BRAVE NEW WORLD OF MEDICAL MALPRACTICE LITIGATION

TAKING THE CASE AND FILING SUIT

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ADDENDUM UPDATE TO SECTIONS III. B. 1. and 3.

Adoption of Rule of Civil Procedure 1042.6
and
Amendment of Rules 1042.1 et seq. Governing Professional Liability Actions

On June 16, 2008, the Pennsylvania Supreme Court adopted the long-awaited and much needed changes to the Certificate of Merit ("COM") Rules to provide, in part, for notice before a Defendant in a professional liability action can obtain a judgment of non pros for a party's failure to timely file a COM. Pa. R.C.P. 1042.6. See **Appendix I: Supreme Court Order Dated June 16, 2008 and New/Amended COM Rules**. The amendments also clarify that the COM rules apply to "a patient or client of the licensed professional" bringing a professional liability claim against a licensed professional "and/or ... a partnership, unincorporated association, corporation or similar entity where the entity is responsible for a licensed professional who deviated from an acceptable professional standard." Pa. R.C.P. 1042.1(a). They make clear that "[a] professional liability claim asserted against a licensed professional includes a claim for lack of informed consent."[1] See also Pa. R. C. P. 1042.3(a), Note. In addition, the amendments note the prevailing view that "[the] filing of preliminary objections pursuant to Rule 1042.2(b) is not a prerequisite to the filing of a notice of intent to enter a judgment of non pros on a professional liability claim pursuant to Rule 1042.6." Pa. R.C.P. 1042.2(b), Note.

Most significantly, the Supreme Court promulgated new Rule 1042.6, which reads as follows:

> **Rule 1042.6. Notice of Intent to Enter Judgment of Non Pros for Failure to File Certificate of Merit. Motion to Determine Necessity to File Certificate. Form of Notice (NEW)**
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> (a) Except as provided by subdivision (b), a defendant seeking to enter a judgment of non pros under Rule 1042.7(a) shall **file a written notice of intention to**

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[1]The Supreme Court has thus codified the holding of the Pennsylvania Superior Court in Pollock v. Feinstein, 917 A.2d 875 (Pa. Super. 2007) (COM must be timely filed in case alleging lack of informed consent).

file the praecipe and serve it on the party's attorney of record or on the party if unrepresented, no sooner than the thirty-first day after the filing of the complaint.

(b) A judgment of non pros may be entered as provided by Rule 1042.7(a) without notice if

(1) the court has granted a motion to extend the time to file the certificate and the plaintiff has failed to file it within the extended time, or

(2) the court has denied the motion to extend the time.

(c) Upon the filing of a notice under subdivision (a) of this rule, a plaintiff may file a motion seeking a determination by the court as to the necessity of filing a certificate of merit. The filing of the motion tolls the time period within which a certificate of merit must be filed until the court rules upon the motion. If it is determined that a certificate of merit is required, the plaintiff must file the certificate within twenty days of entry of the court order on the docket or the original time period, whichever is later.

Note: The motion may be filed at any time prior to entry of a judgment of non pros.

Once the judgment of non pros is entered, a party cannot raise the claim that the filing of a certificate of merit was not required.

Id. (emphasis added). The Rule also includes a form for giving notice to a party of intention to enter judgment of non pros after thirty (30) days of the date of the filing of the notice if a COM is not filed. As part of the form, the party seeking judgment must further state if judgment is to be entered as to all claims, or only as to identified claims in the complaint. Pa. R. C. P. 1042.6(d). To obtain a judgment of non pros, the defendant must file a praecipe pursuant to amended Rule 1042.7, and, where applicable, attach a certificate of service of the notice of intention to enter judgment of non pros. The Prothonotary must enter judgment

provided that four conditions are met: (1) there is no pending motion for determination that the filing of a certificate is not required or no pending timely filed motion seeking to extend the time to file the certificate, (2) no COM has been filed within the time required by Rule 1042.3, (3) except where there is noncompliance with a motion to extend the time for filing a COM or a Court has denied such a motion, the defendant has attached to the praecipe a certificate of service[2] of notice of intention to enter the judgment of non pros, and (4) except where there is noncompliance with a motion to extend the time for filing a COM or a Court has denied such a motion, the praecipe is filed no less than thirty (30) days after the date of the filing of the notice of intention to enter the judgment of non pros. Pa. R. C.P. 1042.7(a). The Prothonotary may not enter judgment if the COM has been filed prior to the filing of the praecipe. Pa. R.C.P. 1042.7, Note. "Rule 237.1 [which provides ten-days notice before a non pros can be entered for failure to file a complaint or by default for failure to plead] does not apply to a judgment of non pros under this rule." Id.

These new and amended COM rules are effective immediately. They apply to all pending actions in which a judgment of non pros for failure to file a certificate of merit has not been entered by June 16, 2008.

The Civil Procedural Rules Committee, Chaired by the Honorable R. Stanton Wettick, Jr., has highlighted the COM amendments in its Explanatory Comment. In short, "[n]ew Rules 1042.6 and 1042.7 address concerns that the present rules (1) permit the entry of a judgment of *non pros* where a plaintiff may believe that the rules governing certificates of merit do not apply and (2) provide for the entry of a judgment of *non pros* where there has been no notice of intent to enter such a judgment." The sixty-day rule for filing a COM has been retained because notice may be filed no earlier than the thirty-first day after the filing of the complaint and judgment may not be filed earlier than thirty days after the filing of the notice.

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[2]Pursuant to the Note to Pa. R. C.P. 1042.7(a), the content of the certificate of service is governed by Rule 208.2(a)(4), which provides:

> (a) A motion shall
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> > (4) include a certificate of service which sets forth the manner of service including the name of an attorney of record for each party that is represented by counsel, the party whom the attorney represents, a "pro se" designation for each party that is unrepresented, and the address at which service was made.

APPENDIX I

Adoption of Rule of Procedure 1042.6 and Admendment of Rules 1042.1et seq. Governing Professional Liability Actions

TAKING THE CASE AND FILING SUIT

BY: ROBERT T. SZOSTAK, ESQUIRE

I. TAKING THE CASE

A. Introduction.

At the turn of this century, the number of private insurance carriers writing medical malpractice business in Pennsylvania was down from 17 to 2 as compared to the early 1990's. The number three cause of death in the Commonwealth could be traced to medical malpractice. The problem was not unidimensional but involved an interconnection of systems of technology, structure, climate, leadership and culture. Premiums charged did not track losses paid yet approximately 5% percent of doctors were responsible for 54% of the medical malpractice in Pennsylvania without evidence of discipline to remove irresponsible or incompetent practitioners. Healthcare providers were not being experience rated by their carriers -- there was no "good driver discount". While the carriers screamed for tort reform to limit lawsuits and eliminate the statutory excess fund, frequency of claims was truly the big problem going forward. Yet, there was a price war in the 90's where carriers reaped the benefit of the investment market. When the market tumbled, resulting in cost of claims exceeding what the carriers could make in the investment market, blaming "frivolous lawsuits" and "trial lawyers" became a national political excuse. This self-inflicted problem was not driven by the tort system. Doctors could not raise their fees, one carrier was writing 60% of the managed care private insurance business in Pennsylvania, and Medicare/Medicaid reimbursement levels were woefully inadequate. To address the medical liability insurance crisis, Pennsylvania responded with a measured comprehensive reform strategy that over the course of the past five years has dramatically reduced the frequency of medical malpractice claims by 50%.

The decision to take a case and file suit cannot be competently approached without a recognition, understanding and application of the numerous reform measures and developing case law. These measures include:

1. Mcare Act (Act 13, 40 P.S. §1303.101, et seq.)

2. Frivolous Litigation Rules: Pa.R.C.P. 1023.1-4

3. Venue Rules: Pa.R.C.P. 1006, 2130, 2156 and 2179

4. Certificate of Merit Rules: Pa.R.C.P. 1042.1-8, as amended

5. Settlement Conference/Mediation Rule: Pa.R.C.P. 1042.21

6. Expert Report Rules: Pa.R.C.P. 1042.26-.38

7. Scheduling Order Rules: Pa.R.C.P. 1042.41 and 1042.51

8. Juror Note Taking Rule: Pa.R.C.P. 223.2

9. Separate Damages Findings Rule: Pa.R.C.P. 1042.71

10. Jury Instructions on Non-Economic Loss Rule: Pa.R.C.P. 223.3

11. Excessive Non-Economic Loss Damage Award Rule: Pa.R.C.P. 1042.72.

On April 14, 2008, Chief Justice Ronald D. Castille released data on medical malpractice case filings and verdicts for 2007 which objectively demonstrates a steady decline in the number of lawsuits filed statewide. More specifically, the Administrative Office of Pennsylvania Courts has published its data comparing 2007 with prior years:

- In 2007, there was a 40.8% decline in the number of malpractice cases filed.

- In Philadelphia, where there is the largest caseload statewide, the decline was greater than 50%.

- 2007 witnessed the fewest number of verdicts resulting in Plaintiff's awards - for example:

Bucks	2 Trials	50% Defendant
Chester	6 Trials	100% Defendant

Delco	13 Trials	100% Defendant
Lehigh	19 Trials	89.5% Defendant
Montco	12 Trials	100% Defendant
Philadelphia	37 Trials	73% Defendant

- Statewide, between January 2000 and July 2003, 73% of the verdicts were for the defense. In Philadelphia, there were 407 verdicts, 59.2% of which were for the defense. 9 were over $10,000,000; 16 were between $5,000,000 and $10,000,000 and 58 were between $1,000,000 and $5,000,000.

- Between July 2003 and December 2004, 78.4% of the verdicts were defense verdicts. In Philadelphia, 68% were for the defense with 3 verdicts over $10,000,000; 3 verdicts between $5,000,000 and $10,000,000 and 18 verdicts between $1,000,000 and $5,000,000.

- In 2007, in Philadelphia, 73% of the verdicts were for the defense; of the verdicts for the Plaintiff, 4 were less than $500,000; 2 were between $500,000 and $1,000,000; 3 were between $1,000,000 and $5,000,000 and 1 was over $10,000,000 (the only one in the state).

- In 2007, 82.7% of the verdicts statewide were for the Defendant. There were only 32 verdicts for the Plaintiff, 15 less than $500,000; 7 between $500,000 and $1,000,000; 8 between $1,000,000 and $5,000,000; 1 between $5,000,000 and $10,000,000 (Pittsburgh) and 1 greater than $10,000,000 (Philadelphia).

This dramatic downward shift in frequency and severity is thus not viewed as a temporary correction, but instead represents a sustained response to the above legislative and Supreme Court Rule changes, particularly the Mcare Act, Venue Rule Changes and the Certificate of Merit Rules which went into effect in March, 2002 and January, 2003 respectively. Chief Justice Castile maintains that "ongoing review and enhancements to our procedures will ensure that both Plaintiffs and Defendants can rely on an accessible court system where professional liability actions are impartially and promptly resolved." **See Appendix A: AOPC Statistics.**

Thus, now more than ever, it is imperative that attorneys screening a potential medical professional liability case understand the law, the rules, the medicine, and the merit before any case is accepted. Given that the defense is winning at least 3 out of 4 medical malpractice cases that go to verdict, litigation success is usually determined, not by advocacy in the courtroom or appeal, but instead by factual and witness integrity, investigation, and exhaustive discovery before trial. For these reasons, medical and factual investigation and discovery are the most critical phases of any medical malpractice or hospital liability case.

B. Investigation - Theory Follows the Facts, Not the Converse

1. Client Interview(s)

The evaluation of a potential medical malpractice claim for its factual, medical, and legal merit is essential. It begins most often with a preliminary telephone conversation. Sometimes it becomes instantly apparent that the caller is "frivolous" or that the call bears validity but any claim is beyond the Statute of Limitations. On other occasions, the call may serve as a good foundation for ascertaining the harm potentially caused, but it is extremely difficult to assess potential liability by telephone. It is certainly impossible to evaluate jury appeal, credibility, and the Plaintiff as perhaps the key witness by telephone interview. Therefore, always require a personal, detailed face-to-face client consultation, including an urgent request that the potential Plaintiff(s) bring any applicable documentation or things to the initial consultation. Emphasize that a meaningful chronology must be established in advance of the consultation.

During the interview(s) with the potential client, factually develop the case to determine the evidence necessary to establish a *prime facie* case and damages, as well as the experts needed to proceed with merit. Potential theories of liability can then be considered as revealed by the facts. Explain the elements, theories, and potential damages available under Pennsylvania law to the client. Seek information from the client to enable a meaningful dialogue to substantiate the elements of the medical professional liability action. Determine the expectations of the client, understanding that their emotion, pain, and significant losses require counseling as well as legal representation. Embrace their story but control, as much as possible, their anxiety and grief. Begin to develop themes as a detailed chronology and chronicle of the past medical history, events leading up to the occurrence, all facts and circumstances surrounding the occurrence or sequence of occurrences, and post-occurrence events unfolds. Develop a personal, specific pre- and post-occurrence profile, carefully

formulating a damage analysis that can be related back to the substandard care that was a factual cause of the subject harm and other losses. Canvas the potential defenses with the client to enable a more expansive conversation for completion of a truly comprehensive factual predicate. Compare the dialogued predicate to the medical records to confirm validity and identify issues. Factor into this assessment, the applicable case law, statutes and theories, including but certainly not limited to negligence, informed consent, corporate negligence, negligent infliction of emotional distress and fraud/misrepresentation. Always judge the situation dispassionately but with a firm commitment to seek the truth and justice.

2. Evaluate and Prepare the Potential Case for Trial, Not for Settlement

Medical malpractice cases must be evaluated and prepared for trial, not for settlement. In so doing, trial readiness empowers settlement. The investigatory period, sometimes as long as two years, must be diligently and exhaustively used to accept or decline the case. Once taken, the case must be factually developed based upon the client's version of the facts and alleged malpractice, medical history including all treating physicians, prior and subsequent hospitalizations, and prior and subsequent medical conditions, and full identification of all witnesses including family, friends and medical providers. To the extent that any logs, notes or calendars are maintained by the patient or the patient's family relating to the medical treatment, they should also be factored into the screening process. Past, present and future medical expenses, loss of services, loss of income and loss of earning capacity must also be evaluated. As a result of the initial meeting with the potential client, a case file must be opened with the applicable Statute of Limitations delineated. Authorizations for obtaining medical records, tax returns and employer records must also be obtained. If the decision is to fully investigate toward accepting the case and filing suit, a fee agreement should be secured. If it is a death case, an estate must be promptly raised.

3. Identify All Parties and Issues

(a) Plaintiffs

As the potential defendants are determined, be certain to establish the applicable statute of limitations. Develop a feel for the care that the client believes to be substandard and determine whether the causally connected harm arising from such care gives rise to both non-economic and economic loss sufficient to warrant the cost of litigation. Begin to develop theories from the facts

grounded upon sufficient probable cause not only to initiate suit, but also to continue to develop the case as it evolves through settlement or verdict. Recognize, of course, the time constraints and COM threshold(s), evaluating the cost of litigation vis á vis the resolution potential, the probability of success or loss, and the ability to prove all elements of the case with a reasonable degree of medical or other professional certainty.

When determining the Plaintiffs, be certain to correctly identify their names and addresses. Also recognize the status of the Plaintiff - whether it involves a minor, an Estate, or incompetent requiring the naming of a parent, personal representative or guardian as the Plaintiff. For wrongful death and survival action cases, it is imperative that an Estate be raised and named as a party Plaintiff in the Complaint or Writ of Summons before the statute of limitations expires.

