

RECENT DEVELOPMENTS IN PENNSYLVANIA MEDICAL MALPRACTICE LAW

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A. ADDITIONS TO PENNSYLVANIA RULES OF CIVIL PROCEDURE

1. Certificate of Merit

Pennsylvania Rules of Civil Procedure 1042.1 through 1042.8 are effective for actions filed on or after January 27, 2003 notwithstanding that the alleged malpractice occurred prior to the enactment date. Three of the rules were slightly amended in February and December of 2005. The rules apply to all "healthcare providers" as defined in the MCARE Act, 40 P.S. § 1303.503, which includes primary healthcare centers, personal care homes, nursing homes, birth centers, hospitals, physicians, nurse midwives and podiatrists, and any corporation, university or educational institution licensed or approved by the Commonwealth to provide healthcare in those roles. The rules also apply to chiropractors, dentists, nurses, pharmacists, physical therapists, psychologists and veterinarians, as well as certain non-medical professionals.

These new rules require a certificate of merit to be filed within 60 days of the filing of a Complaint in any case where it is alleged that the professional deviated from a required professional standard of care. Such a certificate of merit must state wither one of three things, that an appropriate licensed professional provided a written statement that the treatment was below the standard of care and caused harm to the plaintiff, or that a claim against a professional defendant is based solely on allegations that other professionals for whom the defendant is responsible were negligent (a vicarious liability claim - there must be a certificate for the agent even if the agent is not a named defendant), or that expert testimony is unnecessary for prosecution of the claim. The certificate itself only need state that there has been a report by a licensed professional but it does not need to identify what the statement says specifically or the identity of the licensed professional. The Superior Court has affirmed that this rule can be applied retroactively to a situation where the malpractice occurred before the enactment date. *Warren v. Folk*, 886 A.2d 305 (Pa. Super. 2005).

In December 5, 2005, the Pennsylvania Supreme Court amended Rules 1042.3(b) and 1042.8 to clarify that where a plaintiff in a medical malpractice case is raising claims against a defendant for both the defendant's own independent actions and for the actions of others for whom the defendant is responsible, the plaintiff must file certificates of merit for each claim or a single certificate of merit that references both claims.

If no certificate is timely filed then a praecipe can be filed by the defendant which will result in automatic dismissal of the claim for *non pros* (failure to prosecute). Under the holding in *Moore v. Luchsinger*, 862 A.2d 361 (Pa. Super. 2004), a praecipe to dismiss may be filed after the 60th day, but only if no certificate has been filed by the plaintiff. Accordingly, it is incumbent upon defense attorneys to file on the 61st day to avoid a plaintiff from being able to file after the 60th day simply because a praecipe was not filed. However, under these rules, a plaintiff may ask for more time to file the praecipe, particularly if the plaintiff has not been supplied the professional's medical records, and the filing of a motion before the 60th day tolls the ability of the defendant to file a praecipe for *non pros*. Presumably the certificate may be filed as soon as the motion is ruled upon unless the order provides additional time.

Even if a case is not expressly stated in the complaint to be a professional negligence case, the procedure suggested by the rule, *non pros* is still proper where the substance of the allegations assert a claim for professional malpractice. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007); *Varner v. Classic Communities Corp.*, 890 A.2d 1068 (Pa. Super. 2006); *Grossman v. Barke*, 868 A.2d 561 (Pa. Super. 2005). There must be a certificate for a claim against any type of entity which is sued for the actions of a licensed professional as defined by the rules. *Dobos v. Pennsbury Manor*, 878 A.2d 182 (Pa. Commw. 2005). However, where a hospital is sued for failure to perform a clerical function like forwarding diagnostic films, a certificate is not necessary. *Rostock v. Anzalone*, 904 A.2d 943 (Pa. Super. 2006). But a claim that a patient was allowed to fall while she was being transported is a professional negligence and not a premises liability claim, thus requiring a certificate. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007). A pure informed consent claim requires a certificate. *Pollock v. Feinstein*, 2006 Phila. Ct. Com. P. LEXIS 167 (2006).

After a *non pros* is entered, a dismissed plaintiff may still file a petition to open and contend that there is a reasonable explanation or legitimate excuse for the failure to timely submit the certificate. *Womer v. Hilliker*, 908 A.2d 269 (Pa. 2006). Illness and death of an in-law is a legitimate excuse. *Almes v. Burket*, 881 A.2d 861 (Pa. Super. 2005). Ignorance of the rule, however, is *not* a legitimate excuse, even for a *pro se* plaintiff. *Hoover v. Davila*, 2004 Pa. Super. 314 (2004). Nor is uncertainty about whether the case states a professional negligence claim. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007).

In the *Hoover* case, the court also held that the 60-day period runs from the initial filing of the complaint even if it is later reinstated due to service problems. The 60-day period also runs from the initial complaint even if there is an amended complaint. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007); *O'Hara v. Randall*, 879 A.2d 240 (Pa. Super. 2005). A Common Pleas judge in Philadelphia has published two opinions holding that "administrative oversight" or an attorney being out of town are not reasonable excuses for failing to file the certificate. *Vansouphet v. Justman*, 2005 Phila. Ct. Com. Pl. LEXIS 208 (Phila. C.P. 2005) and *Feiner v. Temple Northeastern Hosp.*, 2005 Phila. Ct. Com. Pl. LEXIS 102 (Phila. C.P. 2005).

An expert report served in lieu of filing a certificate of merit does not meet the certificate of merit requirement but it is within the trial judge's discretion whether to grant a petition to open under such circumstances; failure to open the judgement will not be reversed. *Womer v. Hilliker*, 908 A.2d 269 (Pa. 2006); *Harris v. Neuberger*, 877 A.2d 1275 (Pa. Super. 2005). A certificate which is not docketed does not suffice to require opening the judgment. *Warner v. Univ. of Pa. Health Sys.*, 874 A.2d 644 (Pa. Super. 2005). However, the failure to cite the proper portion of the rule may be excused. *Kennedy v. Butler Memorial Hosp.*, 901 A.2d 1042 (Pa. Super. 2006).

Under the applicable rules, during the time before a certificate is filed, the professional does not need to answer the complaint, nor may any discovery be obtained from the professional, although requests for production of documents and for entrance upon land are allowed.

If the case is concluded by voluntary dismissal, defense verdict or court order dismissing the case, the defendant may then ask to see a copy of the written statement obtained from the licensed professional upon which the certificate of merit was based. If the underlying written statement is not adequate after the case has been concluded favorably to the defendant, then the defendant can seek sanctions against the plaintiff.

This certificate of merit has been held to also be required in a malpractice case in federal court although the mandated procedures, including entry of judgment of *non pros* by praecipe, were not adopted and a more lenient procedure was permitted before a case could be dismissed. *Scaramuzza v. Sciolla*, 345 F.Supp. 2d 508 (E.D. Pa. 2004). A similar holding was made in *Abdulhay v. Bethlehem Medical Arts*, 2005 U.S. Dist. LEXIS 21785 (E.D. Pa. 2005). In *Velazquez v. UPMC Bedford Memorial Hosp.*, 328 F.Supp. 2d 549 and 338 F. Supp 2d 609 (W.D. Pa. 2004), the requirement and the state procedures were held to apply.

