jury found Keith Hicks ("Defendant") guilty at CC# 199510400 of criminal homicide. The Defendant was a juvenile (17) at the time of the offense. Judge John A. Zottola·sentenced the Defendant to a mandatory term of life imprisonment. On December 9, 1997, the Superior Court affirmed the judgment of sentence. The Defendant did not file a petition for allowance of appeal.

On July 31, 2012, Attorney Alan R. Patterson III entered his appearance on behalf of the Defendant. On March 16, 2016, Attorney Patterson filed a PCRA Petition seeking relief pursuan to *Miller v. Alabama.* By Order of Sentence dated May 30, 2019, Judge Zottola resentenced the Defendant to a period of incarceration of thirty-five years to life. On June 10, 2019, the Defendant filed a counseled Post Sentence Motion seeking to modify/reduce the sentence imposed on May 30, 2019. On May 25, 2022, the Defendant, proceeding *pro se*, filed a Motion for Reconsideration *Nunc pro Tunc* asking for reconsideration of the sentence imposed on May 30, 2019.

Following the death of Judge Zottola, the case was reassigned to the Honorable Elliot C. Howsie. By Order dated August 23, 2022, Judge Howsie denied the *pro se* Motion fo Reconsideration. On September 19, 2022, Attorney Patterson filed a Notice of Appeal to the Superior Court. By Order dated October 4, 2022, the Superior Court advised of its intent to dismiss the appeal as premature and quash the appeal as an action based on a legal nullity. By Order dated October 18, 2022, Judge Howsie denied the Defendant's counseled Post Sentence Motion. On October 21, 2022, Attorney Patterson filed a Notice of Appeal to the Superior Court seeking revie of the denial of the June 10, 2019, Post Sentence Motion.

The Defendant was ordered to file a Rule 1925(b) Statement. On December 12, 2022, the Defendant filed a Concise Statement of Matters Complained of on Appeal. The Defendan identified the following issues in the Concise Statement:

a. Regarding the sentence imposed on May 30, 2109, whether the Trial Court failed to consider and adequately articulate the individualized sentencing factors discussed in *Miller v. Alabama*, 567 U.S. 460 (2012), and 18 Pa.C.S.A. § 1102.1 pursuant to the dictates of *Commonwealth v. Batts,* 163 A.3d 410 (Pa. 2017) as recently discussed in *Commonwealth v. Heggins,* and more specifically to the sentence imposed, the threat of safety to the public or any individual posed by the Petitioner, age-related characteristics of the Petitioner including his age, home and neighborhood environments, peer pressures, mental capacity and maturity all at the time of the crime, the degree of criminal sophistication at the time of the crime, Petitioner's institutional reports for the past 12 plus years showing no misconducts and the fact that Petitioner has taken every program available to him including becoming a Certified Peer Specialist, his potential for rehabilitation and other factors which were inadequate and did not afford Petitioner an individualized analysis of an appropriate sentence?

b. Whether the Trial Court erred or abused its discretion when denying Petitioner's motion to modify or reduce sentence and failed to adequately consider the sentencing code set forth at 42 Pa.C.S.A. § 9721(b) and/02 204 Pa.Code § 303.l(d) in fashioning a harsh sentence of thirty-five (35) years to life?

c. After vacating of the charge and conviction of Assault by Life Prisoner, whether the Trial Court erred in dismissing the Motion for Reconsideration Nunc pro Tunc considering the vacating of Petitioner's conviction and sentence for the charge of Assault by Life Prisoner at CP-02-0004000-2001, which was determined to be invalid per *Miller* and *Montgomery* (See Opinion in *Comm v. Cobbs*, 56 MAP 2020), which Petitioner avers requires a lower sentence than the sentence of thirty-five to life currently imposed?

Discussion

In this appeal, the Defendant claims that the Trial Court erred by failing to consider and articulate application of sentencing factors identified in *Miller v. Alabama* and 18 Pa.C.S.A. § 1102.1. The Defendant contends that the resentencing failed to comply with Pennsylvania case law related to the sentencing of juveniles convicted of homicide. As a preliminary matter, Section 1102.1 does not apply in this case because the Defendant was convicted in 1996 and the law expressly only applies to defendants convicted after June 24, 2012. *See 18 Pa.C.SA. § 1102.l(a).* However, Section 1102.1 is relevant in these proceedings. In those instances involving defendants convicted prior to June 24, 2012, the Pennsylvania Courts require sentencing judges to make findings regarding the factors set forth in Section 1102.l(d). "In sentencing a juvenile offender to life with the possibility of parole, traditional sentencing considerations apply. The sentencing court should fashion the minimum term of incarceration using, as guidance, Section 1102.l(a) of the Crimes Code." *Commonwealth v. Batts, 163 A.3d 410, 460 (Pa. 2017).* Although the Defendant has not cited any evidence establishing that Judge Zottola failed to consider the mitigating factors, this Court perceives that the resentencing was flawed because the resentencing court failed to provide a statement of reasons identifying how the Section 1102.1(d) factors support the sentence imposed. For this reason, the Court concedes the first issue raised in this appeal has merit. The Court respectfully requests that the Superior Court remand the matter for the Defendant to be resentenced consistent with the mandates of Section 1102.l(d), whereby findings are made on the record.