(b) Defendants

Identifying potential Defendants also begins with the client consultation. This basic information must then be used to fully develop the underlying medical record by obtaining all medical records including but not limited to any or all of the following:

- Admission Record
- Emergency Room Record
- History And/or Physical
- Doctors Orders
- Progress Notes (Physicians)
- Medication Records
- Intravenous Record
- Patient Controlled Analgesia Flow Sheet
- Heparin Protocol
- Nursing Care Plan And/or Evaluation
- Nursing Notes
- Flow Sheets
- Microbiology
- Toxicology
- Urinalysis
- Prenatal Record
- Labor and Delivery Records
- Amniocentesis
- Newborn Record

- Nursery Notes on Newborn
- Fetal Monitoring Strips
- Placental Pathology
- Growth Curve Chart
- Laboratory Reports
- X-ray And/or Radiology Reports
- Ultrasound "B Scans"
- Pathology
- Histology
- Blood Bank
- Chemistry
- Discharge Summary
- Diagnostic Tests (Esoteric)
- CT Scans, Electroencephalogram, EKG, MRI
- Intake-output Fluids
- Consultations Ordered and Reports
- Chemotherapy
- Consent Forms
- Experimental Drugs and Consent Forms
- Psychiatric Records
- Autopsy Report[1]
- Perfusion Record
- Respiratory Flow Sheets
- Arterial Blood Gases
- Pre-anesthesia Form
- Anesthesia Record
- Operative Report
- Perioperative Record
- Recovery Room Record
- Physical/occupational Therapy Records
- Temperature And/or Blood Pressure Record
- Cover Sheet
- Work-up Medical Plan
- Intensive Care Record
- Social Work Records
- Incident Report

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[1]When seeking postmortem documentation, in addition to the Autopsy Report, ask for copies of all supplemental reports, toxicology reports, Certification of Identification, Body Delivery Record, Report of Death, Case Registration Summary, Body Receiving Record, Pronouncement of Death, Pathologic Findings, Chain of Custody documents, Correspondence, Contact Log and Photographs, as well as any medical research performed.

- Sentinel Event Reports
- Pre-Suit Interviews of Health Care Professionals

4. Confirmatory Investigation and Expert Review

The records must then be thoroughly evaluated and submitted for expert review in keeping with the requirements of the Certificate of Merit Rules, Section 512 of the Mcare Act, and Pennsylvania jurisprudence governing the qualifications and competency of expert witnesses. A confirmatory investigation must be made to determine the full identity of all Defendants including practice names, hospital or corporate affiliations, and proper addresses for each. Independent internet research, private investigation, and corporate searches through the Pennsylvania Corporate Bureau must be initiated. Other sources of potential information include telephone directories, Dorland's and other directories of medical providers, and services through the Association of Trial Lawyers of America and state and local trial associations and list servs. Computer data base searches through Lexis or Westlaw may also bear important information. Whenever possible, determine whether any potential Defendant has been sued before and by whom. Speaking with attorneys in those cases and obtaining copies of Complaints could prove invaluable. Jury verdict data bases and med-line searches are also sources of valuable information.

Selection of an expert begins with medical research. After all medical records have been reviewed and medical-legal issues identified, before an expert is consulted, medical research should be undertaken. Major text books, medical journals and electronic medical research should be performed. Once a basic grasp of the medicine as related to the facts is accomplished, an expert in the same subspeciality as the Defendant should be obtained, bearing in mind that there are overlapping subspecialities. Retaining an expert is a matter of personal experience and often involves discussions with other attorneys who may have used any expert being considered. On occasion, the best expert is a subsequent treating/attending physician. Never hesitate to engage such a physician in conversation, preferably face-to-face. As an alternative to direct selection of the expert, there are numerous "expert services" which can indirectly provide competent and qualified specialists. However, this will add cost and, on occasion, a level of relative uncertainty until a direct dialogue and exchange of information is accomplished. Obviously, whether an expert is selected directly or indirectly, the expert must pass muster for purposes of providing a statement under the Certificate of Merit Rule and Section 512 of the Mcare Act. This requires a careful evaluation of any expert's education, knowledge, experience, training, employment history, and licensure, as well as the expert's speciality

qualifications vis a vis the specific care at issue. The analytical skills and demeanor of the expert is vital to trial success. It is, therefore, imperative to personally meet with the expert well in advance of trial not only to thoroughly review the issues, but equally as important, to personally assess the demeanor of the expert for jury communication in the courtroom. Again, discussing the expert witness with colleagues and reviewing the track history of the expert, together with a personal assessment, will enable a determination as to how the expert will perform live on direct and cross. Academic qualifications without personality, passion, integrity, and strength of purpose can quickly escape the jury's attention. Obviously, under the law as it has evolved, engaging more than one expert is commonplace before litigation is instituted. In sum, the selection of the expert is critical, for the expert is the threshold for determining merit and the development of theories, identification of standards, and understanding of the technical aspects of the case through medical treatises, journals, and other information essential to the establishment of a *prime facie* case. Expert review also is a vital tool in discovery when deposing the Defendant(s) and defense witnesses. Although the Plaintiff is the focus of the case, the expert witness can make or break the outcome during discovery, at trial and/or on appeal if expert qualifications or evidentiary issues are challenged.

5. "Think Like a Defense Attorney"

As all of the evidence is being marshaled from the client's version of facts, the medical records, economic loss records, medical research, and expert review, think like a defense attorney. Medical malpractice cases must be aggressively approached understanding that the best defense is a better offense. In order to establish a *prime facie* case and winning strategy with a jury, all potential defenses need to properly be identified and factually and logically refuted. Where the evidence may be conflicting, resolve any conflicts by accepting it, dealing with it and overcoming it based on fact, medicine, and advocacy. Forecast evidentiary issues, two schools of thought, notions, credibility concerns, professional judgment arguments, and proof problems. Follow an honest approach to substantiate what is true and what can be proven to be true, as well as what must be conceded as true and will likely be accepted by the jury as true. In this brave new world of medical malpractice litigation that has been reformed by the Legislature, the Courts, and the court of public opinion, the attorney representing the victim in a medical malpractice case must "front end load" the case with a comprehensive assessment of the facts founded in demonstrable truth and merit through competent expert review, issue simplification, organization, and coordination of proof for resolution by the jury. If the case cannot be placed in life's perspective in an honest, powerful, and straightforward way within the

bounds of permissible advocacy in our adversary process, the case will likely be lost before it is brought.

6. Venue

Where to sue is a function of the new venue rules as discussed above. In short, malpractice cases must be brought *in the county in which the cause of action arose*.

7. Statute of Limitations - The Discovery Rule

The statute of limitations for a malpractice action begins on the date the injury is sustained. 42 Pa.C.S. § 5524. Recognizing that the existence of an injury may not be apparent or reasonably ascertained, Pennsylvania Courts have endorsed the "discovery rule" as an exception to the two (2) year statute of limitations. Under this rule, the statute of limitations does not begin to run until such time as the injury's existence is known or discoverable through the exercise of reasonable diligence. The statute of limitations begins to run when a Plaintiff knows, or reasonably should have known that: (1) an injury has been sustained; and (2) the injury has been caused by another's conduct. In Checcio v. Rice, 870 A.2d 850, 858-59 (Pa. 2005), the Supreme Court held:

> [I]t is not relevant to the discovery rule's application whether or not the prescribed period has expired; the discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises.

Reasonable diligence demands that an individual exercise those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others. The discovery rule follows an objective standard tempered by sufficient flexibility to take into account the differences between persons and their capacity to meet certain situations and circumstances confronting them at the time in question. Simply put, reasonable diligence acknowledges the fallibility of human beings. See Miller v. Ginnsberg, 874 A.2d 93 (Pa. Super. 2005).

The discovery rule is one of fairness. It permits a party to bring a cause of action after the statutory period of limitations has passed where the existence of the injury was not known or where such knowledge could not be reasonably

ascertained. Of course, if through fraud, deception, or concealment of facts, including repeated assurances that a patient's condition will improve, a Defendant lulls an injured patient or his representatives into a sense of security such that the individual's diligence is relaxed, then the Defendant is estopped from evoking the statute of limitations. See Ward v. Rice, 828 A.2d 1118 (Pa. Super. 2003). The discovery rule does not apply to wrongful death and survival actions which must be commenced within two (2) years from the date of death. Pastierik v. Duquesne Light Co., 526 A.2d 323 (Pa. 1987); Pennock v. Lenzi, 882 a.2d 1057 (Pa. Cmwlth. 2005) (En Banc) (discovery rule does not extend 2 year statute of limitations for wrongful death and survival action). Finally, Pennsylvania law substantially extends the statute of limitations where the injury occurs to minors or by an undetected foreign object left in the patient. Under the Mcare Act, with the exception of such actions, a medical professional liability claim is limited by a seven (7) year statute of repose. 40 P.S. § 1303.513.

II. RULES TO LIVE BY WHEN FILING SUIT

- If you or your firm do not routinely do medical malpractice claims, do not do them.
- You make your money from the cases you don't take.
- Identify all issues pertinent to all claims and defenses upon initial screening of the case.
- Start with a good form, readjusting it to fit the facts and circumstances of the subject case.
- Evaluate cost versus recovery and available layers of insurance.
- Identify all liens.
- Your client must be credible.
- The facts must fit the record or the record must be proven wrong.
- Simplify - simplify - simplify.
- Think "depositions" as you draft; think trial as you depose.

- Subscribe to the philosophy that med-mal cases never settle and your probability and reputation for success will follow.

- Med-mal cases must be empowered for trial, not settlement.

- Amalgamate a "law file," including case law, statutory authority, rules and applicable regulations on all issues anticipated to be relevant to the pleadings and proof that may become the subject of preliminary objections and other challenges throughout the case.

- Track the legal precepts in the Complaint.

- Secure the requisite medical opinions from trial competent experts with detailed verbal/written reports before instituting suit and track said opinions in the Complaint.

- Make sure you secure all objective evidence up front (radiographic films, pathology slides/blocks, video, photographs, strips, blood gas slips, hardware, braces, etc.) - Identify spoliation/destruction of evidence issues.[2]

- Know your parties.

- Plead with requisite specificity as required by the rules of procedure, statutory law and decisional authority.

- Use separate counts for each theory against each Defendant named in the Complaint.

- Logically order the Defendants in a sequence that follows the factual predicate of the Complaint with sufficient specific detail to avoid unnecessary preliminary objection challenges that delay and burden the case.

- Discern the local requirements for filing including fees, cover sheets, etc.

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[2]. See Creazzo v. Sun, PICS Case No. 05-1327 (C.P. Northampton June 3, 2005) (McFadden, J.) (Plaintiff's failure to take the necessary steps to preserve a medical device after it was removed from Plaintiff-husband's body warranted dismissal of their manufacturing defect claim).

- Know what you are required to prove and be certain to plead it.
- Use plain English.
- Design and draft the Complaint with crisp assertions to obtain admissions from the defense.
- Plead the facts bearing in mind the scope of review for preliminary objections that all material facts set forth in the Complaint, as well as all inferences reasonably deducible therefrom, are admitted as true for purposes of review.
- Check and recheck the facts.
- Check and recheck the medicine, and whenever possible, have the Complaint reviewed by the appropriate licensed professional supplying the written statement of merit to assure the medical validity of the Complaint.
- Make certain that the client (and whenever possible integrally involved fact witnesses) reviews the Complaint for its factual accuracy and completeness.
- Recheck the named Defendants to make sure that their identities, spellings, and addresses are correct.
- Recheck the named Plaintiffs, including Administrators, Executors, Guardians, and spouses.
- Seek an independent review of the draft Complaint by other attorneys unfamiliar with the facts, theories, and medicine (at a minimum, have someone else proofread the draft).
- Strive to work as a team in developing, drafting, and finalizing the Complaint for filing.
- File on time, meeting the statute of limitations or requirements of the discovery rule exception, assuring that the necessary client verification is attached.

- File the COM with the Complaint or within sixty (60) days after the filing of the Complaint.
- Anticipate defenses and affirmatively seek to diffuse them in the Complaint.
- Hand file the Complaint or utilize overnight express delivery and always obtain a time-stamped copy.
- Remember to demand a jury trial.
- Keep the Prothonotary filing receipt as evidence of filing and jury trial demand.
- Serve the Defendants forthwith.
- Separately itemize the damages sustained[3] and where applicable include the requisite allegations and elements for punitive damages (i.e., conduct that is the result of the health care provider's wilful, wanton or reckless indifference to the rights of others -- an easily perceptible danger of death or substantial physical harm and the probability that it will so result must be substantially greater than is required for ordinary negligence), understanding that a claim for punitive damages is merely incidental and may be struck without

[3] See 40 P.S. § 1301.509. and Pa. R.C.P. 1042.1.

prejudice to the Plaintiff's right to restate a punitive damages claim if supportable as part of the Complaint. [4]

- Appreciate and plead the applicable standard of care, realizing that in cases such as those subject to the Mental Health Procedures Act, that a gross negligence standard (a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity or indifference; the behavior of the Defendant must be flagrant, grossly deviating from the ordinary standard of care) is required.[5]

- Never hesitate to file a separate, new, or amended Complaint and/or COM(s) prior to the statute of limitations to preserve and protect the rights of the Plaintiff(s).

- Whenever possible, file early to eliminate surprise and prejudice by identifying all tortfeasors before the statute of limitations.

- Whenever possible before the statute of limitations has expired, compel the defense to identify all potential parties that may have

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[4]See Lawrence v. Kunkle, (C.P. Lancaster Sept. 28, 2005) (Cullen, J.), citing and quoting, Hutchinson ex rel. Luddy, 870 A.2d 766 (Pa. 2005): Complaint properly states claim for punitive damages where surgeon refused to perform surgery because patient was uninsured. "A punitive damages claim must be supported by evidence to establish that (1) a Defendant had a subjective appreciation of the risk of harm to which the Plaintiff was exposed and that (2) he failed to act...in conscious disregard of that risk." Here, the Court ruled: "The Defendant knew that delaying surgery would create the probability that the Plaintiff would suffer permanent neurological and functional deficits and that the delay would subject Plaintiff to unreasonable and avoidable risk of future injury." Such allegations, if proven, would establish "conscious, deliberate and outrageous conduct." See also Martin v. Johns-Manville Corp., 494 A.2d 988 (Pa. 1985); Feld v. Merriam, 485 A.2d 742 (Pa. 1984); Paul v. Jackson, 788 A.2d 390 (Pa. Super. 2001); McClellan V. Health Maintenance, 604 A. 2d 1053 (Pa. Super. 1992); Hoffman v. Memorial Osteopathic Hospital, 492 A.2d 1182 (Pa.Super. 1985); Stubbs v. Frazier, 454 A.2d 119 (Pa. Super. 1982); Medvez v. Choi, 569 F. 2d 1221 (3rd Cir. 1977); Corrigan v. Methodist Hospital, 869 F. Supp. 1202 (E.D. Pa. 1994). But see Gallagher v. Temple University Hospital, No. 002643, J. JA08009/05, PICS No. 05-1538 (Pa. Super. Sept. 15, 2005) (Memorandum) (Where claimed outrageous acts - true facts surrounding the Plaintiff's oxygen depravation covered-up by whiting out, rewriting and withholding a flow sheet, the original of which the Hospital deliberately failed to produce, warranted could not be located, yet knew was in a safe in the office of the Hospital's risk manager - are independent from the conduct on which liability is premised, there is no basis for a punitive damages claim; the right to punitive damages is a mere incident to a cause of action, not the subject matter of the action itself). See also Stroud v. Abington Memorial Hospital, 2008 WL 1757926 (E.D. Pa. 2008)(Punitive damages predicated on cover up of prior knowledge not allowed).

