RECENT DEVELOPMENTS IN PENNSYLVANIA MEDICAL MALPRACTICE LAW

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TABLE OF CONTENTS

A. ADDITIONS TO PENNSYLVANIA RULES OF CIVIL PROCEDURE 2
1. Certificate of Merit 2
2. Venue 5
3. Other procedural rules 6

B. MEDICAL CARE AVAILABILITY AND REDUCTION OF ERROR ACT (MCARE ACT). 7
1. Patient safety 7
2. Informed consent 7
3. Punitive damages 8
4. Affidavit of non-involvement 8
5. Advance payments 8
6. Collateral source rule 9
7. Calculation of damages 9
8. Preservation and accuracy of medical records 9
9. Expert qualifications 10
10. Statute of repose 11
11. Venue 12
12. Remittitur 12
13. Ostensible agency 12
14. Insurance changes 12

C. RESTRICTION TO JOINT AND SEVERAL LIABILITY 13

D. RECENT CASE DECISIONS 14
1. Duty of care 14
2. Expert witnesses 15
3. Scientific expert evidence 17
4. Proof of causation 18
5. Damages 19
6. Informed consent 19
7. Assumption of risk. 20
8. Corporate and vicarious liability 20
9. Evidentiary matters 21
10. Various causes of action 22
11. Trial and procedural issues 23
12. Jury instruction issues. 24

13. Jurors 25
14. Jurisdiction. 25
15. Arbitration agreements 25
16. Statute of limitations 26
17. Settlements and releases 27
18. Mental Health Procedures Act 27
19. Section 1983 and EMTALA actions. 28
20. Prison Litigation Reform Act and Commonwealth Sovereign Immunity. 28
21. Bad faith cases 29
22. MCARE Fund 29

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.

On 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.

The original version of the rules allowed a certificate of merit to be filed within 60 days of the filing of a Complaint and a non pros default to be taken starting on the 61st day without any notice being required. On June 16, 2008, these rules were amended to require a defendant to file and serve a notice of intention to take a default at least 30 days before a non pros default is taken for failure of the plaintiff to file a certificate. The notice may not be filed until the 31st day after the complaint is filed. Once a notice is filed a plaintiff may file a motion to determine whether a certificate is necessary and that motion tolls the time to file a certificate. A motion by plaintiff to extend the time to file a certificate must be filed by the 30th day after the notice of intention is filed and such a motion also tolls the time to file a certificate. The rule change also makes clear that the certificate requirement applies to cross-claims. This rule went into effect immediately on June 16, 2008 and applies to pending cases as long as a non-pros had not already been entered as of the effective date.

The certificate of merit rules apply to 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).

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 due date, but only if no certificate has been filed by the plaintiff. Accordingly, it is incumbent upon defense attorneys to file on the due date to avoid a plaintiff from being able to file after the due date day simply because a praecipe was not filed. If both praecipe and certificate are filed the same say, the praecipe is valid if it is filed first. *Shon v. Karason,* 920 A.2d 1285 (Pa. Super. 2007).

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 tolls the ability of the defendant to file a praecipe for *non pros*. Even if the motion to extend the time is denied, the period is extended by the number of days the motion was under consideration. *Bourne v. Temple Univ. Hosp.*, 932 A.2d 114 (Pa. Super. 2007), *app den'd*, 939 A.2d 889 (Pa. 2007).

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. *Dental Care Assoc., Inc. v. Keller Engineers, Inc.*, 954 A.2d 597 (Pa. Super. 2008); *Shon v. Karason,* 920 A.2d 1285 (Pa. Super. 2007); *Ditch v. Waynesboro Hosp*. 917 A.2d 317 (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). 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).

A claim of fraud against a professional does not require a certificate. *McElwee Group, LLC v. Munic. Auth. of Elverson*, 476 F. Supp. 2d 472 (E.D. Pa. 2007). Nor is a claim for sexual assault by hospital employees. *Smith v. Friends Hosp.*, 928 A.2d 1072 (Pa. Super. 2007). 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*. 917 A.2d 317 (Pa. Super. 2007). A pure informed consent claim requires a certificate. *Pollock v. Feinstein*, 917 A.2d 875 (Pa. Super. 2007). So does a claim of violation of the Mental Health Procedures Act, 50 P.S. § 7101, *et seq*. *Iwanejko v. Cohen & Grigsby, P.C.*, 249 Fed. Appx. 938 (3d Cir. 2007). A certificate of merit is not required where the plaintiff is not a patient of the medical professional. *Bruno v. Erie Inc. Co.*, 106 A.3d 48 (Pa. 2014) (dicta).

Under a Note to Rule 1042.3(a), if a plaintiff files a certificate stating that expert testimony is unnecessary, then an expert may not be used at trial. In *Mertzig v. Booth*, 2012 WL 1431238 (E.D. Pa. 2012), the court held where the plaintiff had asserted that no certificate of merit is required because the case was governed by the *res ipsa loquitur* doctrine, then plaintiff may not employ an expert at trial to show that the circumstances warrant application of the doctrine.

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), *app. den'd,* 919 A.2d 959 (Pa. 2007); *Gondek v. Bio-Medical Applications, 919 A.2d 283 (Pa. Super.*

2007);. In order to be covered by the rule, a company need not be licensed as a health care provider but can have a general corporate certificate where its charter authorized it to provide health care. *Shon v. Karason, 920 A.2d 1285 (Pa. Super. 2007)*. A corporate negligence claim against a hospital requires a certificate. *Stroud v. Abington Memorial Hosp.*, 546 F. Supp. 2d 238 (E.D. Pa. 2008); *Gondek v. Bio-Medical Applications, 919 A.2d 283 (Pa. Super. 2007)*. But in *Weaver v. UPMC*, 2008 U.S. Dist. Ct. LEXIS 57988 (W.D. Pa. 2008), the court excused the failure of the certificate to cover the corporate liability claim while still noting that a certificate is required.

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). Two Superior Court panels have reversed trial courts' denials of petitions to open where the failure to file was based on an inadvertent clerical error. *Est. Of Aranda v. Amrick*, 987 A.2d 727 (Pa. Super. 2009); *Sabo v. Worrall*, 959 A.2d 347 (Pa. Super. 2008). Ignorance of the rule, however, is *not* a legitimate excuse, even for a *pro se* plaintiff. *Hoover v. Davila*, 862 A.2d 591 (Pa. Super. 2004). Nor is uncertainty about whether the case states a professional negligence claim. *Ditch v. Waynesboro Hosp.,* 917 A.2d 317 (Pa. Super. 2007). Incarceration of the *pro se* plaintiff is not a sufficient excuse, at least where there was no specific showing of difficulty in finding an expert due to the incarceration. *Glenn v. Mataloni*, 949 A.2d 966 (Pa. Commw. 2008), *app. den'd*, 598 Pa. 776, 958 A.2d 1049 (Pa. 2008). However, if the prothonotary does not provide notice under Pa.R.C.P. 236 to the plaintiff, then the judgment must be stricken. *Mumma v. Boswell*, 937 A.2d 459 (Pa. Super. 2007).

