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# **EXPERT REPORT LATE, WHAT TO DO?**

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## “EXPERT REPORT LATE, WHAT TO DO?”

In the recent Pennsylvania Superior Court Case, Jacobs v. Chatwani, et al., 2007 Pa. Super. 102, the court granted leeway to those attorneys who file their expert reports beyond the deadlines proscribed by the Court. The three-judge panel ruled that even when an expert report is filed beyond the deadline, the party opposing admission of the tardy report must still show prejudice in order to have the report precluded at the time of trial. Additionally, the Superior Court found that Pennsylvania law does not require a defense expert in a medical malpractice case to state his or her to the same degree of medical certainty applied to the plaintiff, who bears the burden of proof.

The Superior Court found that a trial court should consider the following factors when determining whether to preclude a witness' testimony for failure to comply with the court's deadlines:

1. The prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
2. The ability of that party to cure the prejudice;
3. The extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of cases in the court;
4. Bad faith or willfulness in failing to comply with the court's order.

Furthermore, the court noted that to preclude the testimony of a witness is a drastic sanction and should only be done where the facts of the case make it necessary.

In its discussion of the appropriate standard for a defense medical expert, the Superior Court stated first that when reviewing the admission of expert testimony, the Court may only overrule the decision of the trial court when there is a clear abuse of discretion. The Court then continued that absent an affirmative defense or a counter-claim, a defense expert's opinion is merely rebuttal, and thus, may be held to a lesser standard than the "reasonable degree of medical certainty" standard to which Plaintiffs' experts must adhere. Statements that the evidence "supports" or "strongly supports," the conclusion is sufficient for a defense medical expert.