[5] See Downey v. Crozer-Chester Medical Center, 817 A.2d 517 (Pa. Super. 2003).

been missed or otherwise unknown to enable the initiation of suit against any such party within the statute.

- Before the statute of limitations has expired compel the defense to identify all parties the defense may seek to blame, including especially all independent contractors.

- If the defense refuses to identify potentially culpable parties, vigorously pursue such information in Discovery Court by seeking to obtain an order compelling disclosure and protecting the record, including a directive that non-compliance will result in a waiver of any statute of limitations defense.

- For wrongful death actions, be certain to comply with the applicable rules of civil procedure, stating the Plaintiff's relationship to the decedent, the Plaintiff's right to bring the action, the names and last known residence addresses of all persons entitled by law to recover damages, the relationship to the decedent, and that the action was brought on their behalf with notice to each person entitled by law to recover damages in the action.[6]

- Consider obtaining a Scheduling Order under Pa. R. C. P. 1042.41 and 51.

- Evaluate whether mediation or ADR would be appropriate for the case. See Pa. R.C.P. 1042.21 and 1042.51.

- Theories flow from facts, not the converse.

III. FILING SUIT

A. Rules of Procedure

1. Pennsylvania Rules of Civil Procedure in General

The initiation of a medical professional liability claim, like any state civil action, requires a basic understanding of the Pennsylvania Rules of Civil Procedure on pleading. An action may be commenced by filing with the

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[6] See Pa.R.C.P. 2202, 2204 and 2205.

Prothonotary a praecipe for Writ of Summons or a Complaint. Pa.R.C.P. 1007. See **Appendix B**: **Sample Complaints.** A jury trial must be formally demanded not later than twenty (20) days after the last permissible pleading; otherwise, that right is deemed waived. Pa.R.C.P. 1007.1. The Writ of Summons or Complaint must contain a caption setting forth the name of the Court, the number of the action, the name of the pleading, the form of the action and the names of all of the parties. Pa.R.C.P. 1018. Every Complaint filed by a Plaintiff and every Complaint filed by a Defendant against an additional Defendant must begin with a notice to defend. Pa.R.C.P. 1018.1. In addition, all actions claiming medical professional liability must contain the designation "Civil Action - Medical Professional Liability Action." Pa.R.C.P. 1042.16.

Rule 1019 regulates the contents of pleadings. Material facts on which a cause of action is based must be stated in a concise and summary form. Although averments of fraud must be averred with particularity, allegations of malice, intent, knowledge and other conditions of the mind may be stated generally. Averments of time, place and items of special damage must be specifically stated. Any part of the Complaint may be incorporated by reference in any other part of the Complaint or in any other pleading in the same action. A party may also incorporate by reference any matter of record in any State or Federal court of record whose records are within the county in which the action is pending, or any matter which is recorded or transcribed verbatim in the office of the Prothonotary, Clerk of any court of record, or Register of Wills of such county. When a claim or defense is based upon a writing, a copy or material part of the writing must be attached to the Complaint. Pa.R.C.P. 1019(a), (b), (f), (g) and (i).

The Plaintiff may plead more than one cause of action against the same Defendant in the Complaint; however, each cause of action and any special damage related thereto must be stated in a separate count containing a demand for relief. Pa.R.C.P. 1020(a). Causes of action and defenses may be pleaded in the alternative. Pa.R.C.P. 1020(c). If an occurrence gives rise to more than one cause of action against the same person, including causes of action in the alternative, they must be joined in separate counts in the action against such person. Failure to join a cause of action constitutes a waiver of such cause of action against all parties to the action. Pa.R.C.P. 1020(d). The relief sought must be specified; any demand for unliquidated damages must not claim a specific sum. Pa.R.C.P. 1021(a) and (b). Every pleading must be divided into paragraphs numbered consecutively and each paragraph should strive to contain only one material allegation. Pa.R.C.P. 1022. Every Complaint must be signed by at least one attorney of record in the attorney's individual name or by the party if unrepresented. Pa.R.C.P. 1023.1(b). The Complaint must be verified and

endorsed in accordance with Rules 1024 and 1025. See **Appendix C**: **Pa. Supreme Court Promulgates Fed. Rule 11 Equivalent.** A Complaint must identify each Defendant against whom the Plaintiff is asserting a professional liability claim. Pa.R.C.P. 1042.2.

B. Certificate of Merit: Pa.R.C.P. 1042.1-8

1. Rules of Procedure

On January 27, 2003, the Pennsylvania Supreme Court promulgated the Certificate of Merit ("COM") Rules effective immediately to actions commenced on or after January 27, 2003. The COM Rules control all civil actions in which a professional liability claim against a licensed professional is asserted. Pa.R.C.P. 1042.1(a). A "licensed professional" includes a health care provider as defined by Section 503 of the Medical Care Availability and Reduction of Error (Mcare) Act, 40 P.S. § 1303.503,[7] a chiropractor, dentist, nurse, optometrist, pharmacist, physical therapist, psychologist, and any of these professionals licensed by another state. Pa.R.C.P. 1042.1(b). When drafting a professional liability action Complaint, each Defendant against whom the Plaintiff is asserting a professional liability claim must be identified. Pa.R.C.P. 1042.2(a). The COM Rules recommend that the following language be used:

> Defendant _____(name) is a licensed professional with offices in _____ County, Pennsylvania. Plaintiff is asserting a professional liability claim against this Defendant.

Id., Note. If a Plaintiff fails to properly assert a professional liability claim against a particular Defendant, this failure to comply with Rule 1042.2(a) must be raised by preliminary objections. Pa.R.C.P. 1042.2(b).

The COM Rules, as amended, further mandate:

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[7] Mcare defines "health care provider" as a primary health care center, a personal care home licensed by the Department of Public Welfare pursuant to the act of June 13, 1967 (P.L. No. 21), known as the Public Welfare Code, or a person, including a corporation, university or other educational institution licensed or approved by the Commonwealth to provide health care or professional medical services as a physician, a certified nurse midwife, a podiatrist, hospital, nursing home, birth center and an officer, employee or agent of any of them acting in the course and scope of employment.

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the Plaintiff, or the Plaintiff if not represented, shall file with the Complaint or within sixty (60) days after the filing of the Complaint, a COM signed by the attorney or party that either

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the Complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

(2) the claim that the Defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this Defendant is responsible deviated from an acceptable professional standard,[8] or

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[8] On February 11, 2005, The Pennsylvania Supreme Court amended the Note to Rule 1042.3(a)(2) to explain:

> NOTE: A COM based on the statement of an appropriate licensed professional required by subdivision (a)(1), must be filed as to the other licensed professionals for whom the Defendant is responsible. The statement is not required to identify the specific licensed professionals who deviated from an acceptable standard of care.

wholesale failure to take any of the actions mandated by the COM rule. There is no equitable exception for substantial compliance with the COM rule for the litigant who fails entirely to timely file a COM.

The court found guidance in the pre-Womer Superior Court opinion in Almes v. Burket, 881 A.2d 861 (Pa. Super. 2005), which excused noncompliance with the rule where Plaintiff's counsel had taken steps to secure expert review, but was away from his office when the sixty day deadline expired due to a death in his family. Under these facts, the Superior Court held that there was a reasonable explanation or legitimate excuse for non-compliance. Comparing Almes to Womer, the Court concluded that "a reasonable explanation or legitimate excuse for noncompliance must establish that the noncompliance was due to some intervening event that could not have been reasonably expected. . . . "[I]t is clear that **the reasonable explanation or legitimate excuse must be more than a misunderstanding of the law governing the applicability of the COM requirement and its deadlines or a belief that no COM is required as to the claims present.**" As an example of substantial compliance, the court observed that it would likely be deemed sufficient compliance if counsel failed to check off all applicable boxes but possessed a written COM statement by an appropriate licensed professional.

3. Merlini v. Gallitzin Water Authority, 934 A.2d 100 (Pa. Super. 2007)

Plaintiff filed a Complaint against an engineering firm alleging that the firm constructed a water line on her property without permission, impairing the property's use. The firm then secured a judgment of non pros for the Plaintiff's failure to file a COM. Plaintiff then petitioned to open judgment asserting that her case was based upon simple negligence, not professional negligence. The Trial Court denied the Petition. The Superior Court reversed concluding that the Complaint did not assert a professional liability claim because it did not allege a deviation from accepted professional standards. Rather, the Court concluded that the Plaintiff's claim involved a breach of duty not to trespass on property, not a question of professional judgment and that, therefore, the Plaintiff was not required to file a COM. This result was reached by the Court based upon the consideration of two fundamental questions in determining whether a claim alleges ordinary, as opposed to professional, negligence: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of professional judgment beyond the realm of common knowledge and experience.

4. Smith v. Friends Hospital, 928 A.2d 1072 (Pa. Super. 2007)

Patient who alleged that she was sexually assaulted and beaten by hospital employees during her hospitalization was not required to file a COM against the hospital for corporate negligence and negligent supervision because her claims did not raise questions of medical judgment or alleged substandard medical treatment. Given that no "professional" standard was involved, the COM rules were deemed inapposite. Indeed, the injuries to the Plaintiff were not the result of the performance of professional services and did not raise questions involving medical judgment beyond the realm of common knowledge and experience. The Plaintiff's claims against the hospital centered only on its failure to properly employ and supervise the assailants and the failure to prevent such acts from occurring.

5. Bourne v. Temple University Hospital, 932 A.2d 114 (Pa. Super. 2007)

Plaintiff underwent surgery to reposition a defibrillator which had previously been inserted into his chest. Postoperatively, he developed a decubitus ulcer which became infected and other conditions. Plaintiff commenced suit against a hospital and other named and unnamed Defendants but did not file any Certificates of Merit with the Complaint. Plaintiff then timely filed a Motion seeking leave to extend the time within which to file the COM pursuant to Rule 1042.3(d). The Trial Court denied this Motion, and the very next day, the Defendants secured a judgment of non pros pursuant to Rule 1042.6(a). The Plaintiff filed a Petition to strike the judgment of non pros arguing that by filing a Motion for Extension, the sixty day period for filing a COM was tolled. The Trial Court rejected this assertion, and the Superior Court reversed holding that Rule 1042.3(d) suspended the time within which the Plaintiff was required to file his COM, stopping the sixty day clock between the time that the Motion for Extension was filed and the sixtieth day of the Rule.

6. Shon v. Karason, 920 A.2d 1285 (Pa. Super. 2007)

Podiatrist's corporate employer was deemed a healthcare provider pursuant to Section 503 of the Mcare Act for which a COM was required to maintain an action in professional negligence. Additionally, citing Womer, the Superior Court concluded that the Plaintiff was not entitled to open the judgment of non pros entered for failure to file a COM because no steps had been taken to comply with Rule 1042.3. Although radiographic and pathology evidence served to prove that a surgical procedure was patently unnecessary, this evidence did

not constitute a COM or otherwise amount to substantial compliance with the rule.

7. Ditch v. Waynesboro Hospital, 917 A.2d 317 (Pa. Super. 2007)

Where a hospital failed to restrain a stroke patient in bed who fell and suffered injuries leading to her death, the Superior Court rejected the argument that the negligence was "ordinary" rather than professional in nature. The Court concluded that the Complaint sounded in medical malpractice because the conduct at issue constituted an integral part of the process of rendering medical treatment to the Plaintiff's decedent. As such, a COM was mandatory. The Court further ruled that the hospital was not required to raise a preliminary objection based on the Plaintiff's failure to file a COM as a prerequisite to filing a Praecipe for Entry of Judgment of non pros under Rule 1042.6.[17] The Court further ruled that the Plaintiff's filing of an Amended Complaint did not foreclose the hospital's Motion for Judgment of non pros or restart the sixty day period for filing a COM. On the facts before it, the Superior Court held that the Trial Court properly denied Plaintiff's Motion to Open and/or Strike the Judgment of non pros because the Plaintiff took no steps to file a COM and failed to articulate reasons as found in its Almes decision that would present a legitimate excuse for opening the judgment.

8. Gondek v. Bio-Medical Applications of Pennsylvania, Inc., 919 A.2d 283 (Pa. Super. 2007)

Plaintiff was injured as a passenger in a head-on motor vehicle accident caused by Defendant driver, a dialysis patient who had just received dialysis treatment from Defendant's dialysis treatment center. Plaintiff sued the dialysis treatment company alleging negligence for failing to adequately monitor the Defendant driver's physical condition, failure to warn the Defendant driver of the challenges in operating a motor vehicle after dialysis treatment and the risks inherent in consuming food shortly after dialysis treatment, and in releasing the Defendant driver dialysis patient from their care when he was not capable of safely operating his motor vehicle. Plaintiff neither filed nor sought a motion to extend the time for filing a COM. Defendant dialysis company secured a

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[17] The Superior Court observed that the contrary ruling in Herrmann v. Pristine Pines of Franklin Park, Inc., 64 Pa.D&C 4th 14 (Allegheny 2003) was not binding and, in fact, had been explicitly rejected by Varner v. Classic Cmtys. Corp., 890 A.2d 1068 (Pa. Super. 2006) and Yee v. Roberts, 878 A.2d 906 (Pa. Super. 2005).

judgment of non pros. The Trial Court denied Plaintiff's Petition to Open, rejecting the Plaintiff's argument that she sued the Defendant treatment center as a joint tort-feasor, not on the basis of a professional liability claim. The Superior Court affirmed, holding that a COM was required against the kidney dialysis company. The Superior Court agreed with the Trial Court that the allegations of the Plaintiff dealt with the failure to render proper professional care. The Court observed that expert testimony would be required to establish the duty owed to the dialysis patient, the standard of care with respect to training and supervision of personnel performing dialysis treatment, the standard applicable to such treatment, and the breach of such standards. Because the Plaintiff's negligence claim originated from the administration and supervision of professional dialysis treatment, the Superior Court concluded that the Plaintiff alleged negligence in the performance of a professional duty and that the Plaintiff thus failed to file a COM as required by Rule 1042.3. As part of its ruling, the Superior Court also found that the failure to file Preliminary Objections did not constitute a waiver of the Defendant's objection to the Plaintiff's failure to file a COM.

9. Pollock v. Feinstein, 917 A.2d 875 (Pa. Super. 2007)

In this informed consent case where the Plaintiff only alleged that she was not fully informed of the risks of a laparoscopic procedure to which she had agreed, the Superior Court held that a COM was required because Rule 1043.3 applies to "a cause of action that is based upon an alleged lack of material medical information as would fail to attain informed consent to undergo a medical procedure." Thus, where a claim is founded upon the alleged failure of a Defendant physician to provide a patient with a full explanation of the medical risks involved in a procedure, the Court pronounced that "at its core," this action required a showing that the [Defendant physicians] failed to conform to a specific acceptable professional standard, namely 'to provide patients with material information necessary to determine whether to proceed with the surgical or operative procedure or to remain in the present condition." Given that this would require expert testimony on any failure to disclose such information as would impart to the Plaintiff a true understanding of the nature of the operation to be performed, the seriousness of it, the organs of the body involved, the disease or incapacity sought to be cured, and the possible results, the Court concluded that the Plaintiff "was required to file a certificate of merit stating that there was a reasonable probability the information provided by [the Defendant physicians] had failed to impart a true understanding of the risks of the procedure." The Court limited its holding, however, to the particular facts of the case. But see Thompson v. Janetta, CCP, Allegheny, No. GD03-10662 (February 12, 2004) (Wettick, J.) (because a lack of informed consent claim is not an action based on

an allegation that a physician deviated from an accepted professional standard, Rule 1042.3 does not require the filing of a COM).