In the *Hoover* case, the court also held that the period runs from the initial filing of the complaint even if it is later reinstated due to service problems. The period also runs from the initial complaint even if there is an amended complaint. *Ditch v. Waynesboro Hosp.,* 917 A.2d 317 (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), *aff'd without opinion*, 894 A.2d 826 (Pa. Super. 2007), *app. den'd,* 917 A.2d 315 (Pa. 2007).

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 medical record does not constitute an expert report or certificate. *Shon v. Karason, 920 A.2d 1285 (Pa. Super. 2007)*. 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). A trial court could properly find that inclusion of an expert report in a pre-trial memorandum was not sufficient where not Certificate had been filed. *Zokaites Contractng Inc. v. Trant Corp.*, 968 A.2d 1282 (Pa. Super. 2009). However, where counsel has the certificate in his file and believes his office has filed it though it has not, this is a reasonable excuse and a trial court's failure to open the *non pros* judgment under such circumstances was reversed. *Sabo v. Worrall*, 959 A.2d 347 (Pa. Super. 2008). The failure to cite the proper portion of the rule may also be excused. *Kennedy v. Butler Memorial Hosp.*, 901 A.2d 1042 (Pa. Super. 2006). Inadequate wording in the certificate by a *pro se* prisoner plaintiff who did submit a physician's letter was also excused. *Booker v. Untied States*, 366 Fed. Appx. 425 (3d Cir. 2010).

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 cases is concluded by voluntary dismissal, defense verdict or court order dismissing the case, under Rule 1042.8, 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 was done where there was no written letter providing a basis for a certificate in a reported decision from Dauphin County, *Estrada v. Olt*, 124 Dauph. 42 (2008), but the court exercised its discretion and awarded less than all of the attorney fees incurred by the defendant. Sanctions were also granted in Philadelphia County where Plaintiff did have a physician's letter but it was from someone who had not practiced medicine in the relevant field of medicine and who wrote that "there will likely not be merit found". All of the defendant's attorney fees were awarded. *Fallon v. Hahnemann Hosp.*, 2011 WL 3027822 (Phila. C.P. 2011).

This certificate of merit has been held to also be required in a malpractice case in federal court. *Iwanejko v. Cohen & Grigsby, P.C.*, 249 Fed. Appx. 938 (3d Cir. 2007). However, the state mandated procedures, including entry of judgment of *non pros* by praecipe, have generally not been adopted by federal district courts and a more lenient procedure was permitted before a case could be dismissed. *McElwee Group, LLC v. Munic. Auth. of Elverson*, 476 F. Supp. 2d 472 (E.D. Pa. 2007); *Abdulhay v. Bethlehem Medical Arts*, 2005 U.S. Dist. LEXIS 21785 (E.D. Pa. 2005)*; Scaramuzza v. Sciolla*, 345 F. Supp. 2d 508 (E.D. Pa. 2004). In *Stroud v. Abington Memorial Hosp.*, 546 F. Supp. 2d 238 (E.D. Pa. 2008), dismissal was granted when the certificate did not encompass the hospital's alleged corporate liability, but plaintiff was granted leave to establish a reasonable explanation for failure to provide the certificate. But in *Weaver v. UPMC*, 2008 U.S. Dist. Ct. LEXIS 57988 (W.D. Pa. 2008), the court excused the failure of the certificate to cover the corporate liability claim. 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. *Gondek v. Bio-Medical Applications, 919 A.2d 283 (Pa. Super. 2007); Ditch v. Waynesboro Hosp.*, 917 A.2d 317 (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), *app. den'd,* 901 A.2d 499 (Pa. 2006); *Dobos v. Pennsbury Manor*, 878 A.2d 182 (Pa. Commw. 2005), *app. den'd,* 919 A.2d 959 (Pa. 2007); *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). A referral alone is also not enough to create venue. *Cohen v. Furin*, 946 A.2d 125 (Pa. Super. 2008). That case also reiterated that a telephone call does not create venue and that it was not error for the trial court to allow additional discovery on venue in connection with a plaintiff's motion for reconsideration of a decision finding improper venue.

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, 40 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.

The MCARE Act was amended *effective August 19, 2007* to add detailed provisions regarding infection control measures for hospitals and nursing homes. These include requirements for nursing homes to report infections to the Commonwealth Department of Health and Patient Safety Authority, and for hospitals to report to the federal Centers for Disease Control and Prevention. Possibly these statutory mandates may later be held to define the standard of care in negligence cases.

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*. A claim for punitive damages was allowed against a nursing facility based on evidence of chronic understaffing. *Scampone v. Grane Healthcare Co.*, 11 A.3d 967 (Pa. Super. 2010) and *Hall v. Episcopal Long Term Care*, 54 A.3d 381 (Pa. Super. 2012). A punitive damages claim could also be based on an allegation that staff did not follow a physician's order to frequently reposition the Decedent and that an LPN was providing advanced wound care in violation of the Nurse Practices Act., 63 P.S. § 211, *et seq. Dubose v. Quinlan, ___ A.3d ___,* 2015 WL 6438917 (Pa. Super. 10-23-15). That case also held that evidence of a defendant's wealth may be heard by a jury in considering whether to award punitive damages and that the trial need not be bifurcated so that liability for punitive damages is decided separate from the amount of punitive damages. However, claims for punitive damages cannot be based upon allegations of a "cover up" of prior medical negligence which did not in itself harm the patient. *Stroud v. Abington Memorial Hosp.*, 546 F. Supp. 2d 238 (E.D. Pa. 2008)

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 payers have no right of subrogation or reimbursement from the plaintiff's tort recovery. The collateral source and subrogation preclusion provisions do *not* apply to life insurance benefits, pension or profit sharing payments, deferred compensation payments, Social Security benefits, Medicaid and Medicare payments and public benefits under an ERISA program. It is reversible error for defense counsel to comment or introduce testimony that medical costs covered by the collateral course rule will be reimbursed by public or private benefits plans. *Deeds v. Univ. of Pa. Medical Ctr.*, 110 A.3d 1009 (Pa. Super. 2015).

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. This section also indicates that counsel fees shall be calculated based on present value of future damages as determined under its provisions. That language does not contemplate an award of counsel fees in addition to damages, but only as a percentage of the award as agreed to between attorney and client. *Sayler v. Skutches*, 40 A.3d 135 (Pa. Super. 2012).

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 interference. However, in *Bugieda v. HUP*, 2007 Phila. Ct. Com. Pl. LEXIS 36 (Phila. C.P. 2007), a Common Pleas Court judge held that this provision was not exclusive and that an adverse inference instruction may be provided against

a medical provider pursuant to pre-existing common law where the plaintiff need only show that the defendant lacked "satisfactory explanation" of why it failed to produce the missing document.