Any complaint alleging deviations from the standard of care against a medical provider must have specific language identifying it as such. A defendant may raise by preliminary objections the failure to include this language. But appellate courts have held that preliminary objections are not required before the defendant could enter a judgment of *non pros* where the complaint on its face asserted a claim against a licensed professional even though the Complaint did not state specifically that it was a professional liability claim. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007); *Varner v. Classic Communities Corp.*, 890 A.2d 1068 (Pa. Super. 2006); *Yee v. Roberts*, 878 A.2d 906 (Pa. Super. 2005); *Dobos v. Pennsbury Manor*, 878 A.2d 182 (Pa. Commw. 2005); *Koken v. Lederman*, 840 A.2d 446 (Pa. Commw. 2004).

2. Venue

A revision to Pennsylvania Rule of Civil Procedure 1006 applies to actions filed on or after January 1, 2002. It applies to all "healthcare providers" as defined in the MCARE Act, 40 P.S. § 1303.503, which includes primary healthcare centers, personal care homes, nursing homes, birth centers, hospitals, physicians, nurse midwives and podiatrists, and any corporation, university or educational institution licensed or approved by the Commonwealth to provide healthcare in those roles, but not to chiropractors, dentists, nurses, pharmacists, physical therapists, psychologists and veterinarians or non-medical professionals.

A medical professional liability claim against a healthcare provider can only be brought in the county in which the cause of action arose. Where there are multiple healthcare providers as defendants, the case may be brought in any county where there can be venue against one of the providers. If non-healthcare providers are defendants, the action must still be brought in a county where a healthcare provider may be sued.

Olshan v. Tenet Health System, 849 A.2d 1214 (Pa. Super. 2004), held that the cause of action arises where the acts affecting the patient occurred, normally where the care was provided, and not where any corporate negligence (such as creation of policies) occurred. In *Peters v. Geisinger Medical Center*, 855

A.2d 894 (Pa. Super. 2004), it was held that the cause of action arises where the negligence occurred and not where the alleged injury to the patient occurred. The physician could only be sued where he negligently prescribed a drug and not where the patient suffered an allergic reaction, even though it was at her home in another county. Though a physician makes a telephone call from his home to another county regarding material care, venue does not lie in the county of residence. *Bilotti-Kerrick v. St. Luke's Hosp.*, 873 A.2d 828 (Pa. Super. 2005)

In *Searles v. Estrada*, 856 A.2d 85 (Pa. Super. 2004), it was held that where the medical care was provided in New Jersey the case must be dismissed. *Forrester v. Hanson*, 901 A.2d 548 (Pa. Super. 2006) held that where a physician was joined as a third-party defendant, but only for purposes of apportionment of liability, Rule 1006 did not apply.

3. Other procedural rules

New Pennsylvania Rules of Civil Procedure 1042.21 through 1042.51 are effective to actions pending as of March 29, 2004. The new rules apply to all "healthcare providers" as defined in the MCARE Act, 40 P.S. § 1303.503, which includes primary healthcare centers, personal care homes, nursing homes, birth centers, hospitals, physicians, nurse midwives and podiatrists, and any corporation, university or educational institution licensed or approved by the Commonwealth to provide healthcare in those roles, but not to chiropractors, dentists, nurses, pharmacists, physical therapists, psychologists and veterinarians or non-medical professionals.

These new rules provide special procedures for professional liability actions against healthcare providers in those counties where similar local procedures have not been promulgated (Philadelphia has such rules already, for instance). Under these rules, a healthcare provider may request a settlement conference or court-ordered mediation prior to exchange or expert reports. A mediation can be demanded but the demanding party must pay the costs of mediation. A party can request an order for production of expert reports and there are certain procedures for requesting expert reports. If expert reports are not produced after a court order, a case may be dismissed. The parties can request scheduling orders and pre-trial conferences.

New Pennsylvania Rule of Civil Procedure 1042.71 (which applies to cases against healthcare providers as defined above), and 4011 and 223.3 (which apply to all cases) were promulgated on August 20, 2004, effective October 1, 2004, for cases pending at that time.

These rules require a breakdown of verdicts into specific categories for past and future damages, limit discovery of anything which occurred during the course of mediation and create a new jury charge which spells out the components of non-economic damages, specifically delineating pain and suffering, embarrassment and humiliation, loss of ability to enjoy the pleasures of life and disfigurement. The charge also lists specific factors that jurors shall consider.

On September 17, 2004, the Supreme Court issued an order, effective to actions pending on December 1, 2004, against healthcare providers as defined above, which promulgates the new Pennsylvania Rule of Civil Procedure 1042.72. This rule allows a defendant to contend that a damage award for non-economic damages is excessive as one ground for post-trial relief. The rule provides guidance as to why a damage award might be considered excessive and allows the trial court to reduce an excessive award. If such a motion is pending, there cannot be an entry of judgment on a trial award.

B. MEDICAL CARE AVAILABILITY AND REDUCTION OF ERROR ACT (MCARE ACT)

The MCARE Act, 240 P.S. § 1303.101, et. seq., was signed into law on March 20, 2002, and replaced the old Health Care Services Malpractice Act entirely. With certain exceptions, the MCARE Act applies to causes of action which arose (that is, the underlying negligence occurred) on or after March 20, 2002. The Act applies actions against healthcare providers as defined above: primary healthcare centers, personal care homes, nursing homes, birth centers, hospitals, physicians, nurse midwives and podiatrists, and any corporation, university or educational institution licensed or approved by the Commonwealth to provide healthcare in those roles, but not to chiropractors, dentists, nurses, pharmacists, physical therapists, psychologists or veterinarians.

1. Patient safety

Certain sections, §§ 1303.303-1303-314, *effective May 19, 2002 or in accordance with applicable regulations*, apply to patient safety and provide authority within the Pennsylvania Department of Health to track adverse events and mandate reporting of adverse events.

2. Informed consent

Under the Act, the requirement of obtaining informed consent (and concomitant liability for not obtaining it) applies to surgeries, related administration of anesthesia, radiation or chemotherapy, blood transfusions, insertion of surgical devices or appliances and administration of experimental medication or devices. § 1303.504, *effective to cases pending as of May 19, 2002*. The patient must be given a description of “the risks and alternatives that a reasonably prudent person would require to make an informed decision as to that procedure”. Expert testimony is required to identify the risks of the procedures, their alternatives and the risks of those alternatives.