10. Kennedy v. Butler Memorial Hospital, 901 A.2d 1042 (Pa. Super. 2006)

Plaintiff sued Defendant hospital for injuries allegedly caused by the infiltration of medication into her tissues leading to complications requiring emergency surgery. She advanced the theories of vicarious and corporate liability. Plaintiff did not file a COM until six months after filing her Complaint when reminded by defense counsel who filed a Praecipe for entry of a default judgment. Although the untimely filed COM set forth the certifying language for direct liability cases, it did not contain the language for vicarious hospital liability. The hospital then filed preliminary objections on this basis, and the Plaintiff amended her Complaint. Over four months later, the Plaintiff filed a second COM, again failing to include certification for vicarious liability. The hospital filed a second set of Preliminary Objections seeking dismissal of the vicarious liability claim grounded in the Plaintiff's failure to provide a COM within sixty days certifying merit to the vicarious liability claim. The Trial Court ultimately dismissed Plaintiff's Amended Complaint in its entirety. On appeal, the Superior Court, in pertinent part, reversed the holding that the Plaintiff had substantially complied with the COM rules by filing a direct corporate liability COM. In reaching this conclusion, the Superior Court explained that the case was controlled by its recent decision in Harris v. Neuburger, infra. The Court somehow concluded that a technically deficient COM was in fact filed and that although the wrong subsection of the COM rule was listed, from the detailed nature of the Plaintiff's Amended Complaint "the hospital certainly would know that the certificate referred to the actions of its employees and would not be prejudiced." In a concurring and dissenting opinion, Judge Johnson expressed the view that the COM filed by the Plaintiff was materially deficient and therefore failed to comport with Rule 1042.3. Judge Johnson agreed that flaws in the form of a Plaintiff's COM should be excused where there has been "substantial compliance" with the purpose of Rule 1042.3 to prevent the filing of baseless medical professional liability claims. However, Judge Johnson departed from the majority's analysis, finding that a Complaint, no matter how detailed, does not substitute for a COM which serves to compel that the Plaintiff's claims if accepted as true possess some reasonable level of merit as to each Defendant that have not been filed merely to expand the pool of resources available to satisfy the Plaintiff's claim. Because a detailed Complaint cannot establish that a Plaintiff's claims are sufficiently meritorious in the opinion of an appropriate medical professional, Judge Johnson concluded that the Complaint itself may not fulfil the underlying

purpose of the COM. Judge Johnson determined that substantial compliance with the COM rules was not shown, nor were the statements of licensed professionals underlying the claims filed of record as in the Harris case.

Clearly, this Superior Court opinion bears no substantive validity given the fact that the Supreme Court, in Womer v. Hilliker, 908 A.2d 269 (Pa. 2006) overruled Harris. Moreover, the reasoning of the dissenting opinion by Judge Johnson is equally as compelling.

11. Varner v. Classic Communities Corporation, 890 A.2d 1068 (Pa. Super. 2006)

The Superior Court held that a COM was required in a suit against an architectural firm and that Plaintiff's counsel's unawareness of the new COM Rules was not a reasonable excuse to open a judgment of non pros. The underlying case arose from a townhouse fire that resulted in death and multiple injuries where the Plaintiffs asserted that the Defendant architectural firm violated the BOCA Code in the construction of the townhouse by using inadequate fire-resistant materials, resulting in rapid spread and prolonging the entrapment of the victims. The Court ruled that the substance of the Complaint, rather than its form controls whether the claim against a professionally licensed Defendant sounds an ordinary negligence or professional malpractice claim. The Court reasoned that because the Plaintiff's claims sounded in professional architectural malpractice and would require expert testimony on claimed noncompliance with the BOCA Code, a COM was required.

12. Harris v. Neuburger, M.D., 877 A.2d 1275 (Pa. Super. 2005), overruled, Womer v. Hilliker, 908 A.2d 269 (Pa. 2006)

Plaintiff obtained expert reports from a board certified emergency room physician which concluded that a Defendant hospital and physician breached the standard of care in their treatment of Plaintiff's decedent, leading to his death. Plaintiff also obtained an additional report from a board certified pediatrician concluding that the Defendant hospital and physicians breached the standard of care and that such conduct was a substantial factor in the death. Pre-litigation, Plaintiff delivered these reports to the hospital and its identified hospital employee doctors as part of a forthcoming lawsuit. Plaintiff then initiated the action by Complaint but failed to file a COM within sixty days. After the Defendants secured a judgment of non pros pursuant to Rule 1042.6, the Trial Court granted the Plaintiff's Petition to Open, finding that the Plaintiff provided a reasonable explanation in that he erroneously, but reasonably, believed that he

had complied with the requirements of the COM Rule by exceeding the elements and purpose of the Rule by providing the Defendants well in advance of the sixty day time limit with not just an Affidavit certifying that an expert report exists but the actual expert reports themselves, as well as the CV's of the experts. The Superior Court ruled that the Trial Court did not abuse its discretion and properly granted the Plaintiff's Motion to Open based on the equitable principles of Rule 126 and the finding that "it was not wholly unreasonable for [Plaintiff] to have concluded that his actions represented substantial compliance with the Certificate of Merit Rule." The Superior Court reasoned "that since [Plaintiff] has satisfied the purpose of Rule 1042.3, he should not be barred from his day in court because he mistakenly, but reasonably, believed he had met his obligation."

NOTE: This opinion has been expressly overruled by the Pennsylvania Supreme Court in Womer v. Hilliker, supra.

13. O'Hara v. Randall, 879 A.2d 240 (Pa. Super. 2005)

The sixty day limitations period for filing a COM does not start anew when a Plaintiff amends the original Complaint.

14. Almes v. Burket, 881 A.2d 861 (Pa. Super. 2005)

Noncompliance with Rule 1042.3 is excused where Plaintiff's counsel had taken steps to secure expert review; however, because of a death in his family, he was away from his office when the sixty day deadline expired. Based on these facts, as a matter of equity and grace, the Superior Court observed that Trial Courts are loathed to put a litigant out of Court for missing a filing deadline due to lawyer oversight and that "snap" judgments are disfavored under Pennsylvania law. The Court held:

> We are not prepared to assert that an attorney who forgets that the certificate was due or who fails to [file a COM] when faced with a family crisis like the one presented here is so derelict in his obligations that the oversight should not be excused.
>
> The law requires only that the failure be accompanied by a reasonable explanation or reasonable excuse. Keeping in mind that the opening of a judgment is an appeal to the equitable powers of the court, we do not believe our law is so cold-hearted as to demand

> vigilance of an attorney who experiences a death in the family or is so cold as to be unwilling to excuse failure under these circumstances. The purpose of requiring a COM is to help eliminate frivolous claims of professional negligence and, possibly, to help hasten the prosecution of the same. Another recognized purpose of the rule can be found in Speicher v. Toshok, 63 Pa.D&C 4th 435, 443 (2003), where it was stated that "the purpose of these rules is to minimize the costs of defense and the time that a licensed professional must devote to the litigation until the Plaintiff has been able to secure a Certificate of Merit." Under the circumstances of the present case, a delay of one week does little damage to either of these admittedly legitimate goals.
>
> For the above reasons, we conclude that [Plaintiff] proffered a reasonable excuse for the failure to file the Rule 1042.3 Certificate of Merit.

Notably, the Pennsylvania Supreme Court, in Womer v. Hilliker, supra., neither disapproved nor addressed the Almes decision. Because the Supreme Court held in Womer that a judgment of non pros entered pursuant to Rule 1042.6 is subject to a Rule 3051 Petition, the Almes case presents a very persuasive equitable consideration for establishing the existence of a reasonable explanation or legitimate excuse for noncompliance.

15. Krauss v. Clarr, 879 A.2d 302 (Pa. Super. 2005)

The Court held that property buyers' claims sounding in tortious interference with contract, negligent misrepresentation, intentional misrepresentation, promissory estoppel, and equitable estoppel against an attorney who served as a broker representing the sellers of the property did not involve any claim that the attorney deviated from an accepted professional standard and therefore did not require the filing of a COM. Significantly, the Superior Court observed that the Plaintiff Buyers had not sought the professional services of the attorney they sued. For this further reason, the Superior Court held that the Plaintiffs were not required to file a COM.

16. **Yee v. Roberts, 878 A.2d 906 (Pa. Super. 2005)**

Preliminary Objections filed by Defendant dentist and professional partnership challenging the specificity of a Plaintiff's dental malpractice Complaint did not present a reasonable explanation for Plaintiff's failure to timely file a COM.

17. **Parkway Corporation v. Edelstein, 861 A.2d 264 (Pa. Super. 2004)**

In this legal malpractice case, the Superior Court found that a memorandum prepared by Plaintiff's attorneys was not a satisfactory substitute for a COM. The Plaintiff's submission of a COM with a Petition to Open was not deemed a reasonable excuse but merely an afterthought that did not cure the failure to comply with the specific time requirements of the rule either by submitting a COM with the Complaint or requesting an extension of time to do so.

18. **Hoover v. Davila, 862 A.2d 591 (Pa. Super. 2004)**

A pro se Plaintiff is not absolved from compliance with Rule 1042.3. Ignorance of the law is no excuse; the sixty day period for filing a COM begins to run on the date of the filing of the original Complaint.

19. **Koppel v. Case, 2 Pa.D&C 5th 373 (Allegheny 2007) (Wettick Jr., A.J.)**

The Trial Court may properly impose sanctions against an attorney representing unsuccessful Plaintiffs in a medical malpractice case where a COM is predicated on unqualified expert review and did not conform to Rule 1042.3. The filing of a COM without a statement of an appropriate licensed professional completely undermines the purpose of the rule that a professional not be required to defend a case that has not been favorably reviewed by an appropriate licensed professional. The Supreme Court did not require a statement of the appropriate licensed professional to be attached to the COM because the Supreme Court assumed that lawyers can be trusted to pursue only cases for which they have obtained the statement required under the rule. This Trial Court held, therefore, that preservation of the integrity of the rule required that significant sanctions be imposed where there was a flagrant disregard of the requirements of the rule. Accordingly, the Trial Court imposed attorney's fees, litigation costs, the cost of insurance premiums incurred by the Defendant doctor, and a donation to an

international medical mission founded to repair childhood deformities internationally.

20. Czerniak v. Longshore, 83 Pa.D&C 4th 459 (Bucks 2007) (Boylan, J.)

Plaintiff filed a Complaint against Defendants for negligently performed cataract surgery resulting in loss of visual acuity. Pre-litigation, Plaintiff's counsel drafted the Complaint with the aid of an expert report authored by a licensed opthamologist who opined that the case had merit and was willing to testify at trial. Plaintiff's counsel did not, however, file the COM within sixty days or a Motion for Extension. The defense snapped a non pros and the very next day Plaintiff filed a COM for each Defendant. Plaintiff then filed a Petition to Open/Strike Judgment, which the Trial Court granted.

The Trial Court noted that the Plaintiff bore the burden of demonstrating that there is "good cause" to reactivate the case pursuant to Rule 3051(b). Specifically, the Trial Court found that the Plaintiff demonstrated good cause and satisfied the three pronged test of Rule 3051(b) with a reasonable explanation for the delay. Plaintiff's counsel believed that the Certificate had been filed with the Complaint by another attorney within her firm according to ordinary business practices. In addition, Plaintiff's counsel immediately filed the Certificates establishing that the cause of action was meritorious with a detailed explanation of the deviations from acceptable professional standards after learning of the mistake. The Trial Court recognized that a Plaintiff should not be punished for errors of counsel which indicate an oversight rather than a deliberate decision. Because the Plaintiff's attorney believed that the certificates were filed until the Defendants filed their Praecipes for Entry of Judgment of Non Pros and upon learning of the inadvertent misstep, immediately filed COM's, the Trial Court reasoned that the purposes of requiring a COM to eliminate frivolous claims of professional negligence and to hasten the prosecution of such claims were satisfied. Indeed, the Plaintiff's expert had concluded that the claim was meritorious well before the Complaint had ever been filed.

The Trial Court distinguished the case from Womer v. Hilliker, supra. Unlike the Plaintiff in Womer, the Plaintiff Czerniak did not argue that she did not have to file a COM or that she had substantially complied with the terms of Rule 1042.3. Rather, the Plaintiff's attorney provided the reasonable explanation that she had believed that the COM had been filed with the Complaint. After balancing the equities and the totality of circumstances, including the lack of prejudice to the defense, the immediate filing of COM's after discovery of the

problem, the non-frivolous claims, and the willingness of Plaintiff's expert to testify on Plaintiff's behalf well before the Complaint was filed, the Court concluded that "it would be unfair to deny Plaintiff the opportunity to proceed with her legitimate malpractice claim."

21. Baker v. Kindred Healthcare, Inc., 83 Pa.D&C 4th 225 (Beaver 2007) (Kunselman, P.J.)

A paralegal for Plaintiff's counsel sent COMs to the Beaver County Prothonotary's Office via overnight delivery, which were received by the Prothonotary but returned to counsel for the Plaintiff because they had not been accompanied by a service fee for filings not presented in electronic format in accordance with a local rule. There was no dispute that the COMs were received on the sixtieth day after the filing of the Complaint. However, the Defendants were able to secure a non pros solely because the local documentary uploading fee had not been paid. The Trial Court ruled that the COMs should not have been refused by the Prothonotary. As part of its rationale, the Court analyzed Womer v. Hilliker, *supra.*, emphasizing that Plaintiff Womer took no steps to comply with Rule 1042.3, but instead engaged in a wholesale failure to take any of the actions that the Rule required. In reaching this result, the Court viewed the Plaintiff's attempted filing as a misstep where the Plaintiff had substantially complied with Rule 1042.3(a). Because the Plaintiff did not violate any state rule, the Court held that the Plaintiff established a reasonable explanation or legitimate excuse for the delay in filing the COM's under Rule 3051(b)(2).

22. McAfee v. Pinnacle Health Systems, 1 Pa.D&C 5th 17 (Dauphin 2007) (Kleinfelter, J.)

Plaintiff's Complaint alleged that two radiological technicians employed by a Defendant hospital caused injury to Plaintiff's decedent while attempting to move her into a wheelchair for the purpose of transporting her to the radiology department for a radiographic study. The Plaintiff claimed that the hospital vicariously caused decedent's death by failing to properly restrain her, failing to properly train hospital staff with regard to patient transportation procedures, and leaving the decedent alone while she was being transported. Plaintiff did not file a COM or seek an extension to do so. After entry of judgment of non pros pursuant to Rule 1042.6, the Court denied Plaintiff's Petition to Strike/Open, rejecting Plaintiff's assertion that her case was not grounded in medical malpractice. In determining the necessity *vel non* of a COM, the Court noted its obligation to examine the averments made in Plaintiff's Complaint. On its face, the Court concluded that Plaintiff's Complaint clearly alleged medical

malpractice. Moreover, the fundamental questions underlying the claims embraced harm within the course of a professional relationship and questions of medical judgment beyond the realm of common knowledge and experience. Because the Complaint alleged that the Defendant vicariously failed to employ standard procedures required in effecting the transport of the decedent thereby failing to exercise the standard of care, and failed to properly hire, train, and supervise its radiology department personnel involved in transporting the decedent, the Court deemed the reference to standard hospital policies and procedures and appropriate standards of care to clearly sound in medical malpractice. Moreover, the Court found that expert testimony would be necessary on these issues. Citing Womer v. Hilliker, the court rejected the Plaintiff's contention that his non-compliance should be excused because the Plaintiff made no attempt to comply with Rule 1042.3 so as to be entitled to relief from the judgment of non pros.