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. *Wexler v. Hecht*, 928 A.2d 973 (Pa. 2007). 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 *Vicari v. Spiegel*, 989 A.2d 1277 (Pa. 2010), an oncologist was allowed to testify that defendant, an ENT surgeon, should have referred the patient to be seen by an oncologist for chemotherapy. In *Wexler v. Hecht*, 928 A.2d 973 (Pa. 2007) it was held that the trial court could preclude a podiatrist from testifying against an orthopedic surgeon. 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 *Jacobs v. Chatwani*, 922 A.2d 950 (Pa. Super. 2007), a urologist who performed pelvic surgery was allowed to testify as to standard of care on behalf of a gynecologist and surgeon who had conducted a pelvic surgery. In *George v. Ellis*, 911 A.2d 121 (Pa. Super. 2006) a surgeon who did not do the surgical procedure in question could nonetheless testify as to the standard of care regarding whether the procedure was appropriate because the expert did refer patients for the procedure. In *Hyrcza v. West Penn Allegheny Health System,* 978 A.2d 961 (Pa. Super. 2009), a neurologist was permitted to testify against a physiatrist on the standard of care for treating multiple sclerosis. In *Renna v. Schadt*, 64 A.3d 568 (Pa. Super. 2013), it was held that a pathologist and an oncologist were both qualified to testify against a surgeon in regard to the surgeon's choice of biopsy method.

In *Gartland v. Rosenthal*, 850 A.2d 671 (Pa. Super. 2004), the Superior Court reversed a trial court which held that a neurologist could not testify against a radiologist reading films relating to neurological problems. Similarly, in *Gbur v. Golio*, 932 A.2d 203 (Pa. Super. 2007), a radiation oncologist could testify as to the liability of a urologist where the allegations against the urologist involved consideration of radiological findings and failing to discuss the findings with a radiologist. 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.

In *Rettger v. UPMC Shadyside*, 991 A.2d 915 (Pa. Super.2010), *app. den'd* 15 A.3d 491 (Pa. 2011), a trial court ruling was upheld which allowed testimony from a neurosurgeon familiar with neurosurgical nursing to testify against a neurosurgical nurse. 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 with lesser experience from testifying about the standard of care of nurses and an internist in a hospital. In *Rose v. Annabi*, 934 A.2d 743 (Pa. Super. 2007), preclusion of an expert was upheld where there was no testimony presented to show substantially similar standard of care between two specialties. In *Anderson v. McAfoos*, 57 A.3d 1141 (Pa. 2012), the Pennsylvania Supreme Court upheld a trial court ruling that a pathologist could not testify as to the negligence of a general surgeon. This case also held that a motion to preclude an expert under § 512 did not require a motion *in limine* but could be raised after *voir dire* of the expert.

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*, 911 A.2d 121 (Pa. Super. 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,* 912 A.2d 851 (Pa. Super. 2006).

The rule has been applied in a federal court. *Keller v. Feasterville Family Health Care Ctr.*, 557 F. Supp. 2d 671 (E.D. Pa. 2008); *Ward v. Most Health Services, Inc.*, 2008 U.S. Dist. Ct. LEXIS 61573 (E.D. Pa. 2008); *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. It does not apply to minors who still may sue until their 20th birthday. Another paragraph of this provision states that a claim for wrongful death or survival must be brought within two years of the date of death except where there was affirmative misrepresentation or fraudulent concealment. This was interpreted to allow a claim more than two years after the negligence and injury were known but within two years of the death. *Dubose v. Quinlan, ___ A.3d ___,* 2015 WL 6438917 (Pa. Super. 10-23-15).

A Superior Court panel held that the doctrine of fraudulent concealment does not toll the statute of repose, and that the statute applies even if the negligence occurred before the Act's effective date of March 20, 2002. *Osborne v. Lewis*, 59 A.3d 1109 (Pa. Super. 2012). Two *en banc* panels of the Superior Court have held that this last provision regarding death cases controls over the seven-year statute of repose, allowing, under a very unusual circumstance, a death action to be brought more than seven years after the negligence as long as it was brought within two years of death. *Matharu v. Muir*, 29 A.3d 375 (Pa. Super. 2011) and 86 A.3d 250 (Pa. Super. 2014). The statute of repose does not apply when the negligent act and resulting injury occurred before the enactment of MCARE Act in 2002. *Bulebosh v. Flannery*, 91 A.3d 1241 (Pa. Super. 2014).

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. Remittitur was deemed properly denied by the trial court in regard to an award of $1 million under the Survival Act and $125,000 under the Wrongful Death Act even though the decedent was in a minimally conscious state when she entered the defendant nursing care facility. *Dubose v. Quinlan*, ___ A.3d ___, 2015 WL 6438917 (Pa. Super. 10-23-15). It has also been held that § 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 of 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 care 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. RESTRICTION TO JOINT AND SEVERAL LIABILITY

The Pennsylvania legislature previous 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, which would have prevented the application of joint and several liability to any tortfeasor found to be less than 60 percent liable. 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).

On June 28, 2011, Pennsylvania Governor Tom Corbett signed into law Senate Bill 1131, amending 42 Pa. C.S. § 7102, which greatly restricts application of joint and several liability among tortfeasors in Pennsylvania cases, and should apply to a variety of matters including all types of medical malpractice claims. The law applies to cases that accrue on or after June 28, 2011, which is generally considered to be the date of the injury or at the latest the date the plaintiff knew or should have known of the injury.

The new law requires courts to enter separate judgments against each defendant for an apportioned amount of that defendant's liability. If a defendant is found to have less than 60 percent of the total liability,

that defendant is only responsible for that share of liability. But where a defendant is held liable for 60 percent or more of the total liability, that defendant is still jointly liable for the shares of all other defendants who do not pay their shares. The new law also permits the trier of fact to consider for the purpose of apportioning liability the responsibility of anyone who has been released by the plaintiff whether or not a party to the lawsuit, allowing proofs to be introduced against non-parties only if they have, in fact, settled with the plaintiff prior to trial. Under the law, pure joint and several liability still applies to intentional misrepresentation and other intentional torts.

D. RECENT CASE DECISIONS

1. Duty of care

In *Winschel v. Jain*, 925 A.2d 782 (Pa. Super. 2007), the Superior Court held that a defendant specialist has a higher duty of care than a general practitioner as a matter of law and therefore a specialist could not introduce expert testimony to state that the scope of the referral by a family physician to a specialist limited the specialist's duty to just performing the test and that the specialist was required to recommend further tests. Rather, the higher duty of a specialist requires her to consider what additional tests might be needed. In *Drumm v. Schell*, 2008 U.S. Dist. LEXIS 45487 (M.D. Pa. 2008), the district court held that a rural physician would be held to a national standard of care but that the jury could consider the resources available to the doctor at the rural facility.

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 *Stever v. Antonowicz*, 83 Pa. D.&C.4th 119 (Blair Co. 2006), *aff'd without op.*, 931 A.2d 61 (Pa. Super. 2007), *app. den'd,* 934 A.2d 1278 (Pa. 2007), the court held that a physician was not liable to an injured motorist for allegedly prescribing a medication that caused the patient to have a seizure and automobile accident. In *Seebold v. Prison Health Services, Inc.*, 57 A.3d 1232 (Pa. 2012), the Pennsylvania Supreme Court held that prison doctors do not have a duty to warn prison guards about inmates who have communicable diseases.