In order for a physician to be liable for failure to obtain informed consent, the patient must show that receipt of additional information would have been a substantial factor in the patient’s decision to undergo the procedure. As the standard is the risk what a reasonably prudent patient would require, the jury must consider this objectively, and not just by what the plaintiff later says would have been relevant. Also, the physician may be liable if he knowingly misrepresents his professional credentials, training or experience. *This last provision is effective only to causes of action arising on or after March 20, 2002.*

3. Punitive damages

Punitive damages may only be awarded where there has been “wilful or wanton misconduct, or reckless indifference to the rights of others”. § 1303.505, *effective to cases pending as of May 19, 2002*. Gross negligence is not sufficient. Punitive damages may not be awarded vicariously unless the party knew of and allowed the conduct. Punitive damages may not exceed 200 percent of the amount of compensatory damages. Also, 25 percent of a punitive award shall be paid to the MCARE Fund with the remaining paid to the plaintiff. *This last provision is effective only to causes of action arising on or after March 20, 2002.*

4. Affidavit of non-involvement

Under §1303.506, *effective to cases pending as of May 19, 2002*, a physician may be dismissed under an abbreviated procedure where she can provide an affidavit indicating that she had no involvement with the patient whatsoever. However, this tolls the statute of limitations and there are penalties for a false affidavit.

5. Advance payments

Under § 1303.507, *effective to cases pending as of May 19, 2002*, a carrier may advance a payment to a plaintiff without that being admissible in court or considered an admission of liability.

6. Collateral source rule

Plaintiffs may no longer recover damages for past medical expenses or lost earnings to the extent the loss was paid by public or private insurance prior to the trial. § 1303.508, *effective only to causes of action arising on or after March 20, 2002*. However, the total amount of medical expenses may be introduced to the jury, which must be the amount actually paid by insurance or directly under prior case law. First party insurance carriers have no right of subrogation or reimbursement from the plaintiff's tort recovery. Collateral source benefits do *not* include life insurance benefits, pension or profit sharing payments, deferred compensation payments, Social Security benefits, Medicaid payments and public benefits under an ERISA program.

7. Calculation of damages

There are a number of provisions regarding calculation of damages in § 1303.509, *effective only to causes of action arising on or after March 20, 2002*. There must be separate findings for past medical related expenses, past loss of earnings and past non-economic loss, future medical and related expenses, loss of future earnings and earning capacity and future non-economic loss. Future medical expenses will be paid quarterly based upon present value with adjustments for inflation and life expectancy. Periodic payments will terminate upon the death of plaintiff.

Loss of future earnings and earning capacity and non-economic losses will be assessed in a lump sum to be paid at the time of judgment. Under § 133.510, *effective only to causes of action arising on or after March 20, 2002*, future damages for loss of earnings or earning capacity shall be reduced to present value but plaintiff may introduce the effect of productivity and inflation over time.

However, under 1303.509, each party liable for future medical and related expenses shall fund them by means of annuity contract or other court-approved plan. Interest will not accrue on future payments. Future medical expenses may be paid by a lump sum if they do not exceed \$100,000. Once there has been funding of future medical costs by an annuity, the judgment may be discharged, although the court shall retain jurisdiction in the event of future disputes.

8. Preservation and accuracy of medical records

Under § 1303.511, *effective to cases pending as of May 19, 2002*, the patient's chart must be created simultaneously with the rendering of treatment or as soon as practically possible. Any subsequent additions must clearly identify the time and date of their entry. If a provider violates this provision, his medical license may be suspended or revoked. If a plaintiff can show an intentional alteration or destruction of records, a jury may be instructed that such alteration or destruction allows a negative inference.

9. Expert qualifications

This particular provision, § 1303.512, *is effective for testimony provided in cases pending as of May 19, 2002*. The retroactivity of this provision has been upheld by the Superior Court. *George v. Ellis*, 2006 Pa. Super. 306 (2006). This provision creates some strict requirements for qualification of experts. Medical expert testimony as to causation as well as standard of care will require an expert who has an unrestricted physician's license in any state and has been engaged in active clinical practice (even if retired at the time of trial) within the previous five years. The court may waive this requirement.

In regard to standard of care testimony as to a physician only (there is not any statutory requirement as to institutions), the expert must be substantially familiar with the applicable standard of care for the specific care in issue, practicing in the same sub-specialty as the defendant physician or a specialty "which has a substantially similar standard of care for the specific care at issue" and must be certified by the same board as the defendant if the defendant is certified. However, a court may waive the same specialty requirement if the court determines that the expert is trained in diagnosis or treatment of the applicable condition and the defendant physician provided care which was not within that physician's specialty or competence. The court may also waive the same speciality or board certification requirements if the court concludes that the expert, as the result of his or her active involvement in a clinical practice or full-time teaching in the same or a related field within the last five years, possesses sufficient training, competence and knowledge to provide testimony.

There have been recent cases regarding expert qualifications, most of them allowing the expert testimony of one specialist against another specialist in a related field. In *Smith v. Paoli Memorial Hospital*, 885 A.2d 1012 (Pa. Super. 2005), a general surgeon and an oncologist could testify against a gastroenterologist in a case alleging failure to diagnose a bowel cancer. In *Wexler v. Hecht*, 847 A.2d 95 (Pa. Super. 2004), *app. granted*, 879 A.2d 1258 (Pa. 2005), it was held that the trial court could not preclude a doctor who wasn't an emergency medicine physician from testifying in an emergency room case since the doctor did have training in emergency room medicine and this gave him enough of a basis to testify. In *Campbell v. Attanasio*, 862 A.2d 1282 (Pa. Super. 2004), *app. den'd*, 881 A.2d 818 (Pa. 2005), it was held that a psychiatrist who was not board certified could testify against a resident who was not board certified either. In *Est. of Herbert v. Parkview Hospital*, 854 A.2d 1285 (Pa. Super. 2004), *app. den'd*, 872 A.2d 173 (Pa. 2005), the Superior Court affirmed a trial court which allowed an internist to testify against a nephrologist.

In *Gartland v. Rosenthal*, 850 A.2d 671 (Pa. Super. 2004), the Superior Court reversed a trial court which held that a neurologist could testify against a radiologist reading films relating to neurological problems. In *B.K. v. Chambersburg Hospital*, 834 A.2d 1178 (Pa. Super. 2003), *app. den'd*, 847 A.2d 1276 (Pa. 2004), it was held that the trial court could not preclude a doctor who wasn't an emergency medicine physician from testifying in an emergency room case since the doctor did have training in

emergency room medicine and this gave him enough of a basis to testify. However, in *Yacoub v. Lehigh Valley Medical Associates*, 805 A.2d 579 (Pa. Super. 2002), *app. den'd*, 825 A.2d 639 (Pa. 2003), the Superior Court affirmed the trial court decision precluding a neurosurgeon from testifying about the standard of care of nurses and an internist in a hospital.