23. Sabo v. Worrall, 81 Pa.D&C 4th 395 (Allegheny 2007) (Wettick Jr., A.J.)

Four months before filing a medical malpractice Complaint, Plaintiff's attorney received an expert report stating that the care rendered by the Defendants fell below the standard of care and caused a decedent's injuries. Within several days after the Complaint was filed, COMs were prepared and placed in the file and reviewed by Plaintiff's counsel, who believed they were filed with the Prothonotary. Counsel assumed that they had been filed by his paralegal until he received notice of entry of non pros judgment. The Trial Court noted that the Plaintiff made an effort to comply with the requirements of Rule 1042.3 and that, therefore, she was entitled to avail herself of Rule 3051 to establish a reasonable explanation or legitimate excuse for such failure. In reaching this result, the Court specifically referenced Womer v. Hilliker, where the Supreme Court held that the Plaintiff could not satisfy the Rule 3051 requirement that there be a reasonable explanation or legitimate excuse because the Plaintiff took no steps to comply with Rule 1042.3. In contrast, the facts of the instant case supported a finding that the Plaintiff's counsel was aware of the requirements of Rule 1042.3 and made an effort to comply with the requirements, raising both questions of fact and law. Central to the court's thinking for granting relief was whether or not the Plaintiff Petitioner mistakenly believed that she had filed a COM. Under the circumstances, the Defendants also challenged the sufficiency of the Plaintiff's expert, an internist, who they argued could not support a COM as to causes of action against a board-certified orthopaedic surgeon or a board-certified emergency room physician. This, the Court ruled, required

depositions and briefing. See Rule 1042.3(a)(1) and accompanying note which defines an appropriate licensed professional giving a COM as an expert that would be permitted to testify at trial.

24. Doble v. Moses Taylor Hospital, 78 Pa.D&C 4th 449 (Lackawanna 2006) (Nealon, J.)

The court ruled that equity dictated opening judgments of non pros where Plaintiff supplied an expert report to her counsel but her attorney failed to timely file a COM and did not advise her to seek new counsel until after the judgments of non pros were entered. The court stated: "The goal of the Certificate of Merit is to weed out clearly non-meritorious lawsuits early in the litigation process . . . and the courts have been more inclined to grant petitions to open judgments of non pros where the purpose of Rule 1042.3 has been satisfied." Since the Plaintiff provided an expert report to her lawyer well in advance of the COM deadline and the litigation was in its infancy, the Court held that the goal of Rule 1042.3 would not be frustrated by opening the judgments of non pros. The persuasive validity of this Trial Court opinion is controvertible in light of the Supreme Court holding in Womer overruling the Superior Court decision in Harris.

25. White v. Behlke, 69 Pa.D&C 4th 353 (Lackawanna 2004) (Nealon, J.)

The court ruled that a corporate liability claim against a hospital must be supported by an independent COM under Rule 1042.3(a)(1) because a corporate liability claim requires expert testimony and is not based solely on allegations of vicarious liability for the conduct of other healthcare professionals. The Court observed that a judgment of non pros under Rule 1042.6 is not an adjudication on the merits for res judicata purposes and that, therefore, a judgment of non pros in favor of one Defendant does not bar a minor Plaintiff from filing another malpractice action against that Defendant in accordance with the Minor Tolling Statute. Instantly, where the Plaintiffs belatedly filed a COM before the entry of a judgment of non pros, the Plaintiffs won the race to the courthouse.

B. COM Case Law (2006 PBI Seminar)

1. Frunzi v. Muller, CCP, Philadelphia, March Term, 2003, No. 4067 (Bernstein, J.) (Opinion Dated 9/25/03)

Plaintiffs filed a COM pursuant to Pa.R.C.P. 1042 governing professional liability actions. Defendant served Interrogatories seeking to ascertain the credentials, licensure information, and information about the medical practice, specialty, subspecialty, Board Certifications, and other curriculum vitae information of the professional supplying the written statement underlying the COM. Judge Bernstein ruled that "the rules preclude any interrogatory seeking the identity or the credentials of the licensed professional upon whose opinion the Certificate of Merit was based until conclusion of the case."

2. Herrmann v. Pristine Pines of Franklin Park, Inc., CCP, Allegheny, No. GD03-6835 (Wettick, Jr., J.) (Order and Opinion Dated 9/29/03)

Plaintiff's decedent died as a result of blunt trauma to her head and chest which occurred when she was returned to a Defendant personal care home and found lying on the floor in her room by a closet door. Plaintiff sued the personal care home but did not identify said Defendant as a licensed professional or allege that Plaintiff was asserting a professional liability claim. The Defendant answered the Complaint and then filed a Praecipe for Entry of Judgment of Non Pros arguing that the Plaintiff asserted a professional liability claim against the Defendant and that no COM had been filed within the time required by Pa.R.C.P. 1042.3. The Defendant further alleged that a Motion to Extend the Time for Filing a Certificate was not advanced before the Court. Judge Wettick rejected this process holding that Pa.R.C.P. 1042.2 governs the situation by requiring the Defendant to raise by preliminary objections the failure of any Complaint to comply with the Certificate of Merit Rules. Judge Wettick held:

> In summary, Rule 1042.2 requires a Plaintiff to identify in the Complaint each Defendant against whom the Plaintiff is asserting a professional liability claim. If a party is so identified, the rules governing professional liability actions are clear: within sixty (60) days of filing the Complaint, the Plaintiff must, as to this party, file a Certificate of

Merit or a Motion to Extend the Time for Filing the Certificate of Merit (Rule 1042.3). If the Plaintiff fails to do so, the Defendant may file a Praecipe with the Prothonotary requesting entry of judgment of non pros (Rule 1042.6).

However, where a Complaint does not allege that the Plaintiff is asserting a professional liability claim against a Defendant, the Plaintiff is not required to file a Certificate of Merit as to this Defendant unless the Plaintiff subsequently files an Amended Complaint stating that the Plaintiff is asserting a professional liability claim against this Defendant. Through the filing of Preliminary Objections, a Defendant may seek a Court Order compelling the Plaintiff to file such an Amended Complaint on the ground that the Plaintiff is asserting a professional liability claim against this Defendant. If the Defendant does not file Preliminary Objections, the Defendant waives its claim that the Plaintiff has violated the rule requiring the filing of a Certificate of Merit.

3. **Helfrick v. UPMC Shadyside Hospital, CCP, Allegheny, No. GD03-010082 (Wettick, Jr., J.) (Opinion and Order Dated 9/29/03)**

On May 29, 2003, Plaintiff asserted professional liability actions against numerous Defendants. His counsel was required to file either a COM or a Motion to Extend the Time for Filing the COM within sixty days after filing the Complaint . Plaintiff failed to do so; however, on the sixty-fourth day after the Complaint was filed, his counsel filed a COM as to one of the Defendant doctors. A mere five hours later, counsel for the doctor filed a Praecipe for Entry of Judgment of Non Pros Pursuant to Pa.R.C.P. No. 1042.6.

Although the text of the rule does not address the issue of what happens when a Plaintiff files a COM beyond the sixty day period but before the

entry of a judgment of non pros, the Note to Rule 1042.6 states: "The Prothonotary may not enter judgment if the COM has been filed prior to the filing of the Praecipe." Here, the Prothonotary in fact entered a judgment of non pros. Plaintiff's counsel filed a Petition to Strike the judgment asserting that the Prothonotary lacked authority to enter non pros after the filing of a COM. Judge Wettick granted the Petition because the Plaintiff complied with the requirements of the rule, albeit untimely, prior to the Defendant's filing of a Praecipe for Entry of Judgment of Non Pros.

4. Helfrick v. UPMC Shadyside Hospital, CCP, Allegheny, No. GD03-010082 (Wettick, Jr., J.) (Opinion and Order Dated 10/7/03)

In this companion case, Judge Wettick addressed two issues:

> (1) Whether a Court may open a judgment of non pros for failure to file a Certificate of Merit entered on the sixty-second day following the filing of the Complaint only if the Plaintiff can meet the three-prong test of Pa.R.C.P. 3051; and
>
> (2) Does the entry of a judgment of non pros for failing to file a Certificate of Merit preclude the Plaintiff from bringing a second lawsuit on the same causes of action if the statute of limitations has not run.

Here, Judge Wettick applied Rule 3051, which provides that if the relief sought from a judgment of non pros includes the opening of a judgment, the Petition shall allege facts showing (1) the Petition is timely filed, (2) there is a reasonable explanation or legitimate excuse for the inactivity or delay, and (3) there is a meritorious cause of action. Judge Wettick ruled that the Plaintiff's Petition did not satisfy the second requirement to obtain relief from a judgment of non pros. More specifically, the Plaintiff could not explain the failure of his counsel to file a COM or a Motion to Extend the Time for Filing a Certificate within the sixty day period. Judge Wettick observed that this will happen in almost every case in which a judgment of non pros is entered for failure to file a COM because the Plaintiff cannot be excused for not seeking to extend the time for filing the COM.

Judge Wettick cautioned that there is no provision in the rules to provide Plaintiff's counsel with notice of intent to file a Praecipe for Entry of Judgment of Non Pros. In fact, a Note to Rule 1042.6 states that "Rule 237.1 (pertaining to notice) does not apply to a judgment of non pros entered under this rule." However, Judge Wettick held that the Plaintiff could bring a second action because the statute of limitations had not run. Judge Wettick reasoned that the dismissal of a Plaintiff's Complaint for failure to file a COM within the required time is not a ruling on the merits, but simply a step that the Plaintiff must take before the merits of the Plaintiff's claims will be addressed. As such, the Court deemed persuasive the case law permitting a second action within the statute of limitations in the context of an action commenced by Writ of Summons but non prossed for failure to file a Complaint when ruled pursuant to Pa.R.C.P. 1037.

5. **Boyd v. Cheltenham York Road Nursing and Rehabilitation Center, Inc.,CCP, Philadelphia, April Term, 2003, No. 1243 (Bernstein, J.)**

On April 15, 2003, Plaintiff filed a Complaint against a nursing and rehabilitation center alleging a professional liability claim. The center was served on May 13, 2003, and on July 30, 2003, Plaintiff filed a COM. The center answered the Complaint on August 22, 2003. Thereafter, the center moved to strike Plaintiff's COM as untimely because it was filed 105 days after the Complaint was filed.

Judge Mark I. Bernstein denied the center's Motion because it failed to avail itself of its right to judgment of non pros by praecipe pursuant to Pa.R.C.P. 1042.6. Judge Bernstein ruled: "Where a Defendant chooses, through inadvertence, agreement of the parties, or otherwise, not to avail itself of its right to a Non Pros by Praecipe, the Court may not strike a filed Certificate of Merit." Further, Judge Bernstein observed that "the Prothonotary may not enter judgment if the Certificate of Merit has been filed prior to the filing of the praecipe." The Court found that the defense was aware of the filing of the Complaint and its progress but affirmatively chose not to take action pursuant to Rule 1042.6.

6. **Hoover v. Davila, CCP, Lawrence, No. 10174 of 2003, C.A. (Cox, J.) (Opinion Dated 11/20/03)**

A pro se Plaintiff filed a Complaint which was subsequently reinstated by the Prothonotary on two occasions. The pro se Plaintiff failed to timely file the required COMs. Three of the Defendants praeciped for and

received a judgment of non pros. Before the fourth Defendant could snap judgment, the Plaintiff requested an extension of time to file a COM. The Plaintiff then secured counsel who filed a Petition to Open or Strike Judgment which contained COMs against the dismissed Defendants. Following argument, the Court denied the Petition to Open and dismissed the Motion for Extension of Time for Filing a COM. The Plaintiff appealed from that Order arguing that the sixty day time frame for filing a COM or granting an extension for filing should begin to run from the date his Complaint was reinstated. The Court rejected this notion and found "that the sixty day time period for filing a Certificate of Merit or requesting an extension of time in the instant case must run from the date of the filing of the Complaint."

The Plaintiff also asserted that the Court erred by failing to consider the factors for granting relief under Pa.R.C.P. 3051. The Court found that Rule 1042.6(a) is mandatory and without room for discretion. The Court, therefore, held that Rule 3051 "does not apply to a judgment of non pros entered pursuant to Pa.R.C.P. No. 1042.6(a)."

7. Speicher v. Toshok, CCP, Allegheny, No. GD03-43906 (Wettick, Jr., J.) (Opinion and Order Dated 5/14/03)

Plaintiff instituted suit by Writ of Summons and filed a Petition for Leave to Conduct Pre-Complaint Discovery in which the Plaintiff alleged that his anesthesiology expert would be unable to determine whether there was a deviation from the standard of care unless and until the depositions of the Defendant anesthesiologist and nurse anesthetist were taken. Judge Wettick noted that before the promulgation of the COM rules, pre-Complaint discovery was sparingly granted and only where the parties seeking discovery could "show a compelling reason." Citing *McNeil v. Jordan*, 814 A.2d 234 (Pa. Super. 2002), Judge Wettick decided that pre-Complaint discovery may not be used to determine whether a cause of action exists. Judge Wettick determined that COM Rule 1042.5 regulating discovery "is intended to restrict the Plaintiff's ability to engage in discovery by barring any discovery without leave of Court except for the Production of Documents and Things or entry upon property for inspection or other purposes." Accordingly, Judge Wettick denied Plaintiff's request for pre-Complaint discovery.

8. Koken v. Lederman, 2003 WL 23112407 (Pa. Cmwlth.2003)

In this non-medical malpractice case, the Commonwealth Court denied a third party's Petition to Open/Strike a Judgment of Non Pros entered

pursuant to Pa.R.C.P. No. 1042.6 based upon the third party Plaintiff's failure to file a COM within sixty days of filing their Complaint for professional accounting negligence and failure to request an extension of time within that period. The Commonwealth Court concluded, therefore, that the Prothonotary properly entered a judgment of non pros on behalf of the professional liability third party Defendants. It is obvious from the Court's ruling that the third party Plaintiffs poorly articulated their Complaint to which the Court stated: "Neither Accountants nor the Court are required to cobble a claim from incorporated scraps."

9. Shinko v. Dunn, CCP, Westmoreland, No. 507 of 2003 (Caruso, J.) (Decision and Order Dated 12/22/03)

The day before the Complaint was filed, the Pennsylvania Supreme Court enacted the COMs rules. Neither the Plaintiffs nor their counsel had actual knowledge of the adoption of the rules at the time the Complaint was filed. The Defendant answered and filed New Matter without reference to a COM. Written discovery was exchanged and the deposition of the Defendant doctor was taken without objection. Supplemental written discovery was provided. The statute of limitations expired. Although the defense was quite aware of the obligation of the Plaintiffs to file a COM, twelve days later, the defense filed a Praecipe for Judgment of Non Pros. Plaintiff timely filed a Petition for Relief from Judgment of Non Pros Pursuant to Pa.R.C.P. 3051.

The Court ruled that the COM rules were not effective as to the Plaintiffs' action at the time their Complaint was field. Because the Plaintiffs' attorneys did not have actual knowledge of the rules until after their publication in the Pennsylvania Bulletin, the COM rules were deemed ineffective as to the Plaintiffs.

