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[redacted] LAW FIRM, P.C.	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
	:	
Plaintiff,	:	DECEMBER TERM, [redacted]
	:	
v.	:	CIVIL ACTION NO. [redacted]
	:	
DAVID A. [redacted], M.D.	:	
	:	
	:	
Defendant / Counterclaim Plaintiff	:	
	:	
v.	:	JURY TRIAL DEMANDED
	:	
[redacted] LAW FIRM, P.C. and [redacted] [redacted], ESQ.	:	
	:	
Counterclaim Defendants	:	
	:	

DR. [redacted]'S BRIEF IN OPPOSITION TO [redacted]'S PRELIMINARY OBJECTIONS

Table of Contents

I. INTRODUCTION

Dr. David [redacted] ("Dr. [redacted]"), by and through his undersigned counsel, hereby presents the following brief in opposition to the Preliminary Objections filed by the [redacted] Law Firm (the "Law Firm") and [redacted], Esq. ("Mr. [redacted]") (collectively, "[redacted]") dated June 21, 2019.

II. BACKGROUND

Dr. [redacted] incorporates his Complaint herein by reference.

III. QUESTIONS PRESENTED

Question One: Should the Court dismiss Dr. [redacted]'s negligence claim where his Complaint clearly alleges that he would not have suffered the damages claimed "but for" [redacted]'s negligence?

Proposed Answer: No. *See supra,* Section IV.B.

Question Two: Should the Court dismiss Dr. [redacted]'s breach of fiduciary duty claim where the Complaint clearly alleges a breach of the fiduciary duties of care and loyalty, both generally and specifically, and well-established law provides that attorneys are fiduciaries and therefore subject to such claims?

Proposed Answer: No. *See supra,* Section IV.C.

Question Three: Should the Court scrutinize the weight and sufficiency of particular factual allegations on preliminary objections?

Proposed Answer: No. *See supra,* Section IV.D.

Question Four: Should the Court strike as vague certain paragraphs of the Complaint that [redacted] plucks out of context and proposes to evaluate in a vacuum, where the Complaint as

a whole clearly provides [redacted] with sufficient notice of the facts and claims against him such that he may frame a proper answer and defense?

Proposed Answer: No. *See supra,* Section IV.E.

Question Five: On the basis of Rule 408 (a trial-evidence rule that is facially inapplicable), should the Court strike as impertinent allegations regarding [redacted]'s fee-waiver proposal that clearly support a violation of [redacted]'s duty of loyalty and also give rise to an inference that [redacted] himself was painfully aware of his early mishandling of Dr. [redacted]'s matter as alleged in the Complaint?

Proposed Answer: No. *See supra,* Section IV.F.

Question Six: Should the Court "dismiss" Dr. [redacted]'s prayer for punitive damages and attorney's fees where [redacted]'s motion articulates the wrong standard, the damages claims are supported by the allegations of the Complaint and established law, and [redacted] has not and cannot claim any prejudice arising from such a garden variety *ad damnum* clause anyway?

Proposed Answer: No. *See supra,* Section IV.G.

IV. ARGUMENT

A. **Standard of Review**.

Under Pennsylvania law, preliminary objections should only be sustained in cases that are free and clear from doubt. *Bower v. Bower*, 531 Pa. 54, 57, 611 A.2d 181, 182 (1992). A court must overrule objections to a plaintiff's complaint if the complaint pleads sufficient facts which, if believed, would entitle the plaintiff to the relief sought. *Wilkinsburg Police Officers Ass'n v. Commonwealth*, 535 Pa. 425, 431, 636 A.2d 134, 137 (1993). When facing preliminary objections in the nature of a demurrer, the court must accept as true all material facts set forth in plaintiff's complaint, as well as all inferences reasonably deducible therefrom. *Youndt v. First*

Nat'l Bank, 868 A.2d 539, 542 (Pa. Super. 2005); *Vosk v. Encompass Ins. Co.*, 851 A.2d 162, 164 (Pa. Super. 2004).

B. **Dr. [redacted]'s Legal Malpractice Claim is Legally Sufficient**.

[redacted] first argues that Dr. [redacted]'s "legal malpractice" claim[1] must fail because Dr. [redacted] is required to plead and prove that he would have prevailed in the underlying litigation absent the negligence of [redacted]. [redacted] is incorrect, however, that such an allegation is necessary in the context of this case.

[redacted] begins his argument by citing to *Kituskie v. Corpsman*, 714 A.2d 1027, 1029-1030 (Pa. 1998), which (as [redacted] notes) provides as follows:

> To state a claim for legal malpractice, "a plaintiff/aggrieved client must demonstrate three basic elements: (1) employment of the attorney or other basis for a duty, (2) the failure of the attorney to exercise ordinary skill and knowledge, and (3) that such negligence was the proximate cause of damage to the plaintiff."

Id. There is no question but that the foregoing accurately summarizes the law in Pennsylvania relative to a claim for legal malpractice sounding in negligence, and Dr. [redacted] has no quarrel with the application of that legal standard to his negligence count herein.