BY THE COURT:
/s/The Honorable Elliot C. Howsie, Jr.
Court of Common Pleas of Allegheny County

ALBERT E. CUNEO vs.
RAYMOND L. BURGESS, YVETTE C. PETERSON, TERRE-TENANT

Revival of Judgements–Terre-Tenants–Priority of Liens and Divestment of Junior Liens by Sheriff Sale

Court sustained Preliminary Objections raising questions of fact to strike Writ of Revival to terre-tenant. Court also overruled Preliminary Objections to Peterson's Preliminary Objections due to issues of standing and jurisdiction.

Case No.: GD-07-011138. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. February 21, 2023.

Pa.R.C.P. 1925(b) OPINION

Procedural History

On 12/28/2022, Albert E. Cuneo ("Cuneo") filed this appeal of my 12/01/2022, order that sustained Yvette C. Peterson's ("Peterson") Preliminary Objections Raising Questions of Fact to strike Cuneo's Writ of Revival to Terre-Tenant, and the judgement entered in this action cannot be indexed in any way against the property known as 2627 Webster Ave., Pittsburgh, Pennsylvania ("Webster Ave."). That order also overruled Cuneo's Preliminary Objections to Peterson's Preliminary Objections.

Raymond Burgess ("Burgess") had executed a mortgage with Wells Fargo on 6/30/2006, which was recorded on 7/6/2006 and secured by the Webster Ave. property. Burgess subsequently defaulted on the mortgage in November 2006 and was the Defendant in a 2007 foreclosure action filed on 3/14/2007, for the Webster Ave. property.

Separately, on 4/19/2007, a judgement was entered in favor of Albert E. Cuneo for a breach of contract claim against Burgess in the Magisterial District Court and was entered and filed in the Court of Common Pleas on 5/29/2007. Cuneo was a lienholder of Burgess' Webster Ave. property at the time when Wells Fargo filed its foreclosure action, and he was provided Notice of the Sheriff's sale Pursuant to Pa. R.C.P. 3129. The record is clear that the Wells Fargo mortgage and foreclosure action was filed and of record before Cuneo's judgement.

As a result of the foreclosure action, U.S. Bank took title to the Webster Ave. property as the successful bidder at the 2/4/2008 Sheriff's sale. The Sheriff's Deed is dated 2/26/2008, and was recorded on 3/14/2008, as Instrument 2008-7032. Peterson subsequently purchased the Webster Ave. property from U.S. Bank, the foreclosing mortgage holder, for $5,600.00 and took title by deed dated 12/31/2008, and recorded it on 3/3/2009, as Instrument Number 2009-4392.

Approximately 14 years later, Cuneo filed a Praecipe for Writ of Revival against Yvette C. Peterson, "Terre-Tenant" on or about 7/15/2022. On 8/22/2022 Peterson filed her Preliminary Objections Raising Questions of Fact to strike Cuneo's Writ of Revival to Terre-Tenant. Cuneo filed a response and his own Preliminary Objections to Peterson's Preliminary Objections on 9/9/2022. In response, Peterson filed ten (10) exhibits which are documents filed of record with the Allegheny County Department of Court Records and the Allegheny County Department of Real Estate, and I take judicial notice as fact pursuant to the Pennsylvania Rules of Evidence Pa. R.E. 201. I heard argument on 12/1/2022 and sustained Peterson's Preliminary Objections and overruled Cuneo's Preliminary Objections, finding that Peterson was not a Terre-Tenant.

Standard of Review

The Superior Court in *Richmond v. McHale,* 35 A.3d 779, 783 (2012) established the standard of review in sustaining preliminary objections for trial courts:

Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Id.

A demurrer tests only whether, as a matter of law, the pleaded allegations may entitle the pleader to relief. To answer that question, the pleader's factual allegations are accepted as true; because there are no other "facts" before the court, the trial court has no basis to assume otherwise. And because neither party has had any opportunity to present evidence showing what the facts actually are, the law precludes dismissal unless it is 'clear and free from doubt' that no relief may be obtained under the pleader's allegations. (internal citations are omitted)

C.G. v. J.H., 172 A.3d 43, 54–55 (2017), *aff'd,* 648 Pa. 418, 193 A.3d 891 (2018).

Discussion

All eight (8) of Cuneo's alleged errors are founded on his incorrect belief that his judgement had priority over Wells Fargo mortgage and that Peterson had purchased the property directly or indirectly from Burgess, making her a Terre-Tenant. Both of Cuneo's legal averments are erroneous upon review of the documents filed with the Allegheny County Department of Court Records and the Allegheny County Department of Real Estate.

Peterson filed Preliminary Objections Raising Questions of Fact to strike Cuneo's Writ of Revival to Terre-Tenant, averring that pursuant to Pa. R.C. P. Rules 1028(a)(1) there is a lack of jurisdiction over Peterson and a demurrer under 1028 (a)(4) averring that Cuneo's Writ of Revival to Terre-Tenant was legally insufficient.

Cuneo first incorrectly argues that his lien had priority over Wells Fargo's mortgage. The record is clear that Wells Fargo's mortgage on the property was perfected and filed on 7/6/2006, nearly ten (10) months before Cuneo's judgement was recorded in the Allegheny County's Department of Court Records on 5/29/2007.

Priority for the liens of purchase money mortgages is provided by statute at 42 Pa.C.S. § 8141(1), time from which liens have priority, is as follows:

Liens against real property shall have priority over each other on the following basis:

(1) Purchase money mortgages, from the time they are delivered to the mortgagee, if they are recorded within ten days after their date; otherwise, from the time they are left for record. A mortgage is a "purchase money mortgage" to the extent that it is:

(i) taken by the seller of the mortgaged property to secure the payment of all or part of the purchase price; or

(ii) taken by a mortgagee other than the seller to secure the repayment of money actually advanced by such person to or on behalf of the mortgagor at the time the mortgagor acquires title to the property and used by the mortgagor at that time to pay all or part of the purchase price, except that a mortgage other than to the seller of the property shall not be a purchase money mortgage within the meaning of this section unless expressly stated so to be.