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 they were not required to remove all sponges. 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. But in *Ward v. Most Health Services, Inc.*, 2008 U.S. Dist. Ct. LEXIS 61573 (E.D. Pa. 2008). the court held that a physician doing x-ray screening examinations for the plaintiff's employer had a duty of care to the plaintiff when a tumor was missed.

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. An *en banc* panel of the Superior Court has held that under § 324A of the Restatement (Second) of Torts, an obstetrician has a duty to a child who was born long after the mother left the doctor's care where the doctor's negligence injured the mother in a way that affected future children. *Matharu v. Muir*, 29 A.3d 375 (Pa. Super. 2011) and 86 A.3d 250 (Pa. Super. 2014) (*en banc)*. A physician cannot be liable for not recommending a dangerous procedure to a patient. *Pomroy v. Hosp. of Univ. of Pa.*, 105 A.3d 740 (Pa. Super. 2014).

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 *Togood* case was followed by the Supreme Court in *Quinby v. Plumsteadville Family Pratice*, 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.

However, 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. The Superior Court held in *MacNutt v. Temple Univ. Hosp.*, 932 A.2d 980 (Pa. Super. 2007) that *res ipsa* did not apply when the defendant has produced expert testimony of an alternative theory of causation of the injury which did not involve negligence. Then in *Griffin v. UPMC*, 950 A.2d 996 (Pa. Super. 2008) the court emphasized that *res ipsa loquitur* could only be used "in the most clear-cut cases". 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. In *Vazquez v. CHS Professional Practice, P.C.*, 39 A.3d 395 (Pa, Super. 2012). the court held that *res ipsa* could not be applied to a removal of a pain pump which left a fragment of the catheter in the patient's shoulder. However, in *Fessenden v. Robert Packer Hospital,* 97 A.3d 1225 (Pa. Super. 2014), the *res ipsa* doctrine was inexplicably expanded to encompass disputed medical causation. The Superior Court panel held that summary judgment for the defendant was improper where the trial judge had said that there needed to be expert proof that the plaintiff's injury was caused by a retained sponge where there were other medical conditions offered by the defendants as the cause; the Superior Court panel said the *res ipsa* doctrine permitted the jury to infer causation as well as negligence in the absence of expert testimony.

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. The Supreme Court held in *Freed v. Geisinger Medical Center*, 601 Pa. 233, 971 A.2d 1202 (2009), a case that arose before the MCARE Act and was not governed by § 512 of the Act, 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 held in *Novitski v. Rusak*, 941 A.2d 43 (Pa. Super. 2008) that a vocational expert could testify regarding the extent to which a plaintiff's injuries prevent him from working, relying on medical testimony. It held in *MIIX Insurance Co. v. Epstein*, 937

A.2d 469 (Pa. Super. 2007) that expert testimony is required in a contribution claim against a medical provider.

In *Jacobs v. Chatwani*, 922 A.2d 950 (Pa. Super. 2007), the Superior Court noted that the standard of medical certainty for a defense expert in her testimony is less than for a plaintiff's expert. Thus, a defense expert could opine that there was a "possible" alternative cause of the plaintiff's condition without certainty as rebuttal to plaintiff's causation theory since the plaintiff has the burden of proving causation.

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. An Eastern District Magistrate Judge held in *Keller v. Feasterville Family Health Care Ctr.*, 557 F. Supp. 2d 671 (E.D. Pa. 2008) that an expert physician may base his opinion solely on the testimony of another physician who is a specialist. The cross examination of experts by learned treatises must be limited so the treatises are not effectively being introduced as direct evidence. *Klein v. Aronchick*, 85 A.3d 487 (Pa. Super. 2014). In *Hyrcza v. West Penn Allegheny Health System,* 978 A.2d 961 (Pa. Super. 2009), the Superior Court upheld limited use of learned treaties on direct examination of an expert to permit that expert to explain the basis of his conclusions.

The Supreme Court has held that a treating physician may testify on a causation issue encountered in treatment even though no expert report was provided. *Polett v. Public Communications, Inc.*, ___ Pa. ___, 2015 WL 6472419 (Oct. 27, 2015). The Superior Court has held that a treating physician may provide evidence of a diagnosis even where that required medical expertise and impacted squarely on the standard of care issue. *Deeds v. Univ. of Pa. Medical Ctr.*, 110 A.3d 1009 (Pa. Super. 2015).

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.

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 *Jacobs v. Chatwani*, 922 A.2d 950 (Pa. Super. 2007), a late expert report was allowed as the delay was found by the trial court not to be prejudicial. That case also noted that an expert can be cross-

examined about a treatise only if he relied on it in forming his opinion or admits that it is authoritative or a "standard work in the field".

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 which had not been identified in the expert's report. In *Freed v. Geisinger Medical Center*, 910 A.2d 68 (Pa. Super. 2006), *aff'd on other grounds,* 601 Pa. 233, 971 A.2d 1202 (2009), 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. In *Winschel v. Jain*, 925 A.2d 782 (Pa. Super. 2007), the Superior Court reiterated the requirement that expert testimony must indicate at some point during her testimony that findings were made to a reasonable degree of scientific certainty, though need not testify as to absolute certainty or rule out all possible alternative explanations; the court specifically held that testimony about what "might have" occurred is not permitted. In *Griffin v. UPMC,* 950 A.2d 996 (Pa. Super. 2008), it was held that an expert who found a 51 percent chance of causation was not stating an appropriately certain opinion even though he used the "magic words" of "reasonable degree of medical certainty". However, in *Vicari v. Spiegel*, 936 A.2d 503 (Pa. Super. 2007), the court held that the totality of the testimony was sufficient to show a reasonable degree of medical certainty even though the expert had testified that the therapy not received "may have prevented" the illness in question.

An *en banc* panel of the Superior Court limited expert discovery by holding that an attorney's correspondence with an expert is protected work product. *Barrick v. Holy Spirit Hosp.*, 232 A.3d 800 (Pa. Super. 2011), *aff'd by an equally divided court*, 91 A.3d 860 (2014). This principle was then incorporated into Pa.R.C.P. 4003.5 by an amendment effective Aug. 9, 2014. 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*, 915 A.2d 1208 (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

A plaintiff may proceed on both a theory of direct cause and increased risk. *Klein v. Aronchick*, 85 A.3d 487 (Pa. Super. 2014). 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) and *Winschel v. Jain*, 925 A.2d 782 (Pa. Super. 2007), the Superior Court held that a plaintiff's 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 negligence was a substantial factor in causing the injury.