Where [redacted] goes astray, instead, is in his reliance, in this case, on the following quotation from *Kituskie* (which was a very different sort of case): "a legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party

[1] It appears that [redacted] intends to refer by this argument solely to Dr. [redacted]'s negligence count. [redacted] does not appear to contest, however, that Dr. [redacted] has adequately stated a claim for legal malpractice sounding in contract. This makes sense, given that Pennsylvania law recognizes legal malpractice claims sounding in both contract and negligence. *See, e.g., McDonald v. McCreesh* (Pa. Super. Ct., 2018) ("an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large"); *Gorski v. Smith*, 812 A.2d 683, 694 (Pa. Super. 2002) ("when an attorney enters into a contract to provide legal services, there automatically arises a contractual duty on the part of the attorney to render those legal services in a manner that comports with the profession at large"); *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 570-571 (Pa. Super. 2007) (same); *Bansley v. Appleton* (Pa. Super. Ct., 2015) (same).

he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a 'case within a case')." *Id.* at 1030. The reason this quotation – and the familiar "case-within-a-case" standard it reflects – is inapposite is because the factual context herein is entirely different.

Kituskie was a classic litigation case that turned on the collectability of damages. In that context, it made perfect sense for the Court to summarize proximate cause as requiring proof of a "case within a case," because Kituskie could *only* prove that his lawyer's failure to bring suit actually damaged him if he would otherwise have won a collectible judgment in the underlying litigation. The whole case thus turned on fixed and historical facts.

By contrast, in this case Dr. [redacted] engaged [redacted] at the beginning of a two-year restricted period to represent him as to the enforceability of a restrictive covenant that was running during the pendency of [redacted]'s representation. Thus, unlike *Kituskie,* [redacted] engaged [redacted] to counsel him as to current and future harms caused by the enforcement of the restrictive covenant. Those harms continued to accumulate against Dr. [redacted] throughout the litigation. Irrespective of the ultimate adverse outcome of the underlying litigation, had [redacted] properly advised him, Dr. [redacted] would have attained a much more favorable resolution regarding his rights on that score. To give just a few examples, [redacted] should have pursued settlement discussions, filed a preliminary injunction motion, and properly advised Dr. [redacted] regarding the weaknesses in his claims. Had [redacted] done so, then one of two things would have occurred: Dr. [redacted] and Copit would have reached a resolution, or Dr. [redacted] would have realized he was stuck with the restrictive covenant much earlier and taken a different employment path. Indeed, [redacted] himself admits in his Preliminary Objections that, had a preliminary injunction been filed, the Court would have been "asked to consider [redacted]'s claims sooner." ([redacted] Memo of Law p.14); *see also, AAA INC. v. Allegheny General Hosp.*, 826

A.2d 886 (Pa. Super. Ct., 2003) (preliminarily enjoining employer from enforcing restrictive covenants, in part because irreparable harm arises where an employer seeks to bar an employee from "being able to earn a living in their chosen profession at the site that they wish to work").

Instead, [redacted] filed a Declaratory Judgment action that included a claim for damages, and then ignored the matter for more than a year -- leaving Dr. [redacted] in legal limbo throughout the entire two-year restricted period. [redacted] also miscounseled Dr. [redacted] regarding the strength of his case, and the likely ability to collect damages, and then (following a trial that resulted in an adverse verdict) clamored to collect a substantial legal fee for his defective "services." Altogether, this was about as bad an outcome as any lawyer could possibly have achieved in a case of this sort, and Dr. [redacted] intends to introduce expert testimony demonstrating that, with competent representation, it would have been avoided.

Because of [redacted]'s many opportunities to influence future facts as they developed, this case thus actually falls closer to one involving transactional legal malpractice – *i.e.*, one where there was no underlying litigation in the first place – than the classic litigation malpractice context which spawned the catchphrase "case within a case." And as in such cases, Dr. [redacted] can establish (unlike in *Kituskie*) that he would not have been injured but for [redacted]'s negligence *in spite of* the ultimate adverse outcome at trial.

Numerous courts have recognized precisely this line of reasoning. As the California Supreme Court explained in similar circumstances, "[t]he requirement that the plaintiff prove causation should not be confused with the method or means of doing so. Phrases such as 'trial within a trial,' 'case within a case,' 'no deal' scenario, and 'better deal' scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established." *Viner v. Sweet*, 30 Cal. 4 th 1232, 135 Cal.Rptr.2d 629, 70 P.3d 1046 (Cal., 2003); *see also, Rogers v. Zanetti*, 518 S.W.3d 394, 404 (Tex., 2017) ("But

malpractice claims do not always depend on ultimate victories. . . . Consequently, to the extent the lawyers argue that we always require a hypothetical showing of ultimate victory, they are mistaken").

The *Viner* court further explained that, regardless of context, a legal malpractice plaintiff fundamentally "must show that **but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result**." *Viner v. Sweet*, 30 Cal. 4th 1232, 135 Cal.Rptr.2d 629, 70 P.3d 1046 (Cal., 2003) (emphasis added). Or, stated differently, "[i]n both litigation and transactional malpractice cases, **the crucial causation inquiry is what would have happened if the defendant attorney had not been negligent**." *Id.*

Fundamentally, the *Viner* formulation is precisely the same "but for" test of proximate cause that is applied under Pennsylvania law, and as in *Viner*, the phrase "case within a case" merely constitutes catchy shorthand for the "but for" test when applied in certain litigation contexts (just not this one). *See, e.g., Ferencz v. Milie*, 535 A.2d 59, 517 Pa. 141 (Pa., 1987) (explaining that "proximate cause" in a legal malpractice case refers to the "but for" legal test); *Smith v. Morrison*, 47 A.3d 131, 2012 PA Super 105 (Pa. Super. Ct., 2012) (upholding jury charge that, "you must find that **but for the Defendant attorney's negligent conduct the Plaintiff would not have sustained the damages claimed**").