(2) Other mortgages and defeasible deeds in the nature of mortgages, from the time they are left for record.

(3) Verdicts for a specific sum of money, from the time they are recorded by the court. (emphasis added)

Id.

There is no dispute that Wells Fargo's mortgage was recorded, and its foreclosure action was prior to Cuneo's verdict judgment. Based on the applicable law as set forth in § 8141, time from which liens have priority, and the record, Cuneo's verdict for a specific sum of money was a junior lien to Wells Fargo's mortgage.

Further, Cuneo incorrectly avers that his judgement lien was not divested by the 2/4/2008, Sheriff's sale and is still viable against the Webster Ave. property. The general rule in Pennsylvania is that a Sheriff's sale of property divests all junior liens on that property. *Unity Sav. Ass'n v. Am. Urb. Scis. Found. Inc.*, 487 A.2d 356, 358 (1984) citing *Albert J. Grosser v. Rosen*, 259 A.2d 679 (1969). Since the record contains an Affidavit of Service Pursuant to Rule 3129, stating that all record lien holders, including Cuneo, were served notice of the 2/4/2008, Sheriff's sale, all junior liens were divested after the Sheriff's sale. The law is clear that Cuneo's lien on the property was divested upon the sale of the property to the mortgage holder at the Sheriff's sale. Applying the law as found in *Unity*, it is clear that Cuneo's lien on the property was divested upon the sale of the property to the mortgage holder at the Sheriff's sale.

Cuneo's filing a Writ of Revival to Terre-Tenant against Peterson was legally insufficient since the record confirms that Peterson is not a Terre-Tenant. The law in Pennsylvania is clear as to what establishes a Terre-Tenant and valid defenses to that claim. "A terre-tenant, as used in our law, is one who became the owner of an interest in the real estate after the lien of the judgment attaches" *Adelson v. Kocher*, 36 A.2d 737, 738 (1944). "A terre-tenant is one who has purchased an estate mediately or immediately from the debtor while it was bound by a judgment." *Ellinger v. Krach*, 28 A.2d 453 (1942), *aff'd sub nom. Simmons v. Simmons*, 29 A.2d 677 (1943). "The only defense in the trial of a scire facias on a judgment is a denial of the existence of the judgment, or proof of a subsequent satisfaction or discharge thereof." *Dowling v. McGregor*, 91 Pa. 410, 412 (1880)

It is evident from the record that U.S. Bank took title to the Webster Ave. property as the successful bidder at the Sheriff's Sale after a review of the dockets at GD-07-5528 and GD-07-11138 in the Allegheny County Department of Court Records and the Allegheny County Department of Real Estate. The Sheriff's Deed transferring the property to U.S. Bank is dated 2/26/2008, and was recorded on 3/14/2008, as Instrument 2008-7032, which divested Cuneo's lien along with all other junior lien holders. Approximately ten (10) months later Peterson, a bona fide purchaser, bought the Webster Ave. property from U.S. Bank on 12/31/2008, which was recorded 3/3/2009. It is apparent from the record and the U.S. Bank to Peterson deed transfer, that Burgess was not a grantor and the property at that time was owned by U.S Bank and not Burgess. Therefore, Peterson did not purchase property mediately or immediately from the debtor (Burgess) while it was bound by Cuneo's judgment which was divested by the 2/4/2008 Sheriff's sale.

Cuneo also filed Preliminary Objections to Peterson's Preliminary Objections in which he attempted to raise procedural issues that allegedly occurred with the underlying Sheriff's sale that took place more than fourteen (14) years ago. First and foremost, neither Peterson nor Cuneo were parties or participants in the Sheriff's sale that occurred in 2008. Therefore, any alleged procedural errors or allegations raised by Cuneo against Wells Fargo and the Allegheny Sheriff's Department are not properly before me. Cuneo lacks standing to raise these issues at this time, and I lack jurisdiction in this matter. I do note that Cuneo had revived his writ of judgement two times before 2022, once in 2012 and again in 2017, and never raised the issue of Peterson being a Terre-Tenant even though she has been the record owner since March of 2009.

Even if I did find that Cuneo has standing, he may be barred by the doctrine of laches since he sat on any rights he may have had for over fourteen (14) years while having at least constructive notice that the property was sold to Peterson in 2009. These reasons are why I overruled Cuneo's Preliminary Objections to Peterson's Preliminary Objections.

Conclusion

In conclusion, I did not commit any errors or abuse my discretion in sustaining Peterson's Preliminary Objections and striking Cuneo's Praecipe for Writ of Revival against Peterson as a Terre-Tenant with prejudice and overruling Cuneo's Preliminary Objections to Preliminary Objections. Applying the law to the record, I found that Peterson was not a Terre-Tenant and the Webster Ave. property could not be indexed by Cuneo's judgement against Burgess. While my ruling does not invalidate Cuneo's judgment against Burgess or his estate, it does preclude him from indexing or executing against Peterson's property for all the above reasons.

BY THE COURT:
/s/Judge John T. McVay, Jr.