But in *Winschel*, the Superior Court limited what the jury could find for a defendant doctor, reversing a defense verdict and granting the plaintiff a new trial where the jury had found negligence but not causation, holding that it was against the weight of the evidence in a failure to diagnose case for a jury not to find causation where undisputed evidence showed that an additional test was "very likely" to have led to diagnosis and treatment at that point "very likely" would have been successful even though the experts were not absolutely certain this would have occurred. In *Pomroy v. Hosp. of Univ. of Pa.*, 105 A.3d 740 (Pa. Super. 2014), involving a claim that the physician did not recommend the proper procedure, it was held that there

must be evidence that the patient would have chosen an alternative, safer procedure if proper advice had been provided by the physician.

The Supreme Court has held that a treating physician may testify on a causation issue encountered in treatment even though no expert report was provided. *Polett v. Public Communications, Inc.*, ___ Pa. ___, 2015 WL 6472419 (Oct. 27, 2015). The Superior Court has held that a treating physician may provide evidence of a diagnosis even where that required medical expertise and impacted squarely on the standard of care issue. *Deeds v. Univ. of Pa. Medical Ctr.*, 110 A.3d 1009 (Pa. Super. 2015).

In *Jacobs v. Chatwani*, 922 A.2d 950 (Pa. Super. 2007), the Superior Court noted that the standard of medical certainty for a defense expert in her testimony is less than for a plaintiff's expert. Thus, a defense expert could opine that there was a "possible" alternative cause of the plaintiff's condition without certainty as rebuttal to plaintiff's causation theory since the plaintiff has the burden of proving causation. As also noted above, in *Griffin v. UPMC,* 950 A.2d 996 (Pa. Super. 2008), it was held that an expert who found a 51 percent chance of causation was not stating an appropriately certain opinion even though he used the "magic words" of "reasonable degree of medical certainty."

Causation as an element of a contributory negligence defense was discussed in *Rose v. Annabi*, 934 A.2d 743 (Pa. Super. 2007), where the court held that missed appointments by the patient could not be used to demonstrate contributory negligence without expert testimony that this was a substantial factor in causing the injury. Nor could failure to provide a family history be contributory negligence where the treating physician was aware of the history from other records.

5. Damages

The Superior Court held that the parents of a decedent could provide evidence of their "profound emotional and psychological loss" and were not restricted to loss of services; *dicta* also allowed this for grieving children. *Rettger v. UPMC Shadyside*, 991 A.2d 915 (Pa. Super.2010), *app. den'd* 15 A.3d 491 (Pa. 2011). The Superior Court held in *Dubose v. Quinlan, ___ A.3d ___,* 2015 WL 6438917 (Pa. Super. 10-23-15) that an award of loss of society and comfort under the Wrongful Death Act, 42 Pa. C.S. § 8301, may be made even where, prior to admission to the defendant facility, the decedent was suffering from severe brain damage and was minimally responsive, reasoning that the fact that the decedent was alive and able to be visited justified an award.

6. 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. The Superior Court held in *Isaac v. Jameson Mem. Hosp*, 932 A.2d 924 (Pa. Super. 2007) that federal Medicaid regulations

regarding informed consent for tubal ligations did not define the standard of care for providing informed consent as those regulations were directed to reimbursement issues.

In *Fitzpatrick v. Natter*, 599 Pa. 465, 961 A.2d 1229 (Pa. 2008), the Pennsylvania Supreme Court held that an informed consent claim may be based solely on the testimony of the patient's spouse and that testimony alone, without the patient's testimony, may be sufficient for the case to go to the jury. In *Cooper v. Lankenau Hospital*, 51 A.3d 183 (Pa. 2012), the Supreme Court held that intent to cause harm is not a requirement in a medical informed consent claim and the jury should not be so charged. In *Bell v. Willis*, 80 A.3d 476 (Pa. Super. 2013), it was held that a chiropractic manipulation is not a surgery and cannot be the basis for a claim of lack of informed consent. Evidence of a patient's knowledge of risk and consent to surgeries is not proper where the claim is based on negligence and introduction of that evidence is error harmful to the plaintiff and requires a new trial. *Brady v. Urbas, 111 A.3d 1155* (Pa. 2015).

7. Assumption of risk

An *en banc* panel of the Superior Court has held in a very interesting case that there may be an assumption or risk defense against a patient even though that doctrine has been severely limited in tort cases in Pennsylvania. An Rh-negative mother had become Rh-sensitive due to the defendant physician's failure to administer RhoGAM during a prior pregnancy, and the doctor asserted an assumption of risk defense since the mother knew of the extreme risk that this might have on future children. The doctor sought summary judgment on the basis of this defense. The trial court denied the summary judgment and the Superior Court affirmed after an interlocutory appeal. However, it was not specifically stated that the defense should or should not be allowed at trial on remand. *Matharu v. Muir*, 29 A.3d 375 (Pa. Super. 2011), *aff'd after remand,* 86 A.3d 250 (Pa. Super. 2014).

8. Corporate and vicarious 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). In H*yrcza v. West Penn Allegheny Health System,* 978 A.2d 961 (Pa. Super. 2009), the Superior Court affirmed a finding of corporate liability where a practice group had total responsibility for operating a rehabilitation unit in a hospital, finding that more akin to a hospital than an office practice. In *Drumm v. Schell*, 2008 U.S. Dist. Ct. LEXIS 36578 (M.D. Pa. 2008), a federal district court held that two companies which provided doctors to staff a hospital could not be liable on a corporate liability theory, and also that the supplied doctors were not its agents as they had been designated independent contractors and the companies did not control or direct their work. However, in *Zambino v. Hosp. of the Univ. of P*a., 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 of a corporate negligence claim against a hospital was held proper where there was no averment that the hospital had notice of the employees' negligent care.

The Supreme Court applied corporate liability to a nursing facility for understaffing and inadequate policies in *Scampone v. Grane Healthcare Co.*, 57 A.3d 582 (Pa. 2012). It also held that a supervising corporation which only employed supervising nurse consultants, but not the staff providing direct care, could be vicariously responsible for negligent care provided by staff. It further noted that the activities of the

nursing facility companies in each case needed to be carefully scrutinized by the court to determine if they owed duties to the injured patient. The Superior Court has also upheld corporate negligence against nursing homes in its opinion in the *Scampone* case, 11 A.3d 967 (Pa. Super. 2010) and in *Hall v. Episcopal Long Term Care*, 54 A.3d 381 (Pa. Super. 2012) and *Dubose v. Quinlan, ___ A.3d ___,* 2015 WL 6438917 (Pa. Super. 10-23-15). These opinions also upheld punitive damages where understaffing was found to have affected the Decedent's care. In *Sokolsky v. Eidelman*, 93 A.3d 858 (Pa. Super. 2014), a legal malpractice action where the validity of the underlying nursing facility malpractice case-within-a-case was at issue, the panel held that summary judgment was improper since the plaintiff had sufficient evidence to show vicarious liability which did not require identification of a specific individual by name. The panel also said that summary judgment on the corporate liability theory was improper as a skilled nursing facility could be liable on a corporate basis if the several policy criteria could be found to apply to it.