Other courts considering precisely this issue have reached the same conclusion. The Oregon court of appeals, for example, has explained as follows:

> In the more specific context of legal malpractice that occurred during the course of litigation, the general requirement that a plaintiff demonstrate that he or she would have obtained a more favorable result but for the negligence of the defendant has been referred to as a requirement of proving a "case within a case." It may well be that **the shorthand expression of "case within a case" makes sense only in the litigation context**, where it may be said that the malpractice occurred in an actual "case." But the underlying requirement—that a plaintiff demonstrate that, but for the malpractice of the defendant, he or she would have obtained a more favorable result—is not a special rule that applies only in litigation malpractice cases. **It is simply the application of the but-for causation requirement that applies in ordinary negligence cases**.

Watson v. Meltzer, 247 Or.App. 558, 270 P.3d 289 (Or. App., 2011) (internal citations omitted, emphasis added). Similarly, the U.S. Court of Appeals for the Seventh Circuit has acknowledged that proving the "case within a case" is unnecessary relative to transactional claims. *Nicolet Instrument Corporation v. Lindquist & Vennum*, 34 F.3d 453, 456 (7th Cir. 1994). As Judge Richard Posner of that court explained, "to withstand summary judgment … [a]ll [plaintiff] had to show was that a rational trier of fact, confronted with the evidence produced in the summary judgment phase of the litigation, could conclude that, yes, [plaintiff] had suffered some harm as a consequence of the law firm's negligence and could quantify that harm to a reasonable, which is not to say a high, degree of precision." *Id.* at 455.

Accordingly, [redacted]'s insistence that Dr. [redacted] must prove the "case-within-a-case" catchphrase in this case is misguided. Rather, that catchphrase accurately distills the "but for" causation test *only* in a litigation case (such as *Kituskie*) where the success of the malpractice claim hinges, necessarily, on the success of the underlying litigation. In the very different context of this case, what Dr. [redacted] must plead, instead, is simply the classic, and more general, "but for" causation that applies in every negligence case under Pennsylvania law – *i.e.*, that "but for the Defendant attorney's negligent conduct the Plaintiff would not have sustained the damages claimed." *Smith*, 47 A.3d at 136. Because Dr. [redacted] has clearly so pled – by alleging that he would not have suffered damages but for [redacted]'s negligence – [redacted]'s preliminary objections should be denied.

C. **Dr. [redacted]'s Breach of Fiduciary Duty Claim Is Legally Sufficient**.

[redacted] next argues that Dr. [redacted]'s breach of fiduciary duty claim is legally insufficient because, he says, such a claim requires a breach of the duty of loyalty, and no such breach has been pled herein. [redacted] is wrong on both counts.

To begin with, it is axiomatic that a claim for breach of fiduciary duty implicates *both* the duty of care, and the duty of loyalty. As our Superior Court has explained,

> The elements of a breach of fiduciary claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) that the defendant (a) negligently or intentionally failed to act in good faith and solely for the benefit of the plaintiff in all matters for which he or she was employed [*i.e.*, duty of loyalty] and/or (b) negligently or intentionally failed to use reasonable care in carrying out his or her duties [*i.e.*, duty of care]; (3) that the plaintiff suffered injury; and (4) that the defendant's failure (a) to act solely for the plaintiff's benefit and/or (b) to use the skill and knowledge demanded of him or her by law was a real factor in bringing about the plaintiff's injuries. See Pa.S.S.J.I. (Civ.) § 6.210 (2015); *see also Conquest v. WMC Mortgage Corp.*, 247 F.Supp.3d 618, 633 (E.D. Pa. 2017) (citation omitted); *Snitow v. Snitow*, 2016 WL 6916537, *9 (C.C.P. Philadelphia 2016), aff'd, 181 A.3d 1262 (Pa. Super. 2017) (unpublished memorandum) (citation omitted).

Riverside Mgmt. Grp., LLC v. Finkelman (Pa. Super. Ct., 2018). It is equally axiomatic that lawyers are subject to breach-of-fiduciary duty claims. As our Supreme Court has explained, "[o]ur common law imposes on attorneys the status of fiduciaries *vis a vis* their clients; that is, attorneys are bound, at law, to perform their fiduciary duties properly. Failure to so perform gives rise to a cause of action." *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 529 Pa. 241 (Pa., 1992).

Moreover, nothing in *Edwards v. Thorpe*, 876 F.Supp. 693 (E.D. Pa., 1995), upon which [redacted] relies exclusively in support of its argument, suggests anything remotely to the contrary. Rather, that case simply restated the obvious, which is that "[n]egligence in a fiduciary relationship implicates the duty of care, not the duty of loyalty." *Id.* at 694. As explained above, however, both duties (care and loyalty) inhere in the fiduciary relationship. Accordingly, Dr. [redacted] would properly state a breach of fiduciary duty claim against [redacted] (as a fiduciary under Pennsylvania law) even if his claims touched only on the duty of care and not also the duty of loyalty. It is clear (and [redacted] does not contest) that Dr. [redacted]'s allegations touch on the duty of care.