An expert must possess a medical license at the time of trial to be qualified to testify even if the expert were licensed when the negligence occurred. *Est. of Weiner v. Fisher*, 871 A.2d 1283 (Pa. Super. 2005); *Bethea v. John F. Kennedy Memorial Hospital*, 871 A.2d 223 (Pa. Super. 2005). In *George v. Ellis*, 2006 Pa. Super. 306 (2006), the Superior Court affirmed the trial court's preclusion of an expert who practiced in Canada and not the United States. An expert who can practice only under probationary terms from his state medical board is *not* considered as having an "unrestricted" license as required in § 512 and therefore may not testify. *Cimino v. Valley Family Medicine*, 2006 Pa. Super. 342 (Pa. Super. 2006).

The rule has been applied in a federal court. *Miville v. Abington Memorial Hosp.*, 377 F.Supp. 2d 488, *recon. den'd*, 2005 U.S. Dist. LEXIS 17153 (E.D. Pa. 2005).

10. Statute of repose

A new § 1303.513, *effective only to causes of action arising on or after March 20, 2002*, creates a seven-year statute of repose. This bars commencement of a lawsuit more than seven years after the date of the alleged tort. This applies even when the injury was discovered later, thus limiting the application of the discovery rule. However, this statute does not apply to foreign objects left in the patient's body or where there was affirmative misrepresentation or fraudulent concealment of the cause of death in the case of a wrongful death action. Also, it does not apply to minors who still may sue until their 20th birthday.

11. Venue

Another section, § 1303.514, requires the creation of a Commission on Venue which has now resulted in the change in civil rules described above.

12. Remittitur

In assigning a request for remittitur, that is, a reduction in the amount of a verdict, the trial court may consider the effect on the availability or access to health care in the community, and that trial court can be reversed if it could not take evidence on this subject. A trial court may also limit the amount of security. § 1303.515, *effective for cases pending as of May 19, 2002*. As noted above, a new Civil Rule 1042.72 has been promulgated to implement this statutory provision. In *Vogelsberger v. Magee-Women's Hospital*, 903 A.2d 542 (Pa. Super. 2006), the Superior Court upheld the trial court's discretion under § 1303.515 and Civil Rule 1042.72 in reducing a verdict. However, § 1303.515 does not apply to a health care provider which is sued for ordinary negligence and not professional medical negligence. *McManamon v. Washko*, 906 A.2d 1259 (Pa. Super. 2006).

13. Ostensible agency

Under § 1303.516, *effective only to causes of action arising on or after March 20, 2002*, a hospital can only be held vicariously liable for the actions of an individual health care provider if the plaintiff shows that a “reasonably prudent person in the patient’s position would be justified in the belief that the care in question was being rendered by the hospital or its agents”. A hospital may also be liable if the plaintiff can show that the care in question “was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents”. Evidence that a physician holds staff privileges is not sufficient to meet these tests. Note that the provision requires proof of the impression to a reasonably prudent person, that is, an objective standard.

14. Insurance changes

The MCARE Fund replaces the CAT Fund as of October 1, 2002. § 1303.712 to .714. For policies renewed in 2003, the primary limits are \$500,000 for a claim, and \$1.5 million for a provider with a \$2.5 million aggregate for hospitals. The primary limits are scheduled to increase from \$750,000 in the year 2006, and \$1 million in 2009, if the Commissioner of Insurance finds that such increases can be handled by the industry. The Fund shall have excess insurance over the primary up to \$1 million. The MCARE Fund will be phased out by the year 2009, if primary carriers are permitted to insure to \$1 million by then, although assessments will continue until all Fund liabilities have been paid. The Act, § 1303.731 to .733, also creates the Joint Underwriting Association, which is a consortium of all insurers authorized to write malpractice insurance in the Commonwealth and which shall provide coverage to all health care providers who cannot “conveniently” obtain private insurance at rates which are not excessive compared to other providers.

A new provision, § 1303.715, provides for MCARE Fund defense and coverage of claims occurring more than four years after the negligence, similar to the old Section 605. Notice from the private carrier must be provided to the Fund within 180 days of the date when the healthcare provider first obtained notice of the claim. Where multiple treatments took place within four years, the private carrier must defend and indemnify. The Fund may seek indemnity against the provider or insurer if the delay in the filing of the claim is the result of the wilful concealment by the provider or insurer. This assumption of defense and liability by the Fund shall be phased out for policies issued on or after January 1, 2006 for torts that occurred after December 31, 2005.

In 2004, the Fund is charged with calculating separate arrangements for podiatrists. §1303.716.

Within 60 days of receipt of complaint, physicians must report the suit to the State Board of Medicine or the State Board of Osteopathic Medicine. §1303.903. Reports of settlements and verdicts which have been required to be made to the National Practitioner Data Bank must now also be made to the appropriate licensing board. §1303.746.

C. FAIR SHARE ACT

The legislature passed the Fair Share Act, codified at 42 Pa. C.S. §7102, on June 19, 2002, effective to causes of action that arise on or after August 20, 2002. The Act would prevent the application of joint and several liability to any tortfeasor found to be less than 60 percent liable. This law would also allow

allocation to parties which had settled with the plaintiff, but were not parties in the case, if sufficient proof is provided. This does not include employers who cannot be found liable under workers' compensation laws. There are also other exceptions which include claims of intentional torts and intentional misrepresentation.

However, the Act was struck down by the Commonwealth Court because it was passed in an unconstitutional manner. *DeWeese v. Weaver*, 880 A.2d 54 (Pa. Commw. 2005), *aff'd per curiam*, 906 A.2d 1193 (Pa. 2006).

D. RECENT CASE DECISIONS

1. Duty of care

A trial court may but need not charge the jury that a physician cannot be liable for an error in judgment. *Schaaf v. Kaufman*, 850 A.2d 655 (Pa. Super. 2004); *D'Orazio v. Women's Diagnostic Center*, 850 A.2d 726 (Pa. Super. 2004), *app. den'd*, 871 A.2d 191 (Pa. 2005); *King v. Stefenelli*, 882 A.2d 666 (Pa. Super. 2004); *Blicha v. Jacks*, 864 A.2d 1214 (Pa. Super. 2004).

In *Faherty v. Gracias*, 874 A.2d 1239 (Pa. Super. 2005), the Superior Court affirmed a jury verdict for the defendant doctors where a sponge left after surgery caused a fatal infection. The court held that there was adequate testimony that it was not required to remove all sponges.

In *Choma v. Iyer*, 871 A.2d 238 (Pa. Super. 2005), the Superior Court held that a trial court had improperly given the jury the "two schools of thought" instruction where the disagreement in the case concerned assessment of the patient's pre-surgical condition, and not differing opinions on the course of treatment for a particular situation.