The Court also made clear that it would not be equitable to allow a non pros under the circumstances of the case. Ruling that the conduct of the Defendant operated as an estoppel or waiver of any objection to the failure of the Plaintiffs to file a COM, the Court was troubled because the Defendant waited until after the running of the statute of limitations before filing the Praecipe for Non Pros to assure that the Plaintiff could not cure the procedural misstep. Other disturbing factors included the failure to file Preliminary Objections, the filing of an Answer with New Matter, and extensive discovery, lulling the Plaintiff into the reasonable belief that the Complaint was valid. Under Rule 1042.4, a Defendant must file a responsive pleading within the time required by Rule 1026 or within twenty days after service of the COM on that Defendant, whichever is later. Thus, if a Defendant is not to file a responsive pleading until a COM is filed, the

Plaintiff would become aware of his/her or its failure to file such Certificate after the passage of twenty days from the service of the Complaint. As a safeguard, reasonable practice would suggest that after the passage of twenty days, the Plaintiff should become curious as to why such a response had not been filed, or upon inquiry or upon the Plaintiff's attempt to enter judgment by default for failure of the Defendant to answer the Complaint, the Plaintiff would become aware that it was expected by the defense that a COM is required. Here, the defense filed an Answer and New Matter prior to the filing of a COM contrary to Rule 1042.4, having the effect of leading the Plaintiff to believe that one was not required. Equity abhors stealth tactics and deceit, especially when substantive rights of the Plaintiff are at stake.

10. Thompson v. Janetta, CCP, Allegheny, No. GD03-10662 (Wettick, Jr., J.) (Opinion and Order Dated 2/12/04)

Because a lack of informed consent claim is not an action based on an allegation that the physician deviated from accepted professional standards and the Plaintiff's expert testimony at trial is limited to the nature of the harm attendant to the procedure and the probability of that harm occurring, the Plaintiff was not required to file a COM in support of her medical malpractice claim premised upon a lack of informed consent. Judge Wettick observed that the COM rules applied to eleven other licensed professions and to attorneys and that a lack of informed consent claim, which is not grounded in negligence, applies only to certain health care providers and not to the other professions governed by the rules. Judge Wettick concluded, therefore, that the language of the COM Rules does not support the position that a Certificate is necessary for health care providers and not the other licensed professionals.

11. Marwell, Inc. v. Patburg, CCP, Venango, No. 1633-1998 (Alexander, S.J.) (Memorandum and Order Dated 3/4/04)

In this legal malpractice case, the Court ruled that the filing of the Complaint triggers the mandate that the COM be filed within sixty days after the filing. Sixty days after the Complaint was filed, the Defendants filed a Praecipe for Entry of Non Pros and judgment was entered. The Court denied Plaintiffs' Petition to Open finding that the Plaintiffs could not demonstrate a "reasonable explanation or legitimate excuse" for their failure to timely file a COM. Accordingly, Plaintiffs' Petition for Relief was denied. The Court recognized that "leniency must not be extended with the application of the Certificate of Merit requirement or this new rule will become a procedural nightmare, if not a nullity."

12. **Kerry v. Butler Memorial Hospital, CCP, Butler, A.D. No. 03-10498, C.P. 04-20049 (Shaffer, J.) (Memorandum Opinion and Order Dated 3/12/04)**

Plaintiff commenced this medical professional negligence action by Writ of Summons followed by a Complaint filed on September 15, 2003. On November 13, 2003, the Court granted Plaintiff's Motion for Extension of Time to File a COM. On January 13, 2004, on Praecipe of one of the Defendants, judgment was entered against the Plaintiff. The next day, January 14, 2004, two days beyond the initial sixty day limit, Plaintiff filed her COMs. A week later, on January 21, 2004, Plaintiff filed a Petition to Open and/or Strike Judgment of Non Pros. The Court denied the Motion, holding that the Complaint is the operative document that triggers the requirements of the COM rules. Rejecting the hard line approach taken in Hoover v. Davila, where the Court stated that the standard in Rule 3051 does not apply to situations under Rule 1042.6, Judge Shaffer disagreed and deemed Rule 3051 applicable. However, Judge Shaffer refused to excuse Plaintiff's counsel's belief that the COMs were due sixty days from when they were initially due, not sixty days from the date of the extension Order. The Court found that Plaintiff's counsel's mistake was not reasonable and, therefore, denied the Petition to Open.

13. **Rostock v. Anzalone, CCP, Luzerne, No. 7393-C of 2003 (Olszewski, Jr., J.) (Memorandum and Opinion Dated 3/23/04)**

Judge Olszewski adopted the reasoning in Shinko v. Dunn to open a judgment of non pros entered against the Plaintiffs.

14. **Supervalu, Inc. v. Construction Engineering Consultants, Inc., CCP, Allegheny, No. GD02-18944 (Wettick, Jr., J.) (Opinion and Order Dated 4/8/04)**

This case interprets Rule 1042.3(c)(2), which excuses a Defendant who has joined a licensed professional as an additional Defendant from filing a COM "unless the joinder is based on acts of negligence that are unrelated to acts of negligence that are the basis for the claim against the joining party." Instantly, the owner of a building sued a construction engineering firm for damages as a result of construction defects. The engineering firm joined another company as an additional Defendant. The engineering firm then filed a Motion for a ruling that it was not required to file a COM with respect to its claim against the additional Defendant or, alternatively, that the deadline for filing such Certificate should be

extended. The Court ruled that the construction firm must file a COM because the claims of both the Plaintiff and the construction firm involved the presentation of evidence as to the cause of a building collapse and who was responsible for the collapse. Accordingly, the third party Plaintiff's claims were deemed related to the Plaintiff's claims. The Court clarified that acts of negligence are not related if they involve different activities and if different expert testimony is required for the Defendant to establish a professional negligence claim against the additional Defendant.

Judge Wettick extended the time within which the construction firm would be permitted to file a COM in connection with its Complaint to Join an Additional Defendant. In doing so, the Court pronounced:

> The purpose of Pa.R.C.P. No. 1042.1 et seq. is to protect licensed professionals from expending resources to defend professional liability claims that may never be substantiated by expert testimony by requiring the party raising the claim to obtain a statement from an appropriate licensed professional that there exists a reasonable probability that the care, skill or knowledge of the party being sued fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm. The protection extends to claims raised against licensed professionals by Defendants and additional Defendants.
>
> A certificate of merit is required whenever the Plaintiff raises a professional liability claim (Rule 1042.3(a)); whenever the Defendant files a counterclaim asserting a claim for professional liability (Rule 1042.3(c)(1)); and whenever the Defendant or additional Defendant asserts a professional liability claim (Rule 1042.3(c)(2)). A separate certificate of merit must be filed as to each licensed professional against whom a claim is

asserted (Rule 1042.3(b)). Thus, the purpose of these rules is to bar any party from pursuing a professional liability claim against a licensed professional unless that party or some other party has a written statement from an appropriate licensed professional supporting a claim that the care, skill or knowledge exercised by this licensed professional fell outside accepted professional standards and that the conduct was a cause in bringing about the harm. (Footnote omitted).

15. COM: *RECAP AND UPDATE* (2006 PBI Seminar)

- ❑ Varner v. Classic Communities Corporation, 2006 Pa. Super. 2, J. A33019/ 05, No. 283 MDA 2005 (Pa. Super. Jan. 6, 2006): Non pros entered in favor of architectural firm due to failure to file COM and Petition to Open denied. Superior Court affirmed holding that "Complaint against the architect, although inartfully drafted, is a claim of negligence in the performance of a professional duty" and "it is the substance of the Complaint rather than its form which controls whether the claim against a professionally licensed Defendant sounds in ordinary negligence or professional negligence.

- ❑ Warren v. Folk , 2005 Pa. Super. 367 (Pa. Super. Oct. 28, 2005): Rule 1042.3 does not affect litigants' vested rights to seek redress in court for injury, but only adds a procedural requirement for going forward with the suit; therefore its application to lawsuits arising from events before its promulgation is not unconstitutionally retrospective.

- ❑ Almes v. Burket, 281 A.2d 861 (Pa. Super.2005): Superior Court held that a death in the Plaintiffs' attorney's family entitled the Plaintiffs to relief from a judgment of non pros where there was a one week delay in filing the COM.

- ❑ O'Hara v. Randall, 879 A.2d 240 (Pa. Super.2005): held that the 60 day period does not start anew with the filing of an amended Complaint.

- ❑ Yee v. Roberts, 878 A2d 906 (Pa. Super. 2005): argument that claim against dental practice arose from ordinary negligence of dental assistant (i.e., no COM needed) rather than professional negligence (i.e., COM needed) rejected based on a reading of the Complaint as a whole, including allegations of failures to train and educate, to properly supervise, and to operate equipment in a safe manner. See also Grossman v. Barke, 868 A.2d 561 (Pa. Super. 2005)(explaining distinguishing characteristics of a medical malpractice claim compared to ordinary negligence). The fact that the Defendant had filed Preliminary Objections to the Complaint had no bearing on the requirement of filing the COM within sixty days or obtaining a timely extension under Rule 1042.3 (d). (Note: Defendant filed Praecipe for non pros on sixty-first day, non pros was entered on that day, and the COM was filed one day after it was due to be filed - on the same day hours, after judgment of non pros was entered).

- ❑ Harris v. Neuburger, 877 A.2d 1 (Pa. Super.2005): affirmed Philadelphia trial court decision (Judge New) opening judgment of non pros where the Plaintiff tendered reports and C.V.s before filing suit to Defendant. Plaintiff was found to have "substantially complied" with the Rule because its underlying purpose is to prevent the filing of baseless medical professional liability actions. The Superior Court applied equitable principles and Rule 126, which provides that the rules of civil procedure shall be liberally construed to secure a just, speedy, and inexpensive determination of every action or proceeding to which they are applicable; the court at every stage of the proceedings may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

- ❑ Warner v. University of Pennsylvania Health System, 874 A.2d 644 (Pa. Super. 2005): COM not timely when presented by Pro Se Plaintiff as a motion in motions clerk.

- ❑ Moore v. Luchsinger, 862 A.2d 631 (Pa. Super. 2004): Defendant not entitled to non pros where Plaintiff untimely filed COM before Defendant praeciped the prothonotary for entry of judgment. See also Helfrick (Under Rule 1042.6, Prothonotary may not enter non pros if the COM has been filed prior to the filing of the praecipe).

- ❑ Hoover v. Davila, 862 A.2d 591 (Pa. Super. 2004): held that Plaintiff's reinstatement of the Complaint did not toll the COM

deadline. Sixty days runs from the date of the filing of the original Complaint. Rule 3051 provides the standard for opening or striking non pros and requires a Plaintiff to show: (1) Petition to Open was timely filed; (2) there was a reasonable explanation or legitimate excuse for the inactivity or delay; and (3) there is a meritorious cause of action.

- ❑ Feiner v. Temple East, Inc., PICS Case No. 05-2029 (Pa. Super. 2005) (Memorandum): Tender of expert report in anticipation of medical malpractice lawsuit and/or illness of counsel is not a reasonable explanation or legitimate excuse to open a judgment of non pros for failure to timely file a COM in accordance with Rule 1042.3. Judge New declined to open a non pros because the Plaintiff delayed a month in filing a petition to open and failed to file on time or seek an extension. Significantly, the expert report tendered was from an attending physician who did not address standard of care issues.

- ❑ Womer v. Hilliker, PICS Case No. 05-2008 (Pa. Super. Aug. 11, 2005): Superior Court, in an unpublished opinion, allowed the Plaintiff to open a judgment of non pros after the Plaintiff failed to comply with the COM rule. More specifically, the Plaintiff supplied the Defendant with more information than Rule 1042.3 required, namely a copy of the expert report (with C.V.) instead of a certification that he had such a report. The Superior Court found that it was not wholly unreasonable for the Plaintiff to believe that his expert report represented compliance with the rule. **The Supreme Court granted allocatur and heard argument on the issue of whether Rule 1042.3 should be deemed subject to equitable exceptions.** But see Helfrick v. UPMC Shadyside Hospital (Wettick, J.) and Feiner v. Temple East, Inc., (Pa. Super. Dec. 5, 2005) (Memorandum Decision).

- ❑ Sell v. Lightner Law Offices, PICS Case No. 05-1416 (Pa. Super. Aug. 9, 2005) (Memorandum): Where Complaint sounds in legal professional negligence, COM is required regardless of other theories of liability.

- ❑ Whitsel v. Commonwealth, Department of Transportation, PICS Case No. 05-1909 (C.P. Dauphin Oct. 26, 2005) (Kleinfelter J.): the Common Pleas Court of Dauphin County ruled that the Defendant

waived any relief to which it was entitled under Rule 1042.6 for Plaintiff's timely failure to file a COM. The Defendant answered the Complaint with new matter. Almost two years later, the Defendant sought a non pros. The court found that a Rule 1042.6 praecipe must be filed within twenty days after the time for filing the COM has expired, i.e., within sixty days of the filing of the Complaint, or within eighty days after the Plaintiff filed the Complaint.

- ❑ Bertovich v. Brownsville Hospital, PICS Case No. 05-1768 (C.P. Washington Oct. 18, 2005) (Bell, J.): the Trial Court refused to open a judgment of non pros where the Plaintiff did not offer a reasonable explanation or legitimate excuse for the failure to timely file a COM.

- ❑ Lawrence v. Malloy, PICS Case No. 05-1557 (C.P. Lackawanna Sept. 9, 2005) (Minora, J.): Complaint conforms to Rule 1042.2 without stating "Plaintiff is asserting a professional liability claim against the Defendant" where caption stated "Civil Action –- Medical Professional Liability Action" in accordance with Rule 1042.16 and Complaint (and COMs) adequately informed the Defendants of the nature of the suit against them.

- ❑ Alpaugh v. Koch, PICS Case No. 05-1556 (C.P. Lackawanna Aug. 10, 2005) (Minora, J.):: Rule 1042.3 does not require that separate COMs be filed for each licensed professional for which a corporate entity may be found vicariously liable.

- ❑ Hutt v. Weiner, PICS No. 05-0459 (C.P. Philadelphia Mar. 15, 2005) (New, J.): Expert's illness was not valid excuse for failing to file COMs; an extension should have been secured under the Rule.

- ❑ Vansouphet v. Justman, PICS Case No. 05-0989 (C.P. Philadelphia May 12, 2005) (New, J.): Attorney administrative oversight and mistake are not reasonable or justifiable excuses for opening or striking a non pros judgment.

- ❑ White v. Behlke, PICS Case No. 04-1896 (C.P. Lackawanna Nov. 23, 2004) (Nealon, J.): Separate COM must be filed for corporate negligence claim.

- ❑ Kerry v. Butler Memorial Hospital, PICS Case No. 04-0485 (C.P. Butler March 12, 2004) (Shaffer, J.): Attorney mistake is no excuse to open non pros.

- ❑ Thompson v. Jannetta, No. GD 03-10662 (C.P. Allegheny Feb. 12 2004) (Wettick, Jr., J.): COM rule does not apply to informed consent causes of action which is not based on an allegation that a licensed professional deviated from an accepted professional standard.

- ❑ Helfrick v. UPMC Shadyside Hospital, 65 Pa. D & C 4th 420 (C.P. Allegheny 2003) (Wettick, Jr., J.): noting that it is almost impossible to establish a reasonable explanation for failing to file a COM within sixty days because the COM rules also govern the practice for extending the deadline.

3. Proposed Recommendation No. 227 for Amendment of Rules 1042.1, et seq., Governing the Certificate of Merit in Professional Liability Actions (Appendix F)

As detailed above, the official Note to Rule 1042.6(a) states that the ten day notice provision in Rule 237.1 does not apply to a judgment of non pros entered under this rule. As a result, there is often the proverbial race to the courthouse on the sixtieth day following the filing of the Complaint with Plaintiff's counsel seeking to file a COM or a Motion for Extension before defense counsel files a Praecipe for entry of judgment of non pros. To date, the Rule has not been amended to require a ten-day notice provision before a judgment is taken. As a result, Plaintiffs who lose the race to the courthouse and thereafter seek to set aside judgment of non pros must satisfy the tripartite test of Rule 3051, including a reasonable explanation for failing to file or seek an extension within the sixty day time period pursuant to Rule 1042.3(d).