However, Dr. [redacted]'s Complaint also specifically references the duty of loyalty, and makes specific allegations that touch on the duty of loyalty directly. Most notably, Dr. [redacted] has alleged that [redacted] offered to waive his attorney's fees if Dr. [redacted] would agree to the terms of a settlement offer propounded to him by Copit. Based on this allegation, a jury could (rightly) conclude that [redacted] realized that he had mishandled the matter, and that the best way for him to sweep his mistake under the rug would be for Dr. [redacted] to settle with Copit and go away. As [redacted] no doubt knew perfectly well at the time (though he never told Dr. [redacted]), such a settlement would have barred Dr. [redacted] from suing [redacted] for malpractice downstream. *See Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991) (Pennsylvania's courts "will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed. . . . An action should not lie against an attorney for malpractice based on negligence or contract principles when that client has agreed to a settlement.") [redacted]'s action thus constituted a clear breach of the duty of loyalty, because it placed [redacted]'s personal interests in conflict with those of his client. Another example is [redacted]'s decision to ignore Dr. [redacted]'s matter for more than a year in favor of pursuits that better served his own interests at the time.

Accordingly, Dr. [redacted] has adequately pled a breach of fiduciary duty claim under both the duty of care and the duty of loyalty, and so [redacted]'s preliminary objection on this basis should be denied.

D. **[redacted]'s Attacks On Specific Evidentiary Allegations – *e.g.*, Preliminary Injunction, Settlement Opportunities, and Employment Advice – Are <u>Procedurally Improper As Well As Substantively Flawed</u>.**

1. **<u>Procedurally Improper</u>**.

[redacted] also attacks certain of Dr. [redacted]'s evidentiary allegations – relating to a preliminary injunction, settlement opportunities and employment advice – as being "legally

insufficient" and thus subject to demurrer under Rule 1028(a)(4). To begin with, however, such arguments pertain fundamentally to the weight of evidence, and are not properly raised by way of preliminary objection at all.

As our Superior Court has explained, "a preliminary objection in the nature of a demurrer is an assertion that a pleading fails to set forth a **cause of action** upon which relief can be granted." *Patrick McGuigan Roofing Co., Inc. v. Kallman*, 592 A.2d 1368, 405 Pa.Super. 586 (Pa. Super. Ct., 1991) (emphasis added). [redacted] does not, however, identify via this argument any specific "cause of action" that must fail. Instead, he merely quarrels with particular factual allegations on their merits. Quarrels about the merits of particular allegations, however, go to the weight and sufficiency of evidence rather than to the existence of a cause of action, and thus are properly addressed at trial rather than on a preliminary motion where, as here, the Court is constrained to "admit as true all well pleaded, factual averments and all inferences fairly deducible therefrom." *Acme Markets, Inc. v. Valley View Shopping Center, Inc.*, 493 A.2d 736, 342 Pa.Super. 567 (Pa. Super. Ct., 1985).

Accordingly, [redacted]'s preliminary objections on these grounds should all be denied for the simple and obvious reason that they are premature and procedurally improper.

2. **<u>Substantively Flawed</u>**.

Moreover, [redacted]'s attacks on each of these three specific evidentiary allegations are also substantively flawed. Each of the contested allegations clearly presents a material disputed factual issue for the reasons described in detail below -- the mere descriptions of which, moreover, further underscore the absurdity of [redacted]'s proposing to adjudicate them at the pleadings stage.

Preliminary Injunction

Relative to a preliminary injunction, the fundamental thrust of [redacted]'s lengthy argument is that Dr. [redacted] could not have prevailed anyway because "no reasonable likelihood of success on the merits existed." [redacted] Brief at 10. But [redacted] misses the point. Whether or not Dr. [redacted] would have won a preliminary injunction, filing one would have advanced Dr. [redacted]'s goals of clarifying whether or not he could legally work in Philadelphia so he could plan his next career steps. More specifically, filing a preliminary injunction motion would have generated one of only three possible outcomes: (1) a win, (2) a loss, or (3) a settlement. Any one of these outcomes would have provided Dr. [redacted] with much-needed guidance regarding his right of employment so he would not be left in legal limbo, and could instead move forward with the next phase of his surgical career without spending two years in purgatory and enduring career disruption thereafter.

Of course, there is also another possibility. [redacted] could simply have advised Dr. [redacted] early on of that which he now so emphatically insists – that "no reasonable likelihood of success on the merits existed." [redacted] Preliminary Objection pp. 10, 13. But rather than so counseling his client at the outset of the representation, he instead "failed to advise Dr. [redacted] in an adequate and timely fashion regarding the legal weaknesses in his claim." Compl. at ¶ 17. Instead of meeting that core responsibility, [redacted] ran up a six-figure bill and left his client in the dark regarding the likely outcome of his claims, all resulting in a trial that ended badly – and *predictably* so, [redacted] now insists.

Accordingly, the issue of [redacted]'s early handling of Dr. [redacted]'s representation, including but not limited to the failure to file a preliminary injunction, is a central point of contention between the parties. It involves nuanced factual and legal issues that will

undoubtedly be the topic of expert testimony a trial. There is certainly no basis for dismissing such a factual dispute on a preliminary motion.