In *Hospodar v. Schick*, 885 A.2d 986 (Pa. Super. 2005), the Decedent was killed in an automobile accident caused by the a patient of the defendant neurologist. Decedent's estate claimed that the neurologist was negligent in failing to advise the Pennsylvania Department of Transportation that the patient was physically incapable of operating a motor vehicle safely because of his seizure disorder. The court held that the Pennsylvania motor vehicle code, though requiring physicians to report to PennDOT patients with physical conditions preventing them from operating a motor vehicle safely, does not provide a private cause of action by an injured motorist against the physician. Similarly, in *McCandless v. Edwards*, 908 A.2d 900 (Pa. Super. 2006), the Superior Court held that a provider did not owe a duty to a victim of a methadone overdose where the methadone was stolen from the provider's patient and the thief then sold the substance to the overdose victim, even if the provider had provided excess quantities of methadone to the patient. *Swisher v. Pitz*, 868 A.2d 1228 (Pa. Super. 2005), held that a psychologist has no duty to warn a third party not to marry his patient.

In *Vogelsberger v. Magee-Women's Hospital*, 903 A.2d 542 (Pa. Super. 2006), the Superior Court held that a physician could be liable to a patient for failing to remove her ovaries prophylactically during a hysterectomy, even in the absence of negligence, where the plaintiff had alleged a specific promise to do so.

2. Expert witnesses

The Supreme Court affirmed the need for expert witnesses in medical malpractice cases in *Toogood v. Rogal*, 824 A.2d 1140 (Pa. 2003), holding that an expert is required to prove the standard of care as well as medical causation even in cases of *res ipsa loquitur*. In a *res ipsa* case, an expert may still be needed to show that the result does not occur ordinarily in the absence of negligence, the instrumentality causing the harm was in the exclusive control of the defendant and the evidence is sufficient to remove the causation in question from conjecture. The *Toogood* case was followed by the Supreme Court in *Quinby v. Plumsteadville Family Practice*, 907 A.2d 1061 (Pa. 2006), which held that a *res ipsa* charge should have been allowed where a quadriplegic was found to have been fallen off an operating table, further holding that judgment n.o.v. in the plaintiff's favor should have been entered. But in *Grossman v. Barke*, 868 A.2d 561 (Pa. Super. 2005), it was held that whether a doctor should have prevented a patient with a history of dizzy spells from falling off an examination table was not a premises liability question nor obvious negligence, but rather was a medical care issue requiring expert testimony. In *Papach v. Mercy Suburban Hosp.*, 887 A.2d 233 (Pa. Super. 2005), the court held that expert testimony was required even though another doctor had warned the defendant about an abnormal CT scan requiring follow-up.

The Superior Court held in *Cominsky v. Holy Redeemer Health System*, 846 A.2d 1256 (Pa. Super. 2004) that expert testimony is needed in order to establish that a person in a persistent vegetative state was enduring pain and suffering. It held in *Freed v. Geisinger Medical Center*, 910 A.2d 68 (Pa. Super. 2006) that a nurse could not only testify as to the standard of care for a treating nurse, but could also opine regarding the causative relationship between breaches of the nursing standard of care for an immobilized patient and the development of pressure sores.

The Superior Court in *Katz v. St. Mary Medical Center*, 816 A.2d 1125 (Pa. Super. 2003) held that the defendant physician could state medical opinions without there having been an expert report about them as long as those opinions were not acquired as part of the litigation but rather derived from the underlying events. Disclosure may still be needed if the defendant physician is going to testify based upon observations from subsequent treating records.

There have been several recent cases regarding the submission of expert reports that are late. In *Wollach v. Aiken*, 815 A.2d 594 (Pa. 2002), the Supreme Court upheld the summary judgment for the failure to produce an expert report by a court deadline. Summary judgment was affirmed and it was found that the plaintiff had acted in "an indolent fashion" by ignoring deadlines blatantly. A summary judgment was also affirmed for failure of a plaintiff to submit timely expert reports in *Kurian v. Anisman*, 851 A.2d 152 (Pa. Super. 2004). The court found that the defendant was prejudiced, and distinguished an earlier Supreme Court holding in *Gerrow v. John Royle and Sons*, 813 A.2d 778 (Pa. 2002), which held that a late report would be permitted when there was no prejudice and extension of a discovery timetable would have been permissible. In *Downey v. Crozer-Chester Medical Center*, 817 A.2d 517 (Pa. Super. 2003), *app. den'd.*, 842 A.2d 406 (Pa. 2004), the Superior Court allowed a late report which was simply a supplemental one, but still affirmed the summary judgment based on the fact that the report did not provide sufficient basis for the claim.

In *Schweikert v. St. Luke's Hosp.*, 886 A.2d 265 (Pa. Super. 2005), the Superior Court upheld preclusion at trial of a medical expert theory who had not been identified in the expert's report. In *Freed v. Geisinger Medical Center*, 910 A.2d 68 (Pa. Super. 2006), a trial court's decision was upheld where an expert's testimony was precluded because the expert's pre-trial report did not state his opinion to a reasonable degree of medical certainty.

The Supreme Court has opined on discovery against experts in *Cooper v. Schoffstall*, 905 A.2d 482 (Pa. 2006), holding that, if there is a preliminary showing of “reasonable grounds that the witness may have entered the professional witness category”, which could be demonstrated by “a significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentives”, then the expert may be subject to deposition by written interrogatories seeking information on the nature of, source and amount of income from prior expert services. However, discovery of the witness’ recordings, including tax records, would require “a strong showing that the witness had been evasive or untruthful in the written discovery”. This decision was followed by the Superior Court in *Feldman v. Ide*, 2007 Pa. Super. 10 (Pa. Super. 2007), which held that an expert’s tax forms could not be discovered absent a showing of extraordinary circumstances.

Previously, in *J.S. v. Whetzel*, 860 A.2d 1112 (Pa. Super. 2004), the Superior Court held that an expert witness for the defense could be cross-examined on the amount of fees gained from testifying in cases for a particular law firm or in a particular kind of case, *i.e.*, testifying for insurance companies. Indeed, the court then held that the expert’s IRS 1099 forms for such services could be requested in discovery. This presumably would also apply to an expert’s testimony for plaintiffs. However, the court held that a party cannot seek all 1099 forms as that might be related to income where expert trial testimony or personal injury matters were not involved, which is consistent with prior cases which have prohibited asking about all income.

3. Scientific expert evidence

The Supreme Court has significantly limited the application of what is often called the *Frye* test for a court reviewing the validity of scientific expert evidence. In *Trach v. Fellin*, 817 A.2d 1102 (Pa. Super. 2003), *app. den’d.*, 847 A.2d 1288 (Pa. 2004), the Superior Court *en banc* (the entire court) held that a *Frye* test may only be used where the party seeks to introduce novel scientific evidence and not just for any expert issues (such as is the standard in federal courts). Thus, the *Frye* test seems appropriate for novel questions of causation where questionable science is used. Thus, in *Folger v. Dugan*, 876 A.2d 1049 (Pa. Super. 2005); *Carroll v. Avallone*, 869 A.2d 522 (Pa. Super. 2005) and *Cummins v. Phoenixville*, 846 A.2d 148 (Pa. Super. 2004) it was held that the *Frye* test may not be used to challenge the conclusions of an expert but only for reviewing the expert’s new or novel scientific methodology.