MARIE K. GLOMB, as ADMINISTRATRIX C.T.A. of the ESTATE OF EVELYN C. SOFRANKO a/k/a EVA C. SOFRANKO, deceased vs. ST. BARNABAS NURSING HOME, INC., d/b/a ST. BARNABAS NURSING HOME; and ST. BARNABAS CLINICAL SERVICES, INC.

Summary Judgment–Collateral Estoppel

GD-14-011106. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ignelzi, J.

OPINION

This Opinion of court addresses the Defendants' Motion for Summary Judgment in the above matter. After careful consideration of Defendant's Motion, Plaintiff's Response in Opposition, all subsequent filings, and oral argument thereupon, it is ORDERED, ADJUDGED, and DECREED that Defendant's Motion for Summary Judgement is GRANTED and Plaintiff's Complaint is dismissed with prejudice. The Court makes the following findings.

Procedural & Factual History

Evelyn C. Sofranko ("Ms. Sofranko") passed away on November 16, 2013 at the age of ninety-two after maintaining residency at St. Barnabas Nursing Home ("SBNH") for a period of time ending on November 5, 2013. (See generally, Plaintiff's Complaint in Civil Action, Marie Glomb v. St. Barnabas Nursing Home, No. 14-011106 (Allegheny Cty. Ct. Com. Pl. Mar. 19, 2015), ECF No. 9) ("Plaintiff's Complaint"); (Defendant's Appendix of Record Material to Motion for Summary Judgement at Appendix G, Marie Glomb v. St. Barnabas Nursing Home, No. 14-011106 (Allegheny Cty. Ct. Com. Pl. Mar. 14, 2022), ECF No. 88) ("Defendant's Appendix"). Ms. Sofranko was admitted to SBNH for a multitude of reasons, least of which included her diagnosis of Dementia. (See generally, Plaintiff's Response to Defendants' Motion for Summary Judgement, Marie Glomb v. St. Barnabas Nursing Home, No. 14-011106 (Allegheny Cty. Ct. Com. Pl. Apr. 18, 2022), ECF No. 89) ("Plaintiff's Response"). During her time at SBNH, Ms. Sofranko experienced injuries that include but are not limited to skin tears, a pressure sore, hyponatremia, malnutrition, and dehydration. (See generally, Plaintiff's Complaint, supra]. Whether SBNH negligently caused these injuries up to and including her death is the subject of the claims.

Marie Glomb ("Ms. Glomb"), administratrix of the estate of Ms. Sofranko, brought survival act claims against SBNH and St. Barnabas Clinical Services ("SBCS") on behalf of Ms. Sofranko's estate and wrongful death actions on behalf of Ms. Sofranko's beneficiaries against SBNH and SBCS. (Id.). The Plaintiff alleges multiple claims including but not limited to negligence which may have resulted in injuries leading up to and including Ms. Sofranko's death. (Id.).

In November of 2016, Defendants sought to move the survival act claim against SBNH to arbitration in connection with an agreement executed upon Ms. Sofranko's admission to SBNH.[1] (Defendant's Motion to Compel Arbitration of Survival Act Claim…, Marie Glomb v. St. Barnabas Nursing Home, No. 14-011106 (Allegheny Cty. Ct. Com. Pl. Nov. 21, 2016), ECF No. 32) ("Defendant's Motion to Compel Arbitration"). The agreement, in essence, stated that any claim stemming from care at the nursing home that Ms. Sofranko may have, would be brought in an arbitration proceeding. (Id. at P. 2, L. 3). In May of 2017, The Honorable Judith Friedman of this Court ordered the Plaintiff's survival act claim against SBNH to arbitration, while all other claims remained in the Court of Common Pleas. (Order of Court ordering survival act claim against SBNH to arbitration, Marie Glomb v. St. Barnabas Nursing Home, No. 14-011106 (Allegheny Cty. Ct. Com. Pl. May. 24, 2017), ECF No. 45) ("Order Granting Arbitration"). The survival act claim against SBCS also remained in state court because SBCS was not a party to the agreement between SBNH and Ms. Sofranko. (Plaintiff's Response, supra, at P. 7).

In September 2018, the parties proceeded to arbitration on the survival act claim against SBNH. (Id.) After several days of testimony and argument, retired Court of Common Pleas Judge Gary P. Caruso ("Judge Caruso") issued a detailed decision in SBNH's favor. (Id.) In his decision, Judge Caruso gives a concise recitation of the relevant facts and testimony relating to Ms. Sofranko's injuries and whether he found SBNH liable those injuries and her death. Judge Caruso found that the Plaintiff failed to prove that SBNH was negligent in the care and treatment of Ms. Sofranko. (Id. at Exhibit C [The Arbitrator's Opinion], P. 13).

After Judge Caruso ruled in SBNH's favor, the Plaintiff moved to confirm the arbitration award, filed a praecipe to enter adverse judgment in accordance with the arbitration award, and filed a timely notice of Appeal to the Superior Court of Pennsylvania appealing Judge Friedman's Order of Court compelling Plaintiff's survival act claim to arbitration. (Id. at P. 7-8). The Superior Court affirmed the order compelling arbitration on September 10, 2020. (Id. at P. 8). On February 25, 2022, Judge Daniel Regan of the Allegheny County Court of Common Pleas entered an order lifting the stay that was in place pending the Superior Court's ruling on Judge Friedman's order compelling arbitration. (Order of Court to Lift Stay, Marie Glomb v. St. Barnabas Nursing Home, No. 14-011106 (Allegheny Cty. Ct. Com. Pl. Feb. 25, 2022), ECF No. 84) ("Order Lifting Stay").