Settlement Opportunities

Relative to settlement opportunities, [redacted] objects that Dr. [redacted]'s allegations regarding the possibility of settlement absent [redacted]'s negligence should be dismissed as speculative. This is, rather obviously, a fact-specific inquiry that is unsuitable for resolution on preliminary objections. Moreover, there is nothing legally inadequate in pleading that competent representation would "likely" have generated a settlement, a better employment path, and a more satisfactory resolution of Dr. [redacted]'s rights. On the contrary, "more-likely-than-not" is all Dr. [redacted] would have to prove to prevail on his claims even at trial, let alone to survive an initial motion to dismiss. *See McPeake v. William T. Cannon, Esquire, P.C.*, 553 A.2d 439, 381 Pa.Super. 227 (Pa. Super. Ct., 1989) (*"*[t]hese [*i.e.*, legal malpractice] elements must be proven by a preponderance of the evidence"); *Kituskie v. Corbman*, 714 A.2d 1027, 552 Pa. 275 (Pa., 1998) (applying preponderance standard).

Moreover, probabilistic assessments regarding what would "likely" have happened but for the attorney's negligence are inherent and unavoidable in legal malpractice cases (and, indeed, in most other negligence cases as well). As the *Viner* Court explained, "[d]etermining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not. . . . [T]he very idea of causation necessarily involves comparing historical events to a hypothetical alternative." *Viner,* 135 Cal.Rptr.2d at 637; *see also Rogers v. Zanetti*, 518 S.W.3d 394 (Tex., 2017) ("[w]hether a negligent lawyer's conduct is the cause in fact of the client's claimed injury requires an examination of the hypothetical alternative: What should have happened if the lawyer had not been negligent?); *Tomlinson v. Metro. Pediatrics, LLC*, 362 Or 431, 412 P.3d 133 (Or., 2018) ("[t]he but-for test of causation can be applied only

by comparing what happened with a hypothetical alternative"). Having botched Dr. [redacted]'s representation, then, [redacted] can hardly now argue that Dr. [redacted]'s claims should be dismissed, on the grounds that it may never be possible to know with 100% certainty what would have happened if [redacted] had instead done his job competently – especially since Dr. [redacted] need only prove a 51% likelihood of success to prevail at trial.

Accordingly, [redacted]'s objections to Dr. [redacted]'s claims based on lost settlement opportunities should be denied.

Alternative Employment

Relative to alternative employment opportunities, [redacted] argues that he "cannot be liable to [redacted] for any conduct in connection with [redacted]'s employment search because that went beyond the scope of their engagement." [redacted] Brief at 17. Once again, [redacted] is mistaken.

Dr. [redacted]'s Complaint clearly alleges that "[t]he purpose of the engagement was to favorably resolve Dr. [redacted]'s rights relative to his employment agreement with Copit in light of Dr. [redacted]'s desire to work in the Philadelphia area during the covered time frame from July 2016 to July 2018." Compl. ¶ 12. Moreover, this same goal was also reflected in the complaint that [redacted] filed on Dr. [redacted]'s behalf against Copit in the underlying litigation, which (for example) provided as follows:

> Plaintiff, David A. [redacted], M.D. ("Dr. [redacted]"), brings this action under Pa. R. 1. Civ. P. 1601 **to declare restrictive covenants in Dr. [redacted]'s Employment Agreement with defendant, Copit Plastic Surgery Associates, Ltd. ("Copit"), void under Pennsylvania law.** Nineteen months after hiring Dr. [redacted], Copit, a small plastic surgery private practice group, terminated him for not being a "good fit," not keeping up with office paperwork and other reasons unrelated to his surgical and clinical skills. Despite firing Dr. [redacted], **Copit has threatened legal action to restrain him from practicing a highly specialized area of medicine for two years at every major medical center in the Philadelphia area**, to impose a $350,000 liquidated damages penalty if Dr. [redacted] dares to care for local patients in need of his professional talents, and to otherwise deprive him of his livelihood. **Dr. [redacted] seeks a declaratory judgment, therefore, to enable him to care for patients and to pursue his chosen**

> **profession in Philadelphia**, and to prevent Copit from engaging in further anticompetitive conduct.

See Exh. 3 to [redacted]'s POs, Underlying Compl. at ¶ 1 (emphasis added). Clearly, Dr. [redacted]'s right and ability to obtain employment in Philadelphia over the next two years were central to his engagement of [redacted].

Against this backdrop, it is equally clear that [redacted]'s assertion that the representation had nothing whatever to do with Dr. [redacted]'s downstream employment rights over the ensuing two years is disingenuous at best. On the contrary, Dr. [redacted]'s right and ability to obtain such employment were at the core of the [redacted] engagement and the litigation it generated. Dr. [redacted]'s allegation that [redacted] was negligent in failing to clarify those rights during the pertinent two-year time period – and thereby hamstrung Dr. [redacted] in obtaining alternative employment during that same timeframe – is thus perfectly justified relative to the scope of [redacted]'s engagement.

Accordingly, [redacted]'s preliminary objection to such allegations should be denied.

E. **Dr. [redacted]'s Allegations Are Sufficiently Specific**.

[redacted] also avers that a handful of paragraphs in Dr. [redacted]'s Complaint lack sufficient specificity. [redacted] thus complains that these paragraphs violate *Connor v. Allegheny General Hospital*, 501 Pa. 308, 461 A.2d 600 (1983). This argument, too, lacks merit.