A corporate liability claim against a hospital requires a certificate of merit. *Stroud v. Abington Memorial Hosp.*, 546 F. Supp. 2d 238 (E.D. Pa. 2008); *Gondek v. Bio-Medical Applications, 919 A.2d 283* (Pa. Super. 2007). But in *Weaver v. UPMC*, 2008 U.S. Dist. Ct. LEXIS 57988 (W.D. Pa. 2008), the court excused the failure of the certificate to cover the corporate liability claim while still noting that a certificate is required.

A plaintiff need not plead the identifies of specific agents of medical entities and striking such allegations upon preliminary objections was in error. *Estate of Denmark v. Williams*, 117 A.3d 300 (Pa. Super. 2015).

9. Evidentiary matters

In an unusual trial situation, the Superior Court affirmed a trial court's holding that a hospital could not introduce inculpatory admissions by a doctor which had not been introduced by the plaintiff, stating that the statements could not be admitted because the hospital and doctor were not adverse since the hospital had not filed a cross-claim against the doctor. It also affirmed the trial court's denial of a request by the hospital to amend during trial to assert the cross-claim on the ground that amendment during trial was unduly prejudicial. *Rettger v. UPMC Shadyside*, 991 A.2d 915 (Pa. Super.2010), *app. den'd*, 15 A.3d 491 (Pa. 2011). Evidence of a tolling agreement which a physician witness had signed was not admissible to show lack of motivation to provide dishonest testimony. *Polett v. Public Communications, Inc.*, ___ Pa. ___, 2015 WL 6472419 (Oct. 27, 2015).

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. However, evidence of a surviving plaintiff's inflammatory language used at the facility in describing her mother's allegedly negligent case was excluded as unfairly prejudicial. *Dubose v. Quinlan*, ___ A.3d ___, 2015 WL 6438917 (Pa. Super. 10-23-15)

In *Papach v. Mercy Suburban Hosp.*, 887 A.2d 233 (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. *Gallo v. Conemaugh Health Sys., Inc.*, 114 A.3d 855 (Pa. Super. 2015) held that discovery was not permitted of alcohol treatment records on a defendant

doctor protected by the Public Health Service Act, 42 U.S.C. § 290ee-3, even though such records had been disclosed to the medical license board and to a criminal court.

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*, 909 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. *Venosh v. Henzes* 121 A.3d 1016 (Pa. Super. 2015) held that the PRPA did not prevent disclosure of documents from a review by a health insurance provider like Blue Cross. *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. 2015) held that the PRPA did not prevent disclosure of materials from an investigation by the Pennsylvania Department of Health as that was not a peer review body. That case also held that attorney-client privilege did prevent disclosure of hospital board minutes where the hospital's attorney was present at the meeting.

In *Buckman v. Verazin*, 54 A.3d 956 (Pa. Super. 2012), a trial court was reversed which had ordered disclosure of a doctor's records from similar surgeries with patient names redacted; it was held that liability should be judged on an objective standard and not the physician's state of mind. The Superior Court has held that a treating physician may provide evidence of a diagnosis even where that required medical expertise and impacted squarely on the standard of care issue. *Deeds v. Univ. of Pa. Medical Ctr.*, 110 A.3d 1009 (Pa. Super. 2015).

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).

Whenever a plaintiff's mental health is pertinent to liability or damages issues in the case, there is an implied waiver of protection of the records under the Mental Health Procedures Act, 50 P.S. § 7111. *Octave v. Walker,* 103 A.3d 1255 (Pa. 2014). However, there is no disclosure where another patient, who is not the plaintiff, is at issue. *Zane v. Friends Hospital*, 836 A.2d 25 (Pa. 2003). In *Gormley v. Edgar*, 995 A.2d 1197 (Pa. Super. 2010), the Superior Court held that an order compelling disclosure of mental health records could be the subject of an interlocutory appeal, and that while "routine" allegations of "shock, mental anguish and humiliation" did not warrant discovery of mental health records, claims of "mental injury, severe emotional trauma requiring treatment, or psychiatric/psychological conditions" result in waiver of patient privilege requiring disclosure.

The Superior Court held that a trial court could not limit the damages from a negligent sterilization to six weeks after an aborted birth. *Catlin v. Hamburg*, 56 A.3d 914 (Pa. Super. 2012).

10. Various causes of action

It has been held that a doctor's duty of care does not prohibit an extramarital affair with a patient's spouse. *Long v. Ostroff*, 854 A.2d 524 (Pa. Super. 2004). This is the case even if the physician is providing incidental mental health treatment and even though mental health professionals can be liable for such conduct. *Thierfelder v. Wolfert*, 52 A.3d 1251 (Pa. 2012).

The Superior Court held that the statute prohibiting claims for wrongful birth and wrongful life, 42 Pa. C.S. § 8305, was in violation of the constitutional requirement that laws address a single subject. A mother suffering emotional trauma when she saw her severely deformed baby at birth after being informed that the baby was normal based on ultrasound was permitted to sue the ultrasound doctor for negligent infliction of emotional distress but not for intentional infliction. *Toney v. Chester County Hospital*, 961 A.2d 192 (Pa. Super. 2008) (*en banc*), *aff'd by an equally divided Supreme Court*, 36 A.3d 83 (Pa. 2011). In *Weaver v. UPMC*, 2008 U.S. Dist. Ct. LEXIS 57988 (W.D. Pa. 2008), the court held that a negligent infliction claim could be brought by parents who witnessed negligent medical treatment and their child's resulting death even though they did not know at the time that the care was below the applicable standard of care.

11. Trial and procedural issues

The Superior Court has limited the use of a pre-suit patient arbitration agreement by a hospital in *Walton v. Johnson*, 66 A.3d 782 (Pa. Super. 2013). A mother had signed the arbitration agreement post-admission for her then-comatose daughter who later recovered and sued. The Court found that the mother had no authority to bind the daughter.

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 plaintiff's attorney can argue that "doctors in this community help each other out when they're in a jam" to attempt to undermine the credibility of a medical expert witness. H*yrcza v. West Penn Allegheny Health System,* 978 A.2d 961 (Pa. Super. 2009).

A jury was allowed to determine the joint liability of a physician who had settled with the plaintiff even though neither plaintiff nor the non-settling co-defendant had introduced expert testimony directed specifically at the settling defendant's conduct. This was because the testimony of the plaintiff's expert against the non-settling defendant on the standard of care could have been applied by the jury to the settling defendant. The court also held that a cross-claim by the non-settling defendant was not necessary to allow the jury to apportion liability to the settling defendant. *Herbert v. Parkview Hospital*, 834 A.2d 1285 (Pa. Super. 2004), *app. den'd*, 872 A.2d 173 (Pa. 2005). In *Tindall v. Friedman*, 970 A.2d 1159 (Pa. Super. 2009), it was held that a trial court properly refused to permit a cross-claim that was sought by amendment in the middle of trial. In *Hatwood v HUP*, 55 A.3d 1229 (Pa. Super. 2012), the Superior Court held that parents could recover for the loss of companionship, society and comfort of a child who died even though there was no evidence of monetary loss.

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.