In *Haney v. Pagnanelli*, 830 A.2d 978 (Pa. Super. 2003), the Superior Court held that an expert could use a process of elimination to rule out other possible causes of a plaintiff’s injury and therefore reach the conclusion that the injury must have been caused during a surgery. In *M.C.M. v. Hershey Medical Center*, 834 A.2d 1155 (Pa. Super. 2003), it was held that a *Frye* review may *not* be used to question whether there is scientific literature to support the expert’s conclusions. Rather, this would be for the jury to consider. But the court did say that an expert would need to discuss the number of hospitals that had adopted a certain diagnostic test to demonstrate that the standard of care required that this test be done.

The Pennsylvania Supreme court did uphold use of a *Frye* review to preclude expert testimony from a plaintiff in *Grady v. Frito Lay*, 839 A.2d 1038 (Pa. 2003). In that case an expert had attempted to testify that the composition of Doritos was defective in that its chips were too rigid, even upon chewing, and could become stuck in the throat. The trial court had ruled that the expert testimony was not based on scientific principles and was thus inadequate. The Superior Court had reversed, but the Supreme Court reinstated the opinion of the trial court excluding the evidence after a *Frye* hearing.

4. Proof of causation

In *Maresca v. Thomas Jefferson University Hospital*, 2004 U.S. Dist. LEXIS 8658 (E.D. Pa. 2004), *aff'd*, 135 Fed. Appx. 529 (3rd Cir. 2005), the federal court held in a failure to diagnose case that an expert's testimony was insufficient to demonstrate that doctors could have prevented or cured the patient's condition if the condition had been diagnosed earlier by the defendant physician. But in *Carrozza v. Greenbaum*, 866 A.2d 369 (Pa. Super. 2004), *app. den'd*, 882 A.2d 1005 (Pa. 2004), the Superior Court affirmed the trial court's finding in a failure to diagnose case involving failure to order a breast biopsy that the plaintiff had adequately demonstrated an increased risk of harm where the plaintiff's expert testified that it was "more likely than not" that an earlier biopsy would have found the cancer. Similarly, in *Vogelsberger v. Magee-Women's Hospital*, 903 A.2d 542 (Pa. Super. 2006), the Superior Court held that an expert only had to testify that the wrongful action by the physician caused an increased risk of harm and the jury could then determine if the patient was injured.

In *Cacurak v. St. Francis Medical Center*, 823 A.2d 159 (Pa. Super. 2003), *app. den'd*, 844 A.2d 550 (Pa. 2004), it was held that an expert physician could not rely on the diagnosis made by a physician who was not testifying in order for the testifying expert to conclude in court that the plaintiff had a particular diagnosis. In *Boucher v. Pennsylvania Hospital*, 831 A.2d 623 (Pa. Super. 2003), *app. den'd*, 846 A.2d 1276 (Pa. 2004), it was held that an expert in court could be cross-examined with a report authored by an expert who was not testifying where that report raised issues of the testifying expert's credibility. Also, the testifying expert had reviewed the prior report.

5. Informed consent

The Superior Court held in *Tucker v. Community Medical Center*, 833 A.2d 217 (Pa. Super. 2003) that there can be no claim against a hospital for failure to obtain informed consent from a patient, even on a *respondeat superior* theory as to a doctor working for the hospital. This followed the decision of the Pennsylvania Superior Court in *Valles v. Albert Einstein Medical Center*, 805 A.2d 1232 (Pa. 2002). That year the Supreme Court had also confirmed that an informed consent claim sounds only in battery, and cannot be a negligence claim. *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742 (Pa. 2002). In *McSorley v. Deger*, 905 A.2d 524 (Pa. Super. 2006), it was held that a broad informed consent form raised a jury issue as to the scope of the patient's consent, and that expert testimony was required in an informed consent claim to prove the nature of the risks of the procedure and the likelihood of their occurrence.

6. Corporate liability

The Superior Court has held that the corporate liability doctrine is limited to hospitals and HMOs and does not apply to physician practice entities. *Sutherland v. Monongahela Valley Hosp.*, 856 A.2d 55 (Pa. Super. 2004). However, in *Zambino v. Hosp. of the Univ. of Pa.*, 2006 U.S. Dist. LEXIS 69119 (E.D. Pa. 2006), a corporate negligence claim against a practice group, a health system and hospital trustees survived a motion to dismiss allowing proof that the entities controlled the patient's care. In *Kennedy v. Butler Memorial Hosp.*, 901 A.2d 1042 (Pa. Super. 2006) dismissal against a hospital was held proper where there was no averment that the hospital had notice of the employees' negligent care.

7. Evidentiary matters

In *Cacurak v. St. Francis Medical Center*, 823 A.2d 159 (Pa. Super. 2003), *app. den'd.*, 844 A.2d 550 (Pa. 2004), the Superior Court reversed a trial court decision excluding the evidence that showed that a plaintiff exhibited violent behavior. The court believed that the evidence was relevant because it refuted the plaintiff's contention that he was forced to exercise caution in caring for his injured neck, which injury was allegedly the result of a negligent surgery. In *Papach v. Mercy Suburban Hosp.*, 887 A.2d 233 2005 (Pa. Super. 2005), the court held that an ambulance emergency medical services report was not a business record or recording of symptoms and was thus inadmissible hearsay.

Troescher v. Grody, 869 A.2d 1014 (Pa. Super. 2005) held that discovery of a defendant's National Databank entries is not permitted. In *Dodson v. Deleo*, 872 A.2d 1237 (Pa. Super. 2005), the Superior Court reversed a trial court's order permitting discovery of records which the appellate court deemed protected by the Pennsylvania Peer Review Protection Act (PRPA), 42 P.S. § 425.1, *et seq.* *Piroli v. LoDico*, 090 A.2d 846 (Pa. Super. 2006), held that the PRPA protected peer review documents even where persons who were not medical providers were present during the peer review proceedings.

The Superior Court had held that it was not error for a trial court to exclude the plaintiff's evidence that the defendant physician was not board certified in his practicing field since there was no established link between qualifications and breach of the standard of care. *Hawkey v. Peirsel*, 869 A.2d 983 (Pa. Super. 2005).

8. Trial issues

Plaintiff's counsel cannot argue that an adverse inference should be taken where a hospital did not provide the testimony of a nurse present during treatment; the witness was equally available to both sides as the plaintiff could have deposed the witness or subpoenaed her for trial. *Hawkey v. Peirsel*, 869 A.2d 983 (Pa. Super. 2005).

A jury may not be instructed to consider the alleged contributory negligence of a patient in failing to follow the doctor's instructions where there is no fact or expert testimony that the patient failed to comply with instructions and that failure contributed to the injury. *Angelo v. Diamontoni*, 871 A.2d 1276 (Pa. Super.), *app. den'd.*, 585 Pa. 694, 889 A.2d 87 (2005).