[redacted]'s reliance upon *Connor* is simply misplaced. Indeed, the Pennsylvania Superior Court further clarified *Connor* in *Reynolds v. Thomas Jefferson University Hospital*, 450 Pa. Super. 327, 676 A.2d 1205 (1996). There, the Superior Court discussed *Connor* and held that the key inquiry is whether or not an allegation allows the plaintiff to pursue an entirely different theory by amending its complaint to bring an entirely new cause of action. *See id.*; *see also Junk v. East End Fire Dept.*, 262 Pa. Super. 473, 490-91, 396 A.2d 1269, 1277 (1978) (stating that

new cause of action arises if amendment proposes different theory or different kind of negligence than that previously raised, or if operative facts supporting claim are changed). Given that Dr. [redacted]'s complaint already asserts the three classic causes of action in a legal malpractice case – negligence, breach of fiduciary duty, and breach of contract – it is simply disingenuous of [redacted] to claim some vague fear of being surprised downstream by an entirely new cause of action.

[redacted] further incorrectly claims -- as did the defendant in *American States Ins. Co. v. State Auto Ins. Co.*, 721 A.2d 56 (Pa. Super. Ct., 1998) -- that, because of *Connor*, "[d]efendants are required to move to strike these vague allegations, or [redacted] may otherwise be permitted to assert other new counterclaims at later stages of this litigation." [redacted] Brief at 19. But, as the Superior Court explained in *American States*, "[t]his is an erroneous reading of *Connor*." *Id.* *Connor* stands, instead, merely for the unremarkable proposition that "if a defendant does not understand what an allegation means it could file preliminary objections and move for a more specific pleading or move to strike that portion of the complaint." *Id.*

Dr. [redacted]'s Complaint is clearly specific enough, however, to provide [redacted] with notice of the facts and claims against him, and for him to frame a proper answer and defense. In arguing otherwise, [redacted] improperly plucks particular paragraphs out of their proper context in the complaint – generally, paragraphs that summarize or introduce more specific allegations – but all of the challenged paragraphs are perfectly clear when read in context. [redacted] cannot look exclusively at individual paragraphs of Dr. [redacted]'s Complaint in blinkered fashion, without also considering the other paragraphs in the Complaint that supplement and relate to the selected paragraphs.

Moreover, in a complaint, a plaintiff is required only to state the "material facts on which a cause of action is based... in a concise and summary form." Pa.R.C.P. 1019(a). This rule has

been interpreted to require that the complaint give notice to the defendant of an asserted claim, and synopsize the essential facts to support it. *Krajsa v. Keypunch, Inc.*, 424 Pa. Super. 230, 235, 622 A.2d 355, 357 (1993). A complaint is sufficiently specific if it provides the defendant with enough facts to enable the defendant to frame a proper answer and prepare a defense. *Smith v. Wagner*, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991); *Milk Mktg. Bd. v. Sunnybrook Dairies, Inc.*, 29 Pa. Cmwlth. 210, 370 A.2d 765 (1977).

Applying these well-established principles herein, Dr. [redacted]'s complaint, when read in its entirety and in context, is plenty specific enough to place [redacted] on notice of the claims against him such that he may prepare a defense. [redacted]'s preliminary objection on this ground should thus be denied.

F. **Dr. [redacted]'s Allegations Regarding [redacted]'s Offer To Waive Fees Is <u>Highly Pertinent</u>.**

[redacted] further objects that Dr. [redacted]'s allegations relating to his offer to waive fees should be stricken as scandalous and impertinent. But [redacted] is wrong – the allegations are highly pertinent – and so his objection should be denied.

Scandalous averments consist of "any unnecessary allegation which bears cruelly upon the moral character of an individual, or states anything which is contrary to good manners or anything which is unbecoming to the dignity of the court to hear, or which charges some person with a crime, not necessary to be shown." *Ellis v. Nat'l Capitol Life Ins. Co.*, 35 Pa. D. & C.2d 490, 493-94 (Montg. 1964). Impertinent averments have been defined as "immaterial and inappropriate to the proof of the cause of action." *Dept. of Envtl. Res. v. Peggs Run Coal Co.*, 423 A.2d 765, 769 (Pa. Cmwlth. Ct. 1980). To be relevant, however, evidence must (only) have "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Pa. R.E. 401. *Accord,*

Com. v. Scott, 480 Pa. 50, 54, 389 A.2d 79, 82 (1978). Further, "[t]he right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice." *Com. v. Hartford Acci. & Indem. Co.*, 396 A.2d 885, 888 (Pa. Cmwlth. Ct. 1979).

Applying these standards, it is clear that [redacted]'s objection fails. To begin with, [redacted] mischaracterizes the allegation at issue. [redacted] did not offer to waive his initial fees as part of a settlement with Dr. [redacted]; rather, [redacted] offered to waive those fees if Dr. [redacted] would accept a settlement offer that *Copit* had extended to Dr. [redacted]. As such, Rule 408 does not apply on its face, because there was never any attempt to compromise a claim. It does not apply, as well, because Dr. [redacted] is not seeking to "disprove the validity or amount of a disputed claim." Rather, Dr. [redacted] invokes the proposal to demonstrate [redacted]'s breach of fiduciary duty in seeking to coerce Dr. [redacted] to accept a settlement that he knew would likely have served forever to conceal his own mishandling of the case to that point. Conveniently, it would also have barred Dr. [redacted] from suing [redacted] for malpractice downstream. *See supra* Section IV.C. Clearly, [redacted] should not have been negotiating his own fee at the same time he was negotiating a settlement for Dr. [redacted], and should not have attempted to coerce his client to surrender his own rights for the benefit of the lawyer. For that reason, the evidence is relevant.