On March 14, 2022, Defendants filed their Motion for Summary Judgement Based on (1) Collateral Estoppel and (2) the Undisputed Record Establishing that No Tortious Conduct By Defendants Was a Legal Cause of Plaintiff's Death. Plaintiff responded on April 18, 2022. Oral argument was held on July 12, 2022. For the reasons set forth herein, the court grants Defendant's Motion for Summary Judgement, thereby dismissing Plaintiff's Complaint with prejudice.

Analysis

I. Standard of Review and Relevant Authority

After the relevant pleadings are closed, but within such time as not to 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.

Pa.R.C.P. No. 1035.2.

Under subdivision (2), the record contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to a jury… To defeat this motion, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense.

Pa.R.C.P. No. 1035.2, Explanatory Note.

The moving party bears the burden of showing that they are entitled to a judgment as a matter of law, and "[i]n determining whether to grant summary judgment . . . [the court] must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party.

Reliance Ins. Co. v. IRPC, Inc., 904 A.2d 912, 914 (Pa. Super. 2006).

Plaintiffs brought the instant matter against SBNH and SBCS based on two causes of action: survival act claims and wrongful death actions.

A survival action under 42 Pa.C.S. § 8302 is brought by the administrator or executor of a decedent's estate in order to recover damages for the decedent's pain and suffering, the loss of gross earning power from the time of injury to death, and the loss of earning power, less personal maintenance expenses, for the estimated working life span of the decedent. ... By contrast, a wrongful death action pursuant to 42 Pa.C.S. § 8301 is designed to compensate the spouse, children, and parents of the deceased for the pecuniary loss they have sustained as a result of the decedent's death, and damages may include the present value of services that would have been rendered to the family had the decedent lived, as well as funeral and medical expenses.

Cowher v. Kodali, 283 A.3d 794, 811 n.1 (Pa. 2022), quoting McMichael v. McMichael, —— Pa. ——, 241 A.3d 582, 587-88 (2020).

Defendants moved for Summary Judgement based on two bases. The first basis the Defendants argue is that Judge Caruso's arbitration decision (finding that SBNH was not negligent as to Ms. Sofranko's injuries or death; that no tortious injury exists) bars all remaining claims pending in this court based on collateral estoppel. (Defendant's Brief in Support of Defendant's Motion for Summary Judgement…, Marie Glomb v. St. Barnabas Nursing Home, No. 14-011106 (Allegheny Cty. Ct. Com. Pl. Mar. 14, 2022), ECF No. 87) ("Defendant's Brief in Support"). The second basis the Defendants argue is that Plaintiff's wrongful death actions fail because, based on Plaintiff's experts' testimony, Ms. Sofranko's death was caused by her end-stage dementia, not any alleged tortious act of St. Barnabas. (Id. at 26).

II. Collateral Estoppel Applies

As stated above, the Defendants argue that the first reason their Motion for Summary Judgement should be granted is because Judge Caruso's arbitration decision finding in favor of SBNH regarding Plaintiff's survival action claim collaterally estopps the remaining claims in state court. The court must determine if collateral estoppel applies to this case.

The doctrine of collateral estoppel, or issue preclusion, applies where the following four prongs are met: (1) an issue of law or fact decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

Frog, Switch & Mfg. Co. v. Pennsylvania Hum. Rels. Comm'n, 885 A.2d 655, 661 (Pa. Commw. Ct. 2005), quoting Rue v. K–Mart Corp., 713 A.2d 82 (Pa. 1998).

1. An Issue of Law or Fact Decided in a Prior Action Is Identical to One Presented in a Later Action.

For the doctrine of collateral estoppel to apply, it must appear that the fact or facts at issue in both instances were identical; that these facts were essential to the first judgement and were actually litigated in the first cause. Id., quoting Schubach v. Silver, 336 A.2d 328, 334 (Pa. 1975).

The claims still present before this court and the matter arbitrated before Judge Caruso all involve and stem from the same set of facts: the injuries and care experienced by Ms. Sofranko at St. Barnabas up to and including her death. The central issue in the survival act claims and wrongful death actions is if St. Barnabas was negligent in the care of Ms. Sofranko and did that negligence cause the injuries leading up to and including her death; i.e. did a tortious injury occur?

As Pennsylvania courts have clearly demonstrated, survival act claims and wrongful death actions stem from the same factual events, although they are distinct causes of action with separate rights:

We have announced the principle that the statutory action [the wrongful death action] is derivative because it has as its basis the same tortious act which would have supported the injured party's own cause of action. Its derivation, however, is from the tortious act, and not from the person of the deceased…

(Clarification added) Valentino v. Philadelphia Triathlon, LLC, 150 A.3d 483, 492 (Pa. Super. Ct. 2016), quoting Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663, 664 (1936).[2]

Plaintiff argues that the first prong of collateral estoppel is not met because survival act claims and wrongful death actions are wholly distinct from each other. (Plaintiff's Response, supra, at P. 24). Although Plaintiff is correct that the wrongful death claimants' rights are entirely separate and distinct from the decedent's rights, to succeed on a wrongful death claim, a wrongful death claim still requires a tortious injury suffered by the decedent. (Valentino, supra, at P. 493). A wrongful death action is derivative of the injury which would have supported the decedent's own cause of action and is dependent upon the decedent's cause of action being viable at the time of death. (Emphasis added) Id. at P. 493, quoting Sunderland v. R.A. Barlow Homebuilders, 791 A.2d 384 (Pa. Super. 2002), aff'd, 576 Pa. 22, 838 A.2d 662 (2003). In other words, the decedent's own cause of action (the survival act claim) must be viable at the time of death for the beneficiary's wrongful death claim to succeed. The fact-finder must find that there was a tortious injury during the decedent's life up until death in order for the wrongful death claim to be successful. Therefore, if a fact-finder did not find any evidence of a tortious injury in the survival act claim, both the survival act claim and wrongful death action will be unsuccessful.