It is reversible error for defense counsel to comment or introduce testimony that medical costs covered by the collateral course rule will be reimburse by public or private benefits plans. *Deeds v. Univ. of Pa. Medical Ctr.*, 110 A.3d 1009 (Pa. Super. 2015). That case also held that two counsel cannot both examine witnesses on behalf of what are essentially the same party where one of the parties did not appear on the verdict sheet.

The Supreme Court has held that the definition of health care provider under the Medical Records Act, 42 Pa. C.S. §§ 6151, *et seq.* must be strictly construed and the Act does not govern pharmacies. *Landay v. Rite Aid of Pa.*, 104 A.3d 1272 (Pa. Super. 2014).

12. Jury instruction issues

The Supreme Court has prohibited the use of the error of judgement instruction where a jury is told that a physician cannot be liable for an error of judgment or mistake of judgment unless it was the result of negligence; this does not prohibit a two schools of thought instruction, however. *Passarello v. Grumbine*, 87 A.3d 285 (Pa. 2014). *Accord, Pringle v. Rapaport*, 980 A.2d 159 (Pa. Super. 2009). The *Pringle* court also held that, in a *res ipsa loquitur* case, the jury could not be told that negligence should not be presumed from the occurrence of an adverse result. In *Hyrcza v. West Penn Allegheny Health System,* 978 A.2d 961 (Pa. Super. 2009), the Superior Court affirmed use of the irrelevant considerations instruction which notes that the case does not involved punishment of the defendant, the defendant's reputation or criticism of his professional abilities beyond the facts of the matter, but noting that reporting to the federal Data Bank should not be mentioned. The Superior Court has endorsed the error of judgment instruction on other occasions as a charge which a trial court may but need not provide. *Blicha v. Jacks*, 864 A.2d 1214 (Pa. Super. 2004); *King v. Stefenelli*, 862 A.2d 666 (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); *Schaaf v. Kaufman*, 850 A.2d 655 (Pa. Super. 2004), *app. den'd,* 872 A.2d 1200 (Pa. 2005). The error of judgment charge is not appropriate where the physician's error is clear. *Vallone v. Creech*, 820 A.2d 760 (Pa. Super.), *alloc. den'd*, 574 Pa. 755, 830 A.2d 976 (2003).

In *Polett v. Public Communications, Inc.*, ___ Pa. ___, 2015 WL 6472419 (Oct. 27, 2015) the Supreme Court held that it was not error for the trial court to have instructed the jury that a defendant had to provide evidence of an alternative cause to an injury; considering other standard instructions that was found to have not improperly shifted the burden of proof to defendant. 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 *Snyder v. Hawn*, No. 1775 MDA 2006 (Pa. Super. 2006 non-precedential memorandum opinion), it was held that an error of judgment instruction, which states that a physician is not liable where she employed the appropriate standard of care, was proper even where the two schools doctrine was not involved; rather, the instruction could be provided as long as the defense expert had indicated that the defendant had made an appropriate judgment call.

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 *Cooper v. Lankenau Hospital*, 51 A.3d 183 (Pa. 2012), the Supreme Court held that intent to cause harm is not a requirement in a medical informed consent claim and the jury should not be so charged.

13. 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*, 590 Pa. 661, 911 A.2d 936 (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 has issued recent opinions 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,* 591 Pa. 659, 916 A.2d 630 (2006), to 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 medica coverage of those issues. However, a separate panel in *Wytiaz v. Dietrick*, 954 A.2d 643 (Pa. Super. 2008) restricted the *Capoferri* opinion and held that questioning did not have to specifically target media exposure to information regarding medical malpractice or tort reform but that general questions about anything read or heard influencing opinion about civil lawsuits, and about having any particular beliefs about medical malpractice cases, are sufficient.

The Superior Court has also noted certain situations where a juror must be disqualified for cause: where the juror's parent or spouse had been a patient of the defendant doctor and where a juror was employed by the same health system corporation that employed the defendant doctor. *Cordes v. Associates of Internal Medicine*, 87 A.3d 829 (Pa. Super. 2014) (*en banc* but divided court).

14. Jurisdiction

The Superior Court held in *Mendel v. Williams*, 53 A.3d 810 (Pa. Super. 2012) that the Philadelphia Court of Common Pleas did not have personal jurisdiction over Underwood Memorial Hospital in New Jersey or a doctor there even though the hospital represented to the public that it was affiliated with the Jefferson Health System and had business agreements with that system, and even though it was alleged that the doctor negligently failed to send a medical report to Einstein Hospital in Philadelphia which caused injury in Philadelphia.

15. Arbitration agreements

The appellate courts have recently addressed arbitration agreements at long term care facilities. The Supreme Court found that an arbitration agreement was not binding where the arbitration forum no longer existed, though noting that the plaintiff's failure to read the agreement was not relevant to its application. *Wert v. Manorcare of Carlisle, PA, LLC*, 124 A.3d 1248 (Pa. 2015). The Superior Court held that an arbitration agreement that was in a separate document was properly held not to apply because the separate agreement did not indicate that agreement to arbitration was a condition for admission to the facility. *Washburn v. Northern Health Facilities, Inc.*, 121 A.3d 1008 (Pa. Super. 2015). That case also held that

the signature of the wife to the agreement could not bind the husband's estate through either an implied or apparent authority theory, or a third-party beneficiary theory. Another Superior Court panel held that where the agreement required a signature on behalf of the facility and no signature was affixed, the agreement was not binding on the family. *Bair v. Manor Care of Elizabethtown, PA, LLC*, 108 A.3d 94 (Pa. Super. 2015).

16. 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 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 a caused by the defendant's surgery.

In *Wilson v. El-Daief*, 964 A.2d 354 (Pa. 2009), the Pennsylvania Supreme Court, reversing the trial court's grant of summary judgment affirmed by the Superior Court, held that even though the plaintiff had admitted that she was in severe pain immediately following surgery and that, more than two years before suit was filed, she felt "something wasn't right" and that the surgeon had not taken proper care of her, there was still a jury question as to when she had discovered the injury and its cause so as to start the limitations period. The court emphasized that discovery was a question best left to a jury though acknowledging that sufficient knowledge could be found even if the plaintiff did not know the precise medical cause of the injury, apprehend that the physician was negligent or understand that she had a legal cause of action. Similarly, in *Simon v. Wyeth Pharmaceuticals, Inc.*, 989 A.2d 356 (Pa. Super. 2009), a drug product liability case, the Superior Court reversed the trial court's granting of judgment NOV, holding that the jury could properly conclude that a plaintiff did not know of the cause of her cancer until a study was publicly released which postulated the link between cancer and the drug plaintiff took, even though that study was released more than two years after the cancer was diagnosed.

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. Phial. 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), *aff'd*, 260 Fed. Appx. 452 (3d Cir. 2008), 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. Similarly, in *Workman v. A.I. Dupont Hospital*, 2007 U.S. Dist. LEXIS 54832 (E.D. Pa. 2007), it was held that a doctor's silence as to possible negligence or his assurance that the patient "would be fine" could not be fraudulent concealment that might toll the statute of limitations.