Moreover, [redacted] seems once again to have mistaken the current procedural posture of this matter. Rule 408 is a rule of evidence that is properly applied *at trial*, not grounds for pre-adjudicating an allegation in a party's pleading on a preliminary motion. And finally, [redacted] can show no improper prejudice that will arise unless the Court strikes the allegation as impertinent, particularly since he has already said he will deny it.

For all these reasons, [redacted]'s motion to strike the allegation should be denied.

G. [redacted]**'s Objections To Specific Elements of Damages – Namely, Punitive Damages and Attorney's Fees – Are Also Procedurally Improper and <u>Substantively Flawed</u>.**

1. **<u>Procedurally Improper</u>**.

[redacted]'s next objection is that Dr. [redacted]'s claims for punitive damages and attorney's fees are "legally insufficient" and so should be dismissed based on Rule 1028(a)(4). While [redacted] presents these objections as demurrers, such a challenge is procedurally improper for the same reasons as [redacted]'s prior "demurrer" to factual allegations. *See supra,* Section IV.D. That is, neither punitive damages nor attorney's fees are "causes of action" susceptible to demurrer but, rather, are damages sought based upon a cause of action. *See Hudock v. Donegal Mut. Ins. Co.*, 264 A.2d 668, 438 Pa. 272 (Pa., 1970) ("[p]reliminary objections in the nature of a demurrer are an inappropriate means by which to challenge the legality of the damages sought in a complaint"). But unlike [redacted]'s prior "demurrer" to particular factual allegations (which was irredeemably flawed), [redacted] *could*, in theory, have properly presented a legal challenge to Dr. [redacted]'s damage claims as an objection based upon the "inclusion of . . . impertinent matter." Pa.R.C.P. No. 1028(a)(2). *Id.* Accordingly, Dr. [redacted] will address the objections on that basis below, in the event the Court is willing to overlook [redacted]'s procedural error and consider them anyway (though it should instead simply deny them as wrongly presented). The standard for an objection based on impertinence is described above. *See supra* Section IV.F.

2. **<u>Substantively Flawed</u>**.

Besides being procedurally improper, [redacted]'s objections to Dr. [redacted]'s factual averments are also baseless.

As to punitive damages, the standard is well known. Punitive damages are awarded for outrageous conduct -- that is, for acts done with "an evil motive or 'in reckless indifference to the rights of others."' *Scampone v. Grane Healthcare Co.*, 11 A.3d 967, 991 (Pa. Super. 2010). For

example, punitive damages may be awarded if the actor's conduct was wanton, willful, or exhibited a reckless indifference to the rights of others. *Id.* Wanton negligence, as distinguished from ordinary negligence, "is characterized by a realization on the part of the tortfeasor of the probability of injury to another, and a reckless disregard of the consequences."

Discussing the concept of "reckless indifference," the Pennsylvania Supreme Court has held that punitive damages may be assessed where a plaintiff adduces "evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk." *Hutchison ex rel. Hutchison v. Luddy*, 870 A.2d 766, 582 Pa. 114 (Pa., 2005). The Court further reasoned that neither law nor logic "prevent[s] the plaintiff in a case sounding in negligence from undertaking the additional burden of attempting to prove, as a matter of damages, that the defendant's conduct not only was negligent but that the conduct was also outrageous, and warrants a response in the form of punitive damages." *Id.* at 124-125. Actual knowledge or evil intent is not a requirement – rather, only an appreciation by the actor that his conduct might substantially increase the risk of serious harm to another in a perceptible way. *See e.g., Hall v. Jackson*, 2001 Pa. Super. 334, 799 A.2d 390, 403 (2001).

Moreover, Pennsylvania's appellate courts have expressly recognized the availability of punitive damages in legal malpractice cases. *See, e.g., Rizzo v. Haines*, 520 Pa. 484 (1989) (awarding punitive damages for attorney malpractice); *Sokolsky v. Eidelman*, 93 A.3d 858 (Pa. Super. Ct., 2014) (holding that punitive damages were potentially available to legal malpractice claimant and remanding for reconsideration in light of that principle).

Applying these principles herein, it is clear that Dr. [redacted]'s claim for punitive damages is not impertinent. Dr. [redacted] has alleged that he came to [redacted] precisely to resolve his employment rights during the two-year period of restriction. [redacted] is an experienced lawyer

who knew this perfectly well, and also knew that Dr. [redacted] was a skilled and promising surgeon who had made an enormous personal investment in cultivating his medical skills, and whose blossoming career would be nipped in the bud if he were sidelined for two years. Nevertheless, [redacted] did essentially nothing for more than a year, allowing his client to suffer on account of his delay. Such behavior easily qualifies as "reckless indifference" or "wanton negligence" for purposes of assessing punitive damages, especially, as here, at the pleadings stage. Likewise, [redacted]'s attempt to coerce Dr. [redacted] into accepting a settlement with Copit further establishes his susceptibility to a punitive damages claim. Accordingly, Dr. [redacted]'s claim for punitive damages should not be stricken as impertinent.