Although there are two causes of action with separate rights for the claimants, both actions concern the same legal question: did St. Barnabas cause tortious injury to the decedent? Both actions rely on the same set of facts and the same legal issue. Judge Caruso analyzed the facts in this matter and determined that there was no tortious injury. Therefore, the first prong of collateral estoppel is satisfied.

2. The Prior Action Resulted in a Final Judgment on the Merits

Pennsylvania law has given great deference to the decisions of arbitrators, with arbitration becoming a vital procedure parties may utilize to solve disputes and to reduce the strain on the judicial system. Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation… A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs, 357 F.3d 272, 289 (3d Cir. 2004).

An arbitration award from which no appeal is taken has the effect of a final judgement on the merits. Dyer v. Travelers, 572 A.2d 762, 764 (Pa. Super.1990), quoting Ottaviano v. Southeastern Pennsylvania Transportation Authority, 239 Pa.Super. 363, 369–370, 361 A.2d 810, 814 (1976). Under Pennsylvania law, arbitration proceedings and their findings are considered final judgments for the purposes of collateral estoppel. Witkowski v. Welch, 173 F.3d 192, 199 (3d Cir. 1999).

In his arbitration decision, Judge Caruso found no tortious act by SBNH for Ms. Sofranko's injuries. The Plaintiff did not appeal the arbitration decision itself, but appealed the Court of Common Pleas order which ordered the parties to arbitrate the survival act claim against SBNH. The Plaintiffs entered a Praecipe to Enter Judgment on Arbitration Award in favor of Defendant against Plaintiff, making the arbitration decision a final judgement on the merits. (Praecipe to Enter Judgment on Arbitration Award, Marie Glomb v. St. Barnabas Nursing Home, No. 14-011106 (Allegheny Cty. Ct. Com. Pl. Dec. 4, 2018), ECF No. 65) ("Praecipe to Enter Judgment").

Furthermore, this court considers the fact that the arbitrator is a retired Court of Common Pleas Judge very influential as a final judgement on the merits in this matter. Judge Caruso carefully analyzed every injury Ms. Sofranko experienced along with expert and witness testimony. The second prong of collateral estoppel is satisfied.

3. The Party Against Whom Collateral Estoppel Is Asserted Was a Party to the Prior Action or Is in Privity with a Party to the Prior Action

First, Plaintiff does not argue that the estate was not a party to the prior action. Ms. Glomb, on behalf of the estate of Ms. Sofranko, brought the survival act claims against SBNH and SBCS and the wrongful death actions against SBNH and SBCS on behalf of Ms. Sofranko's beneficiaries: Marie K. Glomb (daughter), Joe Sofranko, Jr. (son), Tom Sofranko (son), and Greg Sofranko (son). (Plaintiff's Response, supra, at P. 29). To satisfy the third prong of collateral estoppel, the court must determine if Ms. Sofranko's beneficiaries are in privity with Ms. Sofranko's estate, whom was the party to the prior action. The Plaintiff argues that the wrongful death beneficiaries were not parties to the arbitration nor are they in privity with the personal representative of the estate. (Id.).

(a) Except as otherwise provided in clause (b) of this rule, an action for wrongful death shall be brought only by the personal representative of the decedent for the benefit of those persons entitled by law to recover damages for such wrongful death. (b) If no action for wrongful death has been brought within six months after the death of the decedent, the action may be brought by the personal representative or by any person entitled by law to recover damages in such action as trustee ad litem on behalf of all persons entitled to share in the damages…

(Emphasis added) Pa.R.C.P. No. 2202.

An action for wrongful death may be brought only by specified relatives of the decedent to recover damages in [sic] their own behalf, and not as beneficiaries of the estate… Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 658-59 (Pa. Super. 2013). The Plaintiff administratrix brought the instant wrongful death actions on behalf of Ms. Sofranko's beneficiaries, as required by Pennsylvania Civil Procedure.

While factually it is true that the beneficiaries are not named parties in the previous action, the beneficiaries are not named parties at all. Since the commencement of this matter, the only named Plaintiff in this action has been "Marie K. Glomb, as Administratrix C.T.A. of the Estate of Evelyn C. Sofranko a/k/a/ Eva C. Sofranko, deceased." (Defendant's Brief in Support, supra, at P. 17). The court finds the Plaintiff's argument without merit, as they are attempting to refute this issue by relying on a loophole in the rules of civil procedure.

The court also disagrees that the beneficiaries are not in privity with the Plaintiff in the prior action. Plaintiff relies on the courts' rulings in Pisano and Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490 (Pa. 2016), stating that a wrongful death beneficiary's rights are not derivative of the decedent's rights and that a beneficiary's right to a jury trial should be protected against arbitration agreements. Although the Plaintiff restates the rulings from these courts correctly, Plaintiff mistakenly relies upon them to support her argument.

The court in Pisano ruled that wrongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights, holding that a resident's contractual agreement with a nursing home to arbitrate all claims was not binding on non-signatory wrongful death claimants. See generally, Pisano, supra. In essence, the wrongful death claimants could not be compelled to arbitration. The court in Pisano does not address the potential defense of summary judgement or collateral estoppel.