On September 29, 2007, the Supreme Court Civil Procedural Rules Committee proposed an amendment to Rule 1042.6 that would require a Defendant seeking to enter a judgment of non pros to file a written notice of intention to file the Praecipe and serve it on the party's attorney of record or on the party if unrepresented no sooner than the thirty-first day after the filing of the Complaint. The proposed rule would allow for the entry of a judgment of non pros without notice only if the court has granted a motion to extend the time to file the certificate and the Plaintiff has failed to file it within the extended time or the court has denied the motion to extend time. Further, under the proposed rule, upon the

filing of a notice of intent to enter judgment of non pros for failure to file a COM, Plaintiff may file a motion seeking a determination by the court as to the necessity of filing of a COM, which motion would toll the period of time within which the COM must be filed until ruled upon by the court. Once the judgment of non pros is entered, under the proposed rule, a party cannot raise the claim that the filing of a COM was not required. The Prothonotary, on praecipe of a Defendant, must enter a judgment of non pros against a Plaintiff for failure to file a COM within the required time provided that (1) there is no pending motion for determination that the filing of a certificate is not required, or (2) there is no pending timely filed motion seeking to extend the time to file the certificate, no COM has been filed, (3) except as otherwise provided, the Defendant has attached to the praecipe a certificate of service that the notice of intention to enter the judgment of non pros, and (4) the praecipe is filed no less than thirty days after the date of the filing of the notice of intention to enter judgment of non pros. The Prothonotary may not enter judgment if the COM has been filed prior to the filing of the praecipe.

In its explanatory comment, the Civil Procedural Rules Committee thus addresses the concerns that the present rules (1) permit the entry of judgment of non pros where Plaintiff may believe that the rules governing COMs do not apply, and (2) provide for the entry of non pros where there has been no notice of intent to enter such judgment. This remedial recommendation has thus been proposed to remedy this stressful situation.

C. Mcare Act §512 Cases

1. Update of the Law

1. Wexler v. Hecht, 928 A.2d 973 (Pa. 2007)

In 1999, Plaintiff commenced a medical malpractice action against her orthopaedic surgeon arising from failed bunion-removal surgery and post-surgical care. As required by pre-trial Order, Plaintiff submitted the expert report and CV of a podiatric surgeon who opined that the Defendant orthopaedic surgeon deviated from "the ordinary standard of care in surgery" and provided substandard postoperative care that caused the Plaintiff's medical problems. In November 2002, eight months after the Mcare Act was passed, the Defendant filed a Motion in Limine to preclude the podiatric surgeon from testifying at trial on the ground that he was not competent to testify concerning the standard of care pertaining to an orthopaedic surgeon under Pennsylvania common law (reasonable pretension to specialized knowledge in the subject matter of the

inquiry) and the standards set forth in Section 512 of the new Act. The Common Pleas Court precluded Plaintiff's podiatric expert, and the Superior Court affirmed. The Pennsylvania Supreme Court, in a divided opinion, affirmed the lower Court's holding that (1) Section 512 applies to trials of medical malpractice actions occurring after its effective date provided that adequate time for preparation and adjustment is afforded a Plaintiff; and (2) a podiatrist is unqualified to testify as an expert witness concerning the applicable standard of care in a medical malpractice action advanced against an orthopaedic surgeon. The majority determined that Section 512(b)(1) was dispositive, namely, an expert witness testifying about the applicable standard of care must possess an unrestricted physician's license to practice medicine. Because the Plaintiff's podiatric expert was neither a medical doctor nor an osteopath licensed by a State Board appropriate for such practices, and the Mcare Act did not provide for a waiver of this licensing requirement relevant to expert testimony concerning the applicable standard of care, the Supreme Court concluded that the Trial Court appropriately ruled that the Plaintiff's expert was unqualified under the Mcare Act to provide evidence essential to the support of her action.

2. Rose v. Annabi, 934 A.2d 743 (Pa. Super. 2007)

In an unusual procedural context, this case resulted in the exclusion of a settling Defendant colorectal surgeon from the verdict sheet for apportionment of liability because no qualified expert testimony was presented on the standard of care applicable to colorectal surgeons during the trial. The Superior Court ruled that a non-settling co-Defendant's expert in internal medicine/gastroenterology/nutrition, although familiar with the evaluation, diagnosis, and treatment of colon cancer and qualified to inform the jury on issues regarding internal medicine and gastroenterology, was not competent under Section 512(c)(2) because no evidence was presented to establish that the standard of care in his speciality was "substantially similar" to the standard of care of a colorectal surgeon for the care at issue. Nor was the expert competent pursuant to Section 512(c)(3) because no evidence was presented indicating that the board certifications held by the internist/gastroenterologist were the same or similar to the board certification of abdominal surgery.

3. Vicari v. Spiegel, 936 A.2d 503 (Pa. Super. 2007)

In this failure to diagnose tongue cancer case leading to the death of Plaintiff's Decedent, the Plaintiff alleged medical professional liability claims based on Defendant's claimed failure to inform Plaintiff's Decedent about the option of follow-up chemotherapy treatment with a medical oncologist to counter

the risk of metastases. Based on risk factors, the Plaintiff contended that Plaintiff's Decedent was at a higher risk of tumor recurrence and metastases. At trial, Plaintiff presented the testimony of a medical oncologist and an otolaryngologist/ENT surgeon on the issue of Defendant's failure to inform Decedent about follow up chemotherapy and their failure to refer her to a medical oncologist for this purpose. The Court granted a nonsuit, in part, based on the assertion that Plaintiff's expert oncologist was not qualified to opine on the standard of care rendered by the Defendant otolaryngologist/ENT surgeon and the Defendant radiation oncologist because the expert was neither a board-certified ENT surgeon nor licensed to administer radiation therapy. The Superior Court reversed and found that Plaintiff's expert medical oncologist was qualified to render his opinion under the Mcare Act, specifically Section 512(c). The Court held: "The specific care at issue in the instant case is whether the Defendants should have referred [Decedent] to a medical oncologist for discussion of chemotherapy as a treatment option, given the risk factors for metastases present following her surgery. [Plaintiff's medical oncologist] was qualified to opine on the specific care at issue." Although the expert was not an otolaryngologist/ENT surgeon or radiation oncologist, his opinion focused solely on referring a patient to a medical oncologist for chemotherapy treatment and thus was limited to when a person's practicing oncology-related specialties should refer given the risk factors for metastases that were present in the case. Additionally, the expert properly opined that by failing to refer, the Defendants not only deviated from the standard of care, but also increased the risk of harm to the Decedent. In short, the expert's "opinion was limited to elucidate for the jury when it is appropriate for persons in these other oncology-related specialties to refer a patient to a medical oncologist for chemotherapy treatment, an opinion of which he was well-qualified to render."

4. Gbur v. Golio, 932 A.2d 203 (Pa. Super. 2007)

Plaintiff's expert radiation oncologist was deemed qualified to testify on the standard of care and breach thereof by a board certified urologist pursuant to Section 512. The Superior Court deemed the expert qualified based on his qualifications and the fact that the thrust of his testimony did not relate to the substantive field of urology, but rather to the Defendant urologist's failure to properly consider and appreciate the results of a bone scan and to discuss the findings with attending radiologists, decedent-patient's other physicians, and the patient and his family. The Court ruled that Plaintiff's expert also met the standard required to testify about care outside his own particular specialty under Section 512(d) because he was trained in the diagnosis and treatment of the condition of the Decedent. The Court also observed that the expert did not need

to be from the same subspecialty as the Defendant where the subspecialities had a substantially similar standard of care for the specific care at issue.

NOTE: The Supreme Court has granted Defendant's Petition for Allowance of Appeal limited to the issue of whether the Mcare Act forecloses a Plaintiff in a medical malpractice action against a urologist from offering expert testimony from a radiation oncologist to develop the applicable standard of care for the treatment of a cancer patient, upon the urologist's review of a bone density study indicating "[m]ultiple foci of abnormal activity involving the right and left sides of the pelvis, the lower thoracic spine, right ribs, right mandible . . consistent with osseous metastatic disease." Gbur v. Golio, 2008 WL 1798278 (Pa. 2008).

5. Jacobs v. Chatwani, 922 A.2d 950 (Pa. Super. 2007)

On appeal from a defense verdict by Plaintiff against her OB/GYN for alleged damage to her ureter during the performance of a hysterectomy, a judgment in favor of the Defendant was affirmed, rejecting challenges to the qualifications of Defendant's urology expert. The Superior Court ruled that the board certified urologist expert was qualified under both Section 512 and at common law to testify about the standard of care involved in avoiding uretal injury during abdominal surgery. To this end, the Court noted that the expert did not testify regarding the standard of care in the performance of a hysterectomy, but instead opined specifically with regard to the common urologic procedure of cystoscopy and protection of the ureters during surgery, which is subject to the same standard of care whether the person performing the pelvic surgery is a urologist or gynecologist. The Court summarized that the board certified urologist who performed pelvic surgery was qualified to opine on the standard of care related to the protection of ureters during pelvic surgery and on diagnostic testing of urological structures following pelvic surgery, all of which were directly related to his area of expertise.

6. Cimino v. Valley Family Medicine, 912 A.2d 851 (Pa. Super. 2006)

In a pre-trial conference, the Defendant doctors objected to the Plaintiff's use of a purported expert because his medical license had been "restricted". The Trial Court agreed and precluded the Plaintiff's expert. On these facts, the Superior Court affirmed, holding that to qualify as a medical expert under Section 512(b)(1), a physician must possess a valid physician's

license without restrictions or conditions which limit in any way the physician's ability to practice medicine. This result was reached based on the Superior Court's conclusion that the plain and unambiguous meaning of "unrestricted physician's license" in Section 512 is a license free of any conditions placed on the licensee's ability to practice medicine. The Plaintiff's expert's license had been revoked by the State of California, but the revocation was stayed pursuant to a settlement agreement that provided for restoration of the expert's license within three years provided that he complied with numerous requirements during the probationary period. Because the expert was on probation when the case was called for trial, the Trial Court found that the need for the license to be restored was a sufficient basis for it to determine that the license was restricted thus disqualifying him from testifying.

7. George v. Ellis, 911 A.2d 121 (Pa. Super. 2006)

Because the Plaintiff's expert did not possess an unrestricted physician's license to practice medicine anywhere in the United States, the Superior Court held that he was not qualified as an expert in a medical malpractice action brought against a surgeon and orthopaedic center. After determining that the "law of the case doctrine" did not apply to decide the Plaintiff's expert's qualifications under the Mcare Act on remand, the Superior Court ruled that the Mcare Act should properly be applied retroactively. Although the Superior Court disqualified the Plaintiff's expert because he was not board certified or licensed to practice medicine in the United States, the Court found that he possessed sufficient education, training, knowledge, and experience to provide credible, competent testimony as required by Section 512(a). Further, the expert satisfied the second requirement of Section 512(b) by being engaged in an active practice within the previous five years. However, because the unrestricted physician's license requirement cannot be waived and the expert failed to meet this statutorily mandated requirement, the Superior Court found that he was not qualified under the Mcare Act to offer his expert opinion. Interestingly, the Superior Court went on to hold that the expert was otherwise qualified under Section 512(c)(1), (2), and (3) and Section 512(e). Thus, he also met the requirements of Section 512(c)(2). Finally, the Court ruled that the expert qualified under Section 512(c)(3) because his certifications in Canada were similar to the Defendant's board certification in orthopaedic surgery and sports medicine. Lastly, the Superior Court also deemed the expert qualified under Section 512(e) in light of his training, experience and knowledge involving the performance of knee surgery similar to that at issue and referral of patients to other doctors when the procedure at issue was called for. Thus, although the Superior Court felt the expert was qualified in all respects in the field of

orthopaedics and sports medicine, because he did not have an unrestricted physician's license to practice medicine anywhere in the United States, he was properly precluded from testifying as Plaintiff's expert witness.

2. §512 Case Law (2006 PBI Seminar)

1. Callari v. Rosenwasser, 2003 WL 21911912 (CCP, Phila., 2003) (Tereshko, J.)

Plaintiff's expert, Board Certified in Infectious Disease, was deemed competent to testify against a Neurosurgeon on post-operative management of an infectious disease. Judge Allan L. Tereshko concluded that the Mcare Act applies to this case pursuant to Section 512(c)(1) which provides:

> (c) Standard of Care -- . . . An expert testifying as to a physician's standard of care also must meet the following qualifications:
>
> (1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.
>
> (2) Practice in the same subspecialty as the Defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in Subsection (d) or (e).

The Court further concluded that the expert satisfied the prerequisites of Section 512(d) which enables a Court to waive the same subspecialty requirement set forth in Section 512(c)(2).

Judge Tereshko also ruled that the Plaintiff's expert easily qualified under the more liberal Pennsylvania common law. Citing Miller v. Brass Rail Tavern, 664 A.2d 525 (Pa. 1995), the Court embraced the common law test that an expert witness is qualified if he or she has any reasonable pretension to specialized knowledge on the subject matter under investigation. The Court also affirmed its

decision that the Plaintiff's expert sufficiently testified on an increased risk of harm theory.

2. Long v. Ostroff, 63 Pa. D&C 4th 444 (CCP, Philadelphia, 2003) (Mazer Moss, J.)

Plaintiff's expert, a certified psychiatrist, was ruled not qualified to testify under Section 512(e) of the Mcare Act against a board certified family physician. The Court, in its rationale, excluded the Plaintiff's expert because as a board certified psychiatrist, he did not practice in the Defendant's subspecialty, did not practice in a substantially similar subspecialty, was not certified by either the same or a similar approved board, and lacked the requisite qualifications to render an expert opinion on the Defendant's applicable standard of care. Further, the Court concluded that the proffered expert did not possess sufficient training, experience, or knowledge of Defendant's subspecialty which might prompt the Court to waive the Mcare requirements.

3. Campbell v. Golden (CCP, Philadelphia, January Term, 2000, No. 1857) (Mazer Moss, J.)

Plaintiff's expert, a psychiatrist, was determined not competent to offer an expert medical opinion regarding the standard of care provided by the Defendant, a resident internist at the time. The Plaintiff was admitted to the general medical surgical unit at a hospital for respiratory problems. After she manifested anxiety symptoms from shortness of breath, the Defendant ordered intravenous Ativan. The Plaintiff claimed that she suffered from persistent generalized anxiety disorder, panic disorder, and post-traumatic stress disorder by reason of the administration of Ativan. In support of her claims, the Plaintiff produced a psychiatrist who opined that the Defendant-resident internist's use of intravenous Ativan on a patient with a pulmonary problem was below the standard of care. The Court found otherwise and determined that the Ativan was specifically prescribed to treat a pulmonary problem, not a psychiatric one. Because the Plaintiff's expert was a psychiatrist who did not practice in the same subspecialty as the Defendant or a subspecialty which has a substantially similar standard of care, and was not certified by the same or similar approved board and did not possess training or experience in internal medicine, the Court ruled that the Plaintiff's expert was not qualified to opine on standards used by internists when prescribing medication for pulmonary ailments.

4. **Buchkovich v. Cherry, PICS Case No. 04-0027, 04-0028 and 04-0029 (C.P. Centre, 12/31/03) (Brown, P.J.)**

Although Plaintiff's malpractice action was filed in 2000, because Plaintiff's medical experts produced their reports two months after Section 512 became effective, the Court held that Section 512 applied and that its application was not retroactive. The Court noted that Section 512 became effective on May 19, 2002. Plaintiff produced their expert reports on July 24 and July 26, 2002. The Court explained that by July 2002, Section 512 had been effective for approximately two months and that, therefore, application of Section 512 would be prospective, not retroactive. Further, the Court held that even if application of Section 512 was considered retroactive, if the Legislature had intended that Section 512 not apply retroactively, it would have included Section 512 in its list of sections that were not to be applied retroactively. Finally, the Court deemed Section 512 a purely procedural matter, not a substantive right.