In *Yoskowitz v. Yazdanfar*, 900 A.2d 900 (Pa. Super. 2006), sanctions against an attorney for speaking with an expert witness during a break in the witness' direct examination at trial were overturned by the Superior Court, with the court noting that such limitations usually apply only when a witness is on cross-examination.

9. Jurors

In *Fritz v. Wright*, 907 A.2d 1083 (Pa. 2006), the Supreme Court held that the 5/6 rule only required that 5/6 of the jurors agree on each aspect of the case in order to render a proper verdict. A retrial would not be required even though the same 5/6 did not agree on all issues in the jury interrogatories. A rare case of juror misconduct was considered in *Pratt v. St. Christopher's Hospital*, 824 A.2d 299 (Pa. Super. 2003), *aff'd mem.*, 898 A.2d 1142 (Pa. Super 2006), *app. den'd.*, 2006 Pa. LEXIS 2158 (Pa. 2006). After a defense

verdict, the trial court received correspondence from a juror indicating that other jurors had, before final deliberations, spoken to acquaintances as well as a personal physician to obtain their views on a key issue on a case. The Superior Court directed the trial court to have an evidentiary hearing, including testimony from jurors, as to what had occurred, and indicated that if the allegations of juror misconduct were correct the defense verdict would have to be vacated.

The Superior Court issued a rare opinion on the subject of permissible *voir dire*, the questioning of prospective jurors, in *Capoferri v. Children's Hospital of Phila.*, 893 A.2d 133 (Pa. Super. 2006), *app. den'd*, ___ A.2d ___ (Pa. 2007). It was held that it was reversible error to not allow a plaintiff's counsel to ask prospective jurors about their attitudes regarding medical malpractice and tort reform given all the recent media coverage of those issues.

10. Statute of limitations

In *Fine v. Checcio*, 870 A.2d 850 (Pa. 2005), the Pennsylvania Supreme Court settled a longstanding dispute and held that the discovery rule applies even if the plaintiff had discovered the underlying negligence within the two-years of when the negligence occurred. The time to file is still extended until two years after discovery. It was also held that the statute of limitations could be tolled during a time when a physician was providing reassurance to a patient regarding a surgery and the limitations period might not begin until the patient lost confidence in the doctor and first visited a new physician, and that a jury must decide the issue. Similar reassurances were also found to toll the statute of limitations in *Burton-Lister v. Siegel*, 798 A.2d 231 (Pa. Super. 2002). In *Caro v. Glah*, 867 A.2d 531 (2004), the Superior Court held that discovery did not occur until the plaintiff received a second opinion telling her that her injury was caused by the defendant's surgery. In *Miller v. Ginsberg* 874 A.2d 93 (Pa. Super. 2005) the court held that the application of the discovery rule was for the jury because the patient's prior injuries may have made it uncertain as to whether a particular injury was related to a particular surgery. *Miller v. Phila. Geriatric Center*, 463 F.3d 266 (3d Cir. 2006) held that a subjective standard would apply when it was contended that a mentally retarded decedent should have discovered the cause of her injury allowing the jury to consider extending the statutory period. In *Farrell v. DuPont Hosp.*, 2006 U.S. Dist. LEXIS 49079 (E.D. Pa. 2006), it was held that the discovery and fraudulent concealment rules did not apply where the patient had died following a surgery, and no extension of the deadline could be found.

In *Chaney v. Meadville Medical Center*, 2006 Pa. Super. 295 (2006), the Superior Court held that addition by amendment to the complaint of claims alleging negligent actions by the doctor at a different time constituted a new cause of action which was not permitted after the statute of limitations had run; however, specification of the mechanism of injury was deemed only an amplification of existing claims and could be added. *Devine v. Hutt*, 863 A.2d 1160 (Pa. Super. 2004), held that a plaintiff must file a reply to the limitations defense asserted by a defendant in a New Matter asserting the statute of limitations factually. Without a reply pleading from plaintiff, the defense would be deemed admitted by the plaintiff. This rule would *not* apply if the defendant's New Matter just asserted the statute as a conclusion of law, but would apply if certain facts demonstrating that the claim was late were asserted in the New Matter and not answered by the plaintiff.

11. Settlements

The Supreme Court held in *Reutzel v. Douglas*, 870 A.2d 787 (Pa. 2005), that a plaintiff's attorney must have express authority from his client to settle a medical negligence case and without that authority an oral settlement agreement would not be enforced.

12. Mental Health Procedures Act

The confidentiality provision of the Mental Health Procedures Act, 50 P.S. § 7101, *et seq.*, was at issue in *Zane v. Friends Hospital*, 836 A.2d 25 (Pa. 2003). In that case the Supreme Court upheld the complete denial of records sought regarding a patient who had been released but had voluntarily returned to the hospital to meet another patient who was still a resident. The former patient then drugged and kidnapped the current patient and assaulted her. The patient sued the facility and requested the former patient's records to show that the facility had knowledge of his violent tendencies. Without the former patient's records, the plaintiff could not prove the former patient's tendencies and thus show the facility's negligence. Therefore, the plaintiff's case was dismissed. The Supreme Court upheld this result protecting both the patient privilege as well as the facility in that instance.

In *Downey v. Crozer-Chester Medical Center*, 817 A.2d 517 (Pa. Super. 2003), the Superior Court affirmed a lower court summary judgment dismissing a case where a psychiatric patient died as a result of an accidental drowning while bathing herself at the hospital. The court found that the hospital's alleged failure to supervise the patient while she was bathing at most constituted ordinary and not gross negligence as required by the Act. The Superior Court in *F.D.P. and J.A.P. v. Ferrara*, 804 A.2d 1221 (Pa. Super. 2002) held that a group home had no duty to a child who was sexually abused by a former patient released from the facility where the assault had occurred outside the facility. The court found this was not foreseeable and that there was no duty to the child. In *Walsh v. Borczon*, 881 A.2d 1 (Pa. Super. 2005), dismissal of a claim by the trial court was upheld because allegations that doctors wrongly took the patient off medications and failed to arrange coverage when the patient's doctor went on vacation could not constitute gross negligence. In *Cohen v. Kids Peace National Centers*, 2006 U.S. Dist. LEXIS 29440 (E.D. Pa. 2006), the district court held that there was no basis for a jury to find gross negligence where a teenaged patient committed suicide by hanging herself while a resident of the facility, and thus granted summary judgment.

13. Bad faith cases

In *Mishoe v. Erie Ins. Co.*, 824 A.2d 1153 (Pa. 2003), the Supreme Court held that there is no right to a jury trial in a bad faith action brought pursuant to 42 Pa. C.S. § 8371. The federal Third Circuit Court of Appeals, predicting Pennsylvania law, held in *Haugh v. Allstate Ins. Co.*, 322 F.3d 227 (3d Cir. 2003) that actions brought under Pennsylvania's bad faith statute sound in tort and are thus governed by the two-year statute of limitations.