The court in Taylor ruled that the FAA preempted the application of Rule 213(e) and ordered the survival act claim to arbitration, holding that a survival claim can be enforceable to arbitration while a wrongful death claim would be stayed in state court. This court famously did not address the preclusive effect of arbitration proceedings:

In its decision that Rule 213(e) barred bifurcation, the Superior Court expressed concern for the wrongful death beneficiaries' constitutional right to a jury trial. We share the Superior Court's concern, which appears to derive from the potential preclusive effect of arbitration upon the wrongful death beneficiaries in the judicial proceedings, through application of the doctrine of collateral estoppel. However, the preclusive effect of an arbitration award upon judicial proceedings is not presently before this Court. Moreover, although the appellate courts of the Commonwealth have held that "a judicially confirmed private arbitration award will have collateral estoppel effect, even in favor of non-parties to the arbitration, if the arbitrator actually and necessarily decided the issue sought to be foreclosed and the party against whom estoppel is invoked had full incentive and opportunity to litigate the matter," Frog, Switch & Mfg. Co. v. Pa. Human Relations Comm'n, 885 A.2d 655, 661 (Pa. Cmwlth. 2005), we have not addressed this question… Thus, the preclusive effect of arbitration in judicial proceedings is uncertain.

Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 511 (Pa. 2016).

This court must now determine whether the wrongful death beneficiaries are in privity with the named party, the estate of Ms. Sofranko, even though the law is as clear as mud. Although it is true that the rights of the decedent, through her estate, and the rights of the beneficiaries are separate, both causes of action rely on the existence of a tortious injury. For this reason, the court believes that the beneficiaries are in privity with Ms. Sofranko's estate.

The Pennsylvania Supreme Court has held that for the purposes of collateral estoppel, privity exists when the parties have a mutual or successive interest. Cent. Pennsylvania Lumber Co. v. Carter, 35 A.2d 282, 283 (Pa. 1944). In the present matter, both the estate's survival act claims and the beneficiaries' wrongful death actions rely on the existence of a tortious injury, thereby creating a mutual interest in the outcome of that legal issue. The beneficiaries' action is dependent upon the success of the estate's argument that a tortious injury exists and was caused by Defendants. Therefore, the beneficiaries have a mutual interest in the outcome of the arbitration.

Furthermore, the court finds the holdings in Valentino persuasive on this very issue. The Court in Valentino ruled that the wrongful death claimants in that case were bound by the decedent's assumption of all liability by signing a liability waiver form

for a triathlon. The wrongful death claimants, therefore, could not succeed on their claims because the decedent assumed all risk; there could not be a tortious injury. Although the facts are different, the mutual interest is the same. The wrongful death claimants in Valentino were precluded from presenting their claims because a tortious injury did not exist. In that case and the instant matter, privity exists where both actions are dependent upon the same finding. The third prong of collateral estoppel is satisfied.

4. The Party Against Whom Collateral Estoppel Is Asserted Had a Full and Fair Opportunity to Litigate the Issue in the Prior Action

First, Plaintiff argues that the estate did not have a full and fair opportunity to litigate its corporate negligence claims, that they were not litigated in the arbitration, and that Judge Caruso did not make any findings based on these theories. (Plaintiff's Response, supra, at P.17). However, after reviewing the transcript of the arbitration, Plaintiff's counsel argues that "the nursing home itself was negligent under the theory of corporate negligence." (Id., at Exhibit D [Transcript of Arbitration Proceedings] at P. 9 L. 17-18).[3] The court cannot see how Plaintiff was unable to litigate its corporate negligence claim, along with all of its other claims, in the arbitration when counsel discusses corporate negligence in his opening statement.

Next, Plaintiff argues that because the wrongful death beneficiaries were not compelled to arbitration and have the Constitutional right to a jury trial, they should not be estopped from having their day in court. Plaintiff is correct that wrongful death beneficiaries have the right to have their claims heard by a jury trial and that a court cannot deny their right to such under the Constitution by sending their claim to arbitration.[4] However, this court must weigh the rights of Plaintiffs and Defendants alike. Defendants have the right to assert their defense of collateral estoppel, which is a highly recognized defense to claims being heard in a jury trial setting.

The court in Frog Switch gives guidance on what constitutes an opportunity a litigant had to have their claims heard in a prior action. First, the court explains that there is no hard and fast rule: "[b]ecause various forums (i.e., courts, agencies, arbitrators, etc.) invariably have their own procedural quirks, local procedural rules, internal operating procedures, and the like, the "full and fair opportunity" element could never be met because no two forums employ the exact same procedures." Frog Switch, supra, at P. 663.

Analyzing its own facts, the court in Frog Switch explains that its own Complainant had a full and fair opportunity to present his own claim before an arbitrator because Complainant had representation who argued his position, submitted his own testimony and testimony of other witnesses with full ability of cross-examination, had all available remedies upon a successful claim, the existence of procedural safeguards, the ability to participate in discovery and motions practice, the arbitration was subject to all relevant Pennsylvania Judicial Code, and the arbitrator issued a decision. (Id.)

The wrongful death claimants in the instant matter have extremely similar protections, opportunities, and high levels of participation that the Claimant had in Frog Switch. The arbitration consisted of several days of testimony which included expert witnesses on both sides, testimony by fact witnesses, and testimony by two wrongful death beneficiaries, Marie Glomb and Thomas Sofranko. The wrongful death beneficiaries are represented by the same counsel as the estate in the arbitration and argued the same legal issues. Prior to the arbitration, all parties participated in full discovery. The parties were allowed to direct and cross examine witnesses. The arbitration resulted in a detailed, thirteen-page opinion by a retired Court of Common Pleas Judge, who found in favor of SBNH. The fourth prong of collateral estoppel is fully satisfied.