In this trilogy of decisions, the Court applied Section 512 to the Defendants who specialized in pulmonology, neurology, cardiology, and orthopedic surgery. In doing so, the Court excluded Plaintiff's expert certified in pathologic anatomy and clinical pathology on standard of care issues and largely limited Plaintiff's expert in critical care except to the extent that his expert report adequately addressed standards of care applicable to the Defendants certified in internal medicine.

5. **Smith v. Paoli Memorial Hospital, 885 A.2d 1012 (Pa. Super. 2005)**

Section 512 of the Mcare Act does not require an exact match of specialities with the Defendant physicians; the trial court may rely on overlapping standards between specialities. More particularly, a board certified general surgeon and a board certified oncologist/internist were deemed qualified to opine on the standard of care of two board certified Defendant gastroenterologists. The experts were found competent to testify based upon the following Section 512 components and evidence presented in support thereof:

A. The experts were substantially familiar with the applicable standard of care for the specific care at issue;

B. The experts practiced in subspecialities with a substantially similar standard of care for the specific care at issue;

C. The experts were certified by a similar board;

D. The experts were actively involved in and/or teaching in a related field of medicine so as to possess sufficient training, experience, and knowledge to provide credible testimony.

Trial Courts may thus rely on overlapping standards of care between physicians from different subspecialities and allow an expert from one speciality to testify on the treatment rendered by a physician in a different subspeciality.

6. Fried v. Spurlock (Pa. Super. Aug. 22, 2005) (Memorandum Opinion)

Section 512 precluded Plaintiff's expert OB/GYN from testifying on the standard of care required of a Defendant colorectal surgeon stemming from a utero-vaginal condition. The Court (Klein, J.) determined that while an OB/GYN may have had a similar standard of care for part of the procedure in issue, such expert did not profess to have expertise in performing the extensive colon and rectal surgery that was carried out by the Defendant.

7. Campbell v. Attanasio, 862 A.2d 1282 (Pa. Super. 2004)

Psychiatrist found qualified to opine on contraindicated medication administered by a resident internist because the expert was substantially familiar with the applicable standard of care at issue as of the time of the alleged breach of the standard of care under 40 P.S. §1303.512(c)(1).

8. Herbert v. Parkview Hospital, 854 A.2d 1285 (Pa. Super. 2004)

Internist determined competent to render expert testimony as to the appropriate standard of care of nephrologist based on rationale that the expert was qualified to opine on the specific care at issue given the overlap between the expertise of the expert and the Defendant regarding the failure to provide care in the presence of a clearly presented respiratory problem — a large piece of steak was found in the Plaintiff's decedent's throat leading to infection and demise.

9. **Amaya v. York Hospital, No. 1:04-CV-1081 (M.D. Pa. 2006) (Conner, J.) (Memorandum)**

Motion in Limine to prevent a neurologist from testifying on standard of care of an emergency medicine physician found to have threshold merit.

10. **Wexler v. Hect, 847 A.2d 95 (Pa. Super. 2004) (Lally-Green and Popovich, J.J.) (Johnson, J., Dissenting)**

The Superior Court affirmed Philadelphia Common Pleas Court Judge Allan L. Tereshko, holding that Plaintiff's expert, a podiatrist certified by the American Board of Podiatric Surgery, who was "undoubtably an expert in the general field of foot surgery . . . lacked the training and experience necessary to opine about the standard and care relevant to an orthopedic surgeon performing the particular procedure at issue." The Superior Court agreed with the Trial Court that the podiatric expert did not have an M.D. and, therefore, was not specialized in the field of orthopedic surgery. The Courts deemed the podiatric surgeon incompetent, as a matter of common law, to testify on the standard of care and causation as it related to the Defendant board certified orthopedic surgeon who performed the subject bunion-removal surgery. The Superior Court assailed the podiatric expert's report because it referenced a deviation from the "normal standard of care," but did not indicate whether such standard was a "universal standard of care observed by surgeons of every system or school of surgery." The Plaintiff sought to produce the podiatric expert to testify in person at a hearing held by Judge Tereshko on Defendant's Motion in Limine to Exclude the Expert's Report. Judge Tereshko refused this request and the Superior Court concluded that this was not an abuse of discretion because the podiatric expert's opinion would have been based, in part, upon the Defendant's recitation of the standard of care which the Superior Court deemed inadmissible hearsay.

The Superior Court also rejected the podiatrist's qualifications because he criticized the Defendant orthopedic surgeon's entire follow-up program. According to the Superior Court, "the relevant standard of care pertains not only to the procedure being performed, but also pertains closely to the qualifications of the person performing that procedure." In a rambling rationale, the Court concluded that the podiatrist's opinions were insufficient to carry the burden.

Although the Trial Court expressly ruled that its decision was not based on Section 512, the Superior Court proceeded to hold that the podiatric expert was unqualified to render an opinion under the Mcare Act:

> Subsection (a) provides that the expert must, first, have "sufficient education, training, knowledge and experience to provide credible, competent testimony" and second, fulfill the additional qualifications set out in § 1303. 51 2. In our view, the first part of subsection (a) restates the common law standards for rendering an expert medical opinion. The Act then adds new requirements, in addition to the common law requirements in subsections (b) through (d). While certain requirements of other subsections may be waivable, the "baseline" common law requirements of subsection (a) are not waivable. Thus, it logically follows that if the expert's opinion is inadmissible under the common law, it will not be admissible under the Mcare Act. As noted above, the Court did not abuse its discretion by excluding [Plaintiff's podiatric expert's testimony] under the common law. As such the testimony would be inadmissible under the Mcare Act as well.

Beating a dead horse to death, the Court then ruled that even if the podiatric expert's testimony met the common law test, it would inadmissible under subsection (b) of Mcare because podiatrists are not physicians and because the Trial Court chose not to waive the physician's licensure requirement by not finding that the expert "is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience." Further, because the podiatric expert was not board certified in orthopedic surgery or a similar approved board, he failed to meet the requirements of Section 512(c)(3).

The dissent of Judge Justin M. Johnson would hold as follows:

> Regrettably, the majority presumes, as did the Trial Court, that the standard of care for the removal of bunions is materially different in podiatric practice from the standard for the same procedure when conducted by an orthopedist. I am aware of

> no such presumption in our law. Nevertheless, the Majority accepts the Trial Court's explanation, requiring no substantiation for its determination that the standards are, in fact, distinct, and apparently adopts the trial judge's philosophical exegesis. Indeed, the Majority would compound the trial judge's error, concluding that the Court did not err when it refused the only testimony offered to determine what, if any, overlap exists between the respective doctors' expertise and practice. In the absence of such evidence, we cannot properly conclude that the proffered expert witness was not qualified to testify against the Defendant. I conclude accordingly that the Trial Court's entry of summary judgment in this matter was erroneous.

Judge Johnson reasoned:

> Indeed, we have sustained Trial Courts' refusals to admit expert medical testimony only where the record established that the proffered witness had *no* expertise or experience in the treatment, procedure or practice about which he sought to testify.
>
> * * * *
>
> In no case have we determined evidentiary admissibility based merely on purported distinctions in treatment philosophy where the proffered expert's clinical experience encompasses the procedure or treatment at issue. Similarly, we have eschewed attempts to limit admissibility based merely on formalized distinctions between areas of specialization and practice.

* * * *

> Under similar circumstances, where the proffered expert's practice bears common elements with the Defendant's, we have admitted the expert's testimony subject to proof that he or she is not qualified to testify, i.e., that the 'expert' in fact has no expertise on the subject in question.

* * * *

> Because I find no demonstration on the record that the podiatrist whose testimony is at issue lacked expertise in the treatment of bunions (operatively, post-operatively, or at any other time), I am compelled to conclude that the Trial Court erred in precluding his testimony. According, the Court's entry of summary judgment is likewise erroneous.

Judge Johnson further noted that if the Defendants had sought to apply Mcare before the Trial Judge, the Plaintiff would likely have obtained additional expert testimony that the Trial Judge and the Majority would have found more palatable. Finally, Judge Johnson rejected the Majority's retroactive application of Section 512 of the Mcare Act, concluding instead that it "works a seismic shift in the evidentiary landscape of medical malpractice cases and, in this case, has undermined the Plaintiff's ability even to present her case for the putative violation of vested a right."

11. <u>Gartland v. Rosenthal, 2004 WL 869583 (Pa. Super. 2004)</u>

The Superior Court, in this opinion by Judge Richard B. Klein, reversed a Trial Court Order entering summary judgment in favor of the defense and held that a neurologist was qualified to render expert opinion evidence regarding what radiologists should have done when reading x-rays relating to neurologic problems. Judge Klein noted that the fact that the Plaintiff's expert was a neurologist "established *prima facie* his qualifications to read the X-rays in this case and to offer an opinion on what should have been done under the circumstances." The Defendants did not produce any evidence to refute his

apparent qualifications to read x-rays and to make neurological incisions. The Court commented: "While we would probably not find him qualified to render such an opinion if the radiologists were reading x-rays of the leg, we believe that at least at the summary judgment stage and on this record, his opinion on x-rays relating to neurological problems and the standard of care for radiologists reading such x-rays should have been allowed." The Court concluded that even under Mcare's tougher standard, Plaintiff's expert in the field of neurology was qualified to offer his opinions.

12. Johnson Estate v. Rybarczyk, Pa. Super., No. 983 EDA 2003, J. A42012/03 (Filed April 22, 2004) (Memorandum)

Plaintiff-mother suffered a premature rupture of her membranes prompting Defendant to take various cultures, one of which was positive for Group B Strep exposing her fetus to infection. Plaintiff delivered her baby; however, he died due to extreme prematurity. The case ultimately proceeded to a jury trial against only two of the Defendant OB/GYNs who had rendered brief treatment and ordered the testing. The jury returned its verdict in favor of said Defendants. The trial judge had precluded two of Plaintiff's experts, one of whom was a pediatrician, and the other of whom was a pathologist. The Superior Court affirmed this decision finding that both experts lacked the requisite education, training, knowledge, experience and qualifications regarding the standard of care for premature birth that the Defendant OB/GYNs followed.

13. Qualifications/Same Subspecialty

(A) George v. Ellis, 820 A.2d 815 (Pa. Super. 2003)

At trial, following *voir dire* on qualifications of Plaintiff's proposed expert witnesses, trial court granted Defendant's Motion for Nonsuit finding the witnesses unqualified within the areas at issue. The Superior Court reversed, holding that experts need not be equally qualified, for it is the duty of an expert to assist the trier of fact. Where an expert demonstrates that he or she has sufficient skill, knowledge, and experience to aid the jury in its determination, the jury should be free to reject this testimony, but it should be presented to the jury for them to decide. The challenged expert, based on many years of orthopedic practice and surgery, should have been allowed to testify. Defendant's counsel would then be free to argue the merits of the expert's opinions in view of his experience during closing to the jury.

(B) B.K. ex rel. S.K. v. Chambersburg Hospital 834 A.2d 1178 (Pa. Super. 2003)

The trial judge precluded the testimony of Plaintiff's expert witness, a Board Certified Pediatrician, ruling that he was not qualified in Emergency Room Medicine to testify as to the standard of care for treating a pediatric seizure. The Superior Court reversed because the Plaintiff's expert clearly demonstrated specialized knowledge of the disputed issue between the parties and confirmed his qualifications as an expert under the governing standard of review. Central to the Superior Court's reasoning was the fact that the expert possessed 25 years of supervisory experience with the very standards of care driving the focal inquiry of the case. The Court declared:

> The touchstone of expert qualification is, again, 'specialized knowledge.' To preclude scholars, authors, instructors, and other authorities from qualifying as experts simply because they teach or supervise a craft rather than practice the craft flies in the face of the 'specialized knowledge standard.' Indeed, it is inconceivable that one could meaningfully supervise a skilled practitioner without specialized knowledge of the practice.

(C) Kovalev v. Sowell, 2003 WL 22700778 (Pa. Super. 2003)

Plaintiff, who was trained in Russia as a medical doctor, was deemed unqualified to offer expert medical testimony on his own behalf by reason of his failure to present evidence that he possessed any specialized training in Orthopedics, Radiology, or Neurology or any medical subspecialty that would have been pertinent to his case.

(D) Overlapping Subspecialities Common Law Decisions

- B.K. v. Chambersburg Hospital, 834 A.2d 1178 (Pa. Super. 2003) (Board Certified pediatrician deemed qualified in emergency medicine based on practice and supervisory experience demonstrating specialized knowledge of the disputed issue between the parties); George v. Ellis, 820 A.2d 815 (Pa. Super. 2003)

(Canadian orthopedic surgeon qualified based on skill, knowledge and experience to aid the jury in its determination).

- ❑ Yacoub v. Lehigh Valley Medical Assoc., 805 A.2d 579 (Pa. Super. 2002) (in the absence of proper qualifying foundation on specialty overlap or experience, Board Certified neurosurgeon precluded as to standards of care in the fields of internal medicine and special care unit nursing).

- ❑ Rauch v. Mike-Mayer, 783 A.2d 815 (Pa. Super. 2001) (Board Certified neurologist who for prior decade practiced in psychiatry and not neurology, qualified in neurology because of trust to be placed in his testimony going to the weight of such evidence).

- ❑ McClain v. Welker, 761 A.2d 155 (Pa. Super. 2000) (Ph.D. in neuroscience without medical degree competent to testify on cause of cognitive defects).

- ❑ Gunn v. Grossman, 748 A.2d 1235 (Pa. Super. 2000) (infectious disease specialist allowed to testify as to standard of care required of a cardiologist in prescribing antibiotics).

- ❑ Poleri v. Salkind, 683 A.2d 649 (Pa. Super. 1996) (Board Certified orthopedic surgeon qualified to testify regarding standard of care of physiatrist because wound care is an area in which the subspecialists overlap).

- ❑ Montgomery v. South Philadelphia Medical Group, 656 A.2d 1185 (Pa. Super. 1995) (internist qualified to opine on standard of care for a physician's assistant).

- ❑ Lira v. Albert Einstein Medical Center, 559 A.2d 550 (Pa. Super. 1989) (Board Certified neurologist with training in the specialized care at issue found qualified to testify against EMT where specialties overlap in practice or experience).

D. Venue (Appendix G: Pa.R.C.P. 1006, 2130, 2156 and 2179)

The Supreme Court of Pennsylvania, by Orders issued January 27, 2003 and March 5, 2003, changed Pennsylvania's venue rules applicable to medical

professional liability claims. These rules are applicable to medical professional liability actions filed on or after January 1, 2002 (but not to actions filed before that date).

A medical professional liability action may be brought against a health care provider for a medical professional liability claim *only in a county in which the cause of action arose.*[18] Pa.R.C.P. 1006(a).1. For joint or joint and several liability medical professional claims against two or more Defendants, the action must be brought in any county in which venue may be laid against any Defendant, i.e., in any county in which a malpractice cause of action arose. Pa.R.C.P. 1006(c)(2). If one or more causes of action stated against the same Defendant is a medical professional liability claim, the action must be brought only in a county in which the cause of action arose. Pa.R.C.P. 1006(f)(2). These new venue rules are applicable not only to individual Defendants, but also to partnerships (Rule 2130(a)), unincorporated associations