The same is true relative to Dr. [redacted]'s claim for attorney's fees. Dr. [redacted] does not dispute that "[t]he general rule is that the parties to litigation are responsible for their own counsel fees and costs unless otherwise provided by statutory authority, agreement of parties, or some other recognized exception." *Cresci Const. Services, Inc. v. Martin*, 64 A.3d 254, 266 (Pa. Super. 2013) (*quoting Cher-Rob, Inc. v. Art Monument Co.*, 594 A.2d 362, 363 (Pa. Super. 1991)). However, Pennsylvania does provide by statute and rule of court for the recovery of attorney's fees from an adversary in some instances. *See, e.g.*, 42 Pa. C.S. § 2503 (6), (7), (9) (attorney's fees may be awarded for certain improper litigation conduct); Pa. R. Civ. P. 1023.1, 1023.4 (attorney's fees may be awarded for improper litigation conduct); Pa. R. Civ. P. 4019(g) (attorney's fees may be awarded for improper discovery conduct). Obviously, it would be premature to decide whether such provisions apply herein at this stage, but Dr. [redacted] must at least preserve the possibility of such claims in his initial pleading.

More importantly, Dr. [redacted] further submits that this case falls under the judicially-created exception to the "American Rule" by which a client who successfully sues its attorney

for legal malpractice may recover as compensatory damages from its attorney-adversary the fees that the client incurred in prosecuting the malpractice action against the attorney.

The policy basis for this common-law exception has been particularly well articulated under New Jersey law (though, as we show below, the exception has also been applied under Pennsylvania law). *See Saffer v. Willoughby*, 143 N.J. 256, 670 A.2d 527 (1996). The New Jersey Supreme Court has itself summarized the *Saffer* holding thus:

> In *Saffer*, we held that "a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred ... in prosecuting [a] legal malpractice action." *Saffer, supra*, 143 N.J. at 272, 670 A.2d 527. Saffer involved a fee dispute between an attorney and a former client. *Id.* at 260, 670 A.2d 527. . . . We considered the client's argument that the attorney should be prohibited from recovering any fee proximately related to the attorney's negligence, if proved. *Id.* at 269, 670 A.2d 527. One aspect of that issue was whether the legal expenses incurred by the client in recovering a favorable verdict against the attorney should be considered consequential damages. *Ibid.* In evaluating those questions, we emphasized that a client is entitled to recover for losses that are proximately caused by an attorney's negligence. We noted also that the purpose of a legal malpractice claim is to put the client in as good a position as he or she would have been if the attorney had performed competently. *Id.* at 269-71, 670 A.2d 527. Applying those tenets, we ruled that "[o]rdinarily, an attorney may not collect attorney fees for services negligently performed." Id. at 272, 670 A.2d 527. Moreover, we determined that a negligent attorney could be held responsible for the reasonable legal expenses and attorneys' fees incurred by a former client who successfully asserted a legal malpractice claim. *Ibid.* In so doing, we reasoned that "[t]hose are consequential damages that are proximately related to the malpractice[,]" and that "unless the negligent attorney's fee is determined to be part of the damages recoverable by a plaintiff, the plaintiff would incur the legal fees and expenses associated with prosecuting the legal malpractice suit." *Ibid.*

Packard-Bamberger & Co., Inc. v. Collier, 771 A.2d 1194, 167 N.J. 427 (N.J., 2001) ("we hold that a successful claimant in an attorney-misconduct case may recover reasonable counsel fees incurred in prosecuting that action"); *Bailey v. Pocaro & Pocaro*, 305 N.J.Super. 1, 6, 701 A.2d 916 (App.Div.1997) ("a plaintiff who is economically injured by an attorney's legal deficiency should be made whole.... [T]he concept of 'wholeness' includes the attorney's fees and costs to pursue the malpractice claim").

These same principles apply equally under Pennsylvania law. *See, e.g., Patel v. Vaccaro* (E.D. Pa., 2018) ("attorneys' fees -- both amounts paid by the client to the negligent attorney as

well as expenses incurred by the client to prosecute its malpractice claim against the attorney -- are an item of damages in a legal malpractice claim") *citing Post v. St. Paul Travelers Ins. Co.*, 691 F.3d 500, 520 (3d Cir. 2012) (and cases cited therein) (applying Pennsylvania law). Accordingly, [redacted]'s objections to Dr. [redacted]'s claims for attorney's fees should be denied.

Finally, and as explained previously, a party seeking to strike allegations as impertinent must establish prejudice. [redacted] has not even tried to meet this requirement, and, if he had tried, would certainly have failed. Prayers for relief seeking punitive damages and attorney's fees are so standard they can hardly be considered "prejudicial." Accordingly, there is no reason whatever for this Court to consider such objections at this stage of proceedings, and there is considerable risk that, by doing so, it will be rushed into a judgment that is erroneous. [redacted]'s objections to punitive damages and attorney's fees should thus be denied.[2]

V. CONCLUSION

For the foregoing reasons, Dr. [redacted] respectfully requests that the Court deny [redacted]'s preliminary objections.

Respectfully Submitted,

E. McCord Clayton, Esq.
Attorney for David [redacted]

Dated: July _____, 2019

[2] Dr. [redacted] seeks leave to amend should the Court find merit in any of [redacted]'s objections despite Dr. [redacted]'s opposition.

CERTIFICATE OF SERVICE

I hereby certify that, on the below-referenced date, I served the foregoing document and any supporting exhibits via ECF (assuming functionality has been restored) on [redacted] P. [redacted], Esq., Ralph J. Kelly, Esq., Alesia Sulock, Esq., and Christopher Dougherty, Esq., or, alternatively, via email and/or first-class mail addressed as follows:

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