Because all prongs of collateral estoppel have been met, Defendant's Motion for Summary Judgment will be granted on this basis.

III. Claimant's Wrongful Death Claim Fails Because Her Death Was Caused by Dementia

Defendants argue that the wrongful death actions should also be dismissed because Ms. Sofranko's death was factually caused by her dementia. This is because Ms. Sofranko's death certificate states the cause of death as dementia, Judge Caruso found that after reviewing medical records and expert testimony that Ms. Sofranko's Alzheimer's Disease caused her inability to eat or drink, and that Plaintiff's own experts do not refute that her Alzheimer's ultimately caused her death. (Defendant's Brief in Support, supra, at P. 24).

(a) General rule.--An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery.

42 Pa.C.S.A. §8301(a).

The wrongful death statute in Pennsylvania, 42 Pa.C.S.A. §8301(a), requires the existence of a wrongful act, neglect, unlawful violence, or negligence to recover damages; i.e., a tortious injury. Not only did Judge Caruso find no tortious act on the part of SBNH relating to Ms. Sofranko's death, the Plaintiff's own experts do not say that the actions of SBNH and SBCS negligently caused Ms. Sofranko's death.

A plaintiff in a medical negligence matter is required to present an expert witness who will testify, to a reasonable degree of medical certainty, regarding the standard of care (duty); that the acts of the physician deviated from the standard or care (breach); and that such deviation was the proximate cause of the harm suffered. Mitchell v. Shikora, 209 A.3d 307, 315 (Pa. 2019). None of the Plaintiff's expert witnesses say that Ms. Sofranko's death was caused by St. Barnabas. Nurse Wright, after a thorough examination of all of Ms. Sofranko's injuries, concluded that the nursing services at St. Barnabas fell below the standard of care, but never said that it was the ultimate cause of Ms. Sofranko's death. (See generally, Plaintiff's Response, supra, at Exhibit C [The Arbitration Opinion] and Exhibit E [Nurse Wright's Expert Report]). Dr. Mirza, the Plaintiff's physician expert, testified that the long-term outcome of Ms. Sofranko's dementia would not have been altered and does not state that St. Barnabas's actions caused her death. (Id. at Exhibit C [The Arbitration Opinion] and Exhibit F [Dr. Mirza's Expert Report).

The Plaintiff has not provided sufficient evidence or expert testimony proving that St. Barnabas caused Ms. Sofranko's death. Therefore, summary judgment will be granted on this basis because Plaintiff's wrongful death actions cannot be proven with sufficient expert testimony.

Conclusion

After viewing the record in the light most favorable to the Plaintiff, the court cannot find any other decision than to grant Defendants' Motion for Summary Judgement. While wrongful death beneficiaries have the Constitutional right to a jury trial, Defendants have the right to assert a collateral estoppel defense or a defense that Plaintiff has not provided sufficient expert testimony to support its wrongful death claims. In his arbitration decision, Judge Caruso concluded that there was no tortious injury that resulted in Ms. Sofranko's death by St. Barnabas. The arbitration resulted in a final judgement on the merits. All claims

in this case require the existence of a tortious injury to succeed. Because a fact-finder found no tortious injury, collateral estoppel applies. Summary judgement is granted and Plaintiff's claims will be dismissed with prejudice. An appropriate Order will follow.

BY THE COURT:
/s/The Hon. Philip A. Ignelzi

[1] The agreement was signed by signed by Ms. Sofranko's son, Thomas Sofranko, who was Ms. Sofranko's power of attorney at the time.

[2] The Court in Valentino addressed the issue of whether a liability waiver that was signed by a decedent could bar wrongful death claims by beneficiaries when the decedent waived all liability of the Defendant. The Court held that a beneficiary could not bring a wrongful death claim when the decedent waived liability concerning his injuries; finding that because a wrongful death claimant's rights to recover damages was wholly rooted in the defendant's alleged tortious conduct, the decedent assumed all risk. Although the Valentino case is factually different than our present matter, the Court finds this ruling influential in determining the recovery rights of beneficiaries.

[3] See generally Plaintiff's Response, Exhibit D [Transcript of Arbitration Proceedings] for several instances where Plaintiff's counsel argues that the St. Barnabas staff did not follow appropriate policies and procedures and question Nurse Wright on policies and procedures of St. Barnabas.

[4] Furthermore, as Appellee noted, compelling arbitration upon individuals who did not waive their right to a jury trial would infringe upon wrongful death claimants' constitutional rights. This right, as preserved in the Seventh Amendment of the United States Constitution, "is enshrined in the Pennsylvania Constitution," and "the constitutional right to a jury trial, as set forth in PA. CONST. art. 1, § 6, does not differentiate between civil cases and criminal cases." Bruckshaw v. Frankford Hospital of City of Philadelphia, 58 A.3d 102, 108–109 (Pa.2012). Denying wrongful death claimants this right where they did not waive it of their own accord would amount to this Court placing contract law above that of both the United States and Pennsylvania Constitutions. Commonwealth v. Gamble, 62 Pa. 343, 349 (1869) ("But that the legislature must act in subordination to the Constitution needs no argument to prove...."). Pisano, supra, at P. 661-62.