In *Chaney v. Meadville Medical Center*, 912 A.2d 300 (Pa. Super. 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.

The doctrine that a fraudulent concealment tolls the statute of limitations was applied in an unusual case, *Krapf v. St. Luke's Hospital*, 4 A.3d 642 (Pa. Super. 2010). A nurse had surreptitiously murdered several patients whose families sued for wrongful death more than two years after the deaths. The trial court denied summary judgment on limitations grounds but certified an interlocutory appeal. The Superior Court affirmed, holding that the hospital's fraudulent concealment had tolled the statute even in wrongful death cases where the discovery rule did not apply. The court further held that the hospital had an affirmative duty to tell the families what had happened, a condition for a wrongful concealment finding, and that the hospital was on sufficient notice of the possible murders to create fraudulent concealment when certain evidence was brought to the hospital administration's attention even though it had not yet been concluded that the nurse had killed the patients.

A claim under the Survival Act, 42 Pa. C.S. § 8302, runs at the latest two years after death. *Bell v. Willis*, 80 A.3d 476 (Pa. Super. 2013).

17. Settlements and releases

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.

In *Maloney v. Valley Medical Facilities, Inc.*, 984 A.2d 478 (Pa. 2009), the Pennsylvania Supreme Court, upholding a prior Superior Court decision, held that a particular reservation of claims against the non-settling doctor defendant properly reserved the plaintiff's rights against that doctor even though the doctor was the agent of a released practice entity. The Supreme Court distinguished and limited prior law holding that release of the principal always releases the agent by noting that in the case on review there were separate negligence claims against different agents of the practice entity so that the release of the entity could be considered to have only applied to part of the negligence. In a concurring opinion, one justice held that this distinction should only be allowed in medical malpractice cases.

18. Mental Health Procedures Act

Whenever a plaintiff's mental health is pertinent to liability or damages issues in the case, there is an implied waiver of protection of the records under the Mental Health Procedures Act (MHPA), 50 P.S. § 7111. *Octave v. Walker,* 103 A.3d 1255 (Pa. 2014). The confidentiality provision of the MHPA was at issue in another type of situation 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.

The MHPA also has an immunity provision requiring a finding of gross negligence. 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), *app. den'd*, 847 A.2d 1286 (Pa. 2004), 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), *aff'd mem.*, 256 Fed. Appx. 490 (3d Cir. 2007), 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. In *DeJesus v. Dept. of Veterans Affairs*, 479 F.3d 271 (3d Cir. 2007), the Court affirmed a finding that a psychiatric facility had been grossly negligent for releasing a patient who 18 hours later shot his children and two other children, where the patient was demonstrating violent and suicidal urges. *DeJesus* also held that the MHPA created a duty of mental health providers to protect third persons who might not otherwise have an ability to sue for negligence under common law. A claim under the MHPA requires a certificate of merit. *Iwanejko v. Cohen & Grigsby, P.C.*, 249 Fed. Appx. 938 (3d Cir. 2007).

19. Section 1983 and EMTALA actions

The Third Circuit Court of Appeals issued a surprising decision which held that a nursing home resident could sue a facility under § 1983 of the Civil Rights Act, 42 U.S.C. § 1983, for violations of the Federal Nursing Home Reform Amendments, 42 U.S.C. § 1396r, *et seq.*, as applied to the resident's treatment. *Grammar v. Kane*, 570 F.3d 520 (3d Cir. 2009). However, in another case the Third Circuit took a restricted view of the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, *et seq.*, in holding that it does not create a right to someone who is only an outpatient and that, in determining whether there was an emergency condition, the hospital's actual knowledge of an emergency should be the criterion. *Torretti v. Main Line Hospitals, Inc.*, 580 F.3d 168 (3d Cir. 2009).

20. Prison Litigation Reform Act and Commonwealth Sovereign Immunity

In *McCool v. Department of Corrections*, 984 A.2d 565 (Commw. Ct. 2009), *app. den'd*, 605 Pa. 677, 985 A.2d 10 (2010), it was held that the Prison Litigation Reform Act, 42 Pa. C.S. §§ 6601 *et seq.*, applied to a prisoner's medical malpractice case, allowing a court, under § 6602(e)(2) to dismiss a case without considerations of preliminary objections. The Commonwealth Court also held that the exception to

Commonwealth immunity for medical malpractice in 42 Pa. C.S. § 8522(b)(2) only applied to individual health care practitioners who were employed by a Commonwealth agency, but not to the agencies themselves which were immune.

21. 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.

22. 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. In *Cope v. Insurance Commissioner*, 955 A.2d 1043 (Pa. Commw. 2008) and *Community Hospital Alternative v. Ario*, 59 A.3d 63 (Pa. Commw. 2013), the Commonwealth Court held that receipt of a summons alone was not sufficient notice to a medical provider to trigger the 180-day period for notifying the Fund of a § 715 claim. In *Wolfson v. MCARE*, 39 A.2d 551 (Pa. Commw. 2012), it was held that a medical records request from an attorney for the stated purpose of litigation is not formal notice of a claim; at least a summons must be received. In *Yussen v. MCARE*, 46 A.3d 685 (Pa. 2012), the Pennsylvania Supreme Court held that the four-year period under § 715 was invoked even though the filing of the summons occurred within four years; the service of the complaint was more than four years later and that was the triggering date.

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. In *Polyclinic Medical Ctr. v. MCARE,* 13 A.2d 561 (Pa. Commw. 2011), it was held that the Fund was not obligated to provide coverage where a patient was injured as a result of a tort by a fellow patient.

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 its proportionate shares of delay damages after a verdict for the Plaintiff. The Pennsylvania Supreme Court held in *Kinney-Lindstrom v. MCARE*, 73 A.3d 543 (Pa. 2013) that the Fund could be required to pay more than its proportionate share of delay damages in § 715 cases if it was in exclusive control of settlement negotiations and handled those negotiations negligently and they resulted in an excess verdict against the health care provider, even where that exceeds the statutory coverage limit, but further held that the Fund had acted reasonably in not settling the case at hand so that delay damages on the entire excess verdict were therefore properly not awarded. The Supreme Court further held that "the number of occurrences under § 715 is determined by examining whether there is one or multiple instances of professional negligence that caused the harm," each resulting in a "discrete injury," and that "the number of victims of the medical malpractice is not controlling." The determination under those criteria required a remand for a jury trial due to unresolved issues of fact.

The Commonwealth Court held in *West Penn Allegheny Health System v. MCARE Fund*, 11 A.3d 598 (Pa. Commw. 2010) that the aggregate liability limit for excess insurance did not apply to claims for extended insurance under § 715 of the Act, which were subject to the entire per claim limit regardless of aggregate payments on behalf of the provider. In *Tindall v. Friedman*, 970 A.2d 1159 (Pa. Super. 2009), it was held that a plaintiff could agree with the defendant doctor to receive tender of the primary carrier coverage and agree not to pursue the defendant's personal assets, but still retain a claim against the doctor's MCARE excess coverage.

This article does not constitute legal representation or advice which would require specific consultation with an attorney.

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