14. MCARE Fund

The Supreme Court settled a long-standing coverage issue involving the MCARE Fund (the case actually started when it was the CAT Fund) in the decision *Hershey Medical Center v. CAT Fund*, 821 A.2d 1205 (Pa. 2003). In a case involving a physician who was an agent of the hospital, it was held that the

physician's private second level excess insurance, above the CAT Fund initial excess layer, would apply to a judgment before any insurance on the hospital which employed the physician. This decision was sought by the Fund because it wanted to reach the large private excess layer on the doctor before the hospital's excess insurance from the Fund (as well as the hospital's own primary insurance) could be reached. This rule was applied even though the primary and private excess layers on the doctor were in the form of self-insurance. The Supreme Court found that the purpose of the CAT Fund statute was to preserve the financial integrity of the Fund and thus interpreted coverage in that way.

The Supreme Court also decided another important case involving the MCARE Fund, *PMSLIC v. CAT Fund*, 843 A.2d 379 (Pa. 2004). In that case, a private insurance carrier had failed to notify the Fund within 180 days that a claim should be covered by the Fund under the old § 605 (now § 715 under the MCARE Act). This is the provision which says that the Fund must defend and indemnify any claim where the negligence occurred more than four years before the claim was filed. The Supreme Court held that the Fund could deny coverage if the Fund was notified more than 180 days after the doctor had learned of the claim, even in the absence of prejudice to the Fund. No prejudice requirement applies according to the Court.

The Commonwealth Court held in *Gabroy v. CAT Fund*, 886 A.2d 716 (Pa. Commw. 2005), that the Fund was not required to "drop down" to pay uncovered primary coverage where the primary carrier was insolvent and the Guaranty Fund's limit was reached. Nor is the Fund required to provide excess coverage where a doctor did not have primary coverage. *Paternaster v. Lee*, 863 A.2d 487 (Pa. 2004). In *St. Joseph Medical Center v. CAT Fund*, 845 A.2d 692 (Pa. Commw. 2004), it was held that the Fund was not required to provide coverage to a hospital accused of negligently supervising a hospital technician who sexually assaulted a patient while conducting certain medical tests. This was not considered negligence in application of medical skills. *Strine v. MCARE Fund*, 894 A.2d 733 (Pa. 2006) held that a bath in a nursing home that was prescribed by a physician was considered a covered medical service.

The Superior Court held in *Caruso v. CAT Fund*, 858 A.2d 620 (Pa. Super 2004), that the primary carrier and CAT Fund had to pay proportionate shares of delay damages and post-judgment interest after a verdict for the Plaintiff.

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Mr. Kahn has for the last 28 years concentrated his practice in the area of litigation, including representation of clients in casualty and commercial matters. He is chair of the professional liability and commercial litigation practice group. Mr. Kahn has extensive experience in professional negligence litigation involving attorneys, accountants and medical providers; real estate, estate, contract, civil rights, collection and business disputes; insurance law and transactions; motor vehicle, aircraft and product liability tort litigation; and in the structuring of large settlements.

Professional Background:

Margolis Edelstein, Partner, 1995 - present
Chair, Professional Liability and Commercial Litigation Group

Blank, Rome, Comisky & McCauley, Partner 1988 - 1995, Associate 1979 - 1988
Litigation Department
Chair, Personal Injury Litigation Group; extensive commercial litigation work

Clerk, Honorable Stanley S. Brotman, U.S.D.C., D.N.J., 1978 - 1979

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Commonwealth of Pennsylvania, 1978
State of New Jersey, 1985

United States District Courts for Eastern District of Pennsylvania, District of New Jersey, Eastern District of New York and Southern District of New York, 1978-88

Educational Background:

Harvard Law School, J.D. 1978
University of Pennsylvania, B.A. 1974, magna cum laude

Representative Engagements:

Defense of insureds of AIG Group, American Safety Casualty Ins., Aon/Affinity Risk Services, CNA, Erie Ins. Co., Evanston Insurance, Fireman's Fund, General Casualty Ins., General Star, Gulf Insurance, Home Ins. Co., Interstate Ins. Group, Kemper Group, Medical Mutual Ins., Navigators Pro, Physicians Ins. Exchange, Pennsylvania MCARE Fund, Scottsdale Ins., TIG Insurance Co., Western Word Ins., Westport Ins. and Zurich Ins. Representation of BankOne Financial Corp., Fleet Bank, Midlantic Bank, Penn Mutual Life Ins. Co., Tenet Healthcare Corp., Travelers Express Co., Trump organization, SEPTA, Wal-Mart Stores.

Professional Organizations:

Chair, Philadelphia Bar Association State Civil Committee
Member, Governor Rendell's Task Force on Medical Malpractice
Settlement Master, Court of Common Pleas of Philadelphia
Member, Chancellor's Task Force on Commonwealth Business Court
Member, Phila. and Penna. Bar Special Task Forces on Proposed Rules of Evidence
Member, Penna. Bar Special Committee on Revision of Discovery Rules
Who's Who in America

Publications:

"Defining the Scope of Representation", Harmonie Group Web Site, Aug. 2006
"Discharging Liability After Client Discharge", Harmonie Group Web Site, Mar. 2006
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"Tax Consequences in Personal Injury Actions", Chapter 38A, Damages in Tort Actions, 1992
"Ensure Tax Advantages in Case Settlements" Trial, June 1990
Prepared Philadelphia Court of Common Pleas Civil Practice Manual chapter on replevin actions
"In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions," Hastings
Constitutional Law Quarterly, Summer 1979

Lectures:

"Medical Malpractice Crisis in Pennsylvania", Phila. Assoc. of Defense Counsel, March and June 2003
"Governor's Task Force on Medical Malpractice", Jeanes Hospital surgeons, February 2003
"Dental Malpractice," Aon Risk Services, March 2001, November 1999
"Tax Advantages in Settlements," Pennsylvania Trial Lawyers, November 1994
"Case Management Techniques," Philadelphia Bar Association, December 1993
"Medical Malpractice," Philadelphia Pain Society, October 1993
"Premises Liability," American Society for Industrial Security, November 1992
"Mental Health and the Law -- Malpractice Issues," Medical Education Services, Nov. 1990
"Procedural Due Process in Land Planning and Regulation," ALI-ABA Course on Land Planning and
Regulation of Development, Washington, D.C., May 1981

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Born April 11, 1953, Indianapolis, Indiana. Mr. Kahn resides in Center City Philadelphia with his wife and two children. He was Chair of the Board of Directors of the Jewish Family and Children's Service of Greater Philadelphia and its 2006 Honoree. He is a Trustee of the Jewish Federation of Greater Philadelphia. He has previously served as President of the Philadelphia Dance Alliance, Secretary of the Schuylkill River Development Council and a Board Member of Temple Beth Zion-Beth Israel. He was the a recipient of the 1993 Young Leadership of the Jewish Federation of Greater Philadelphia and the 1994 Stella Moore Award from the Philadelphia Dance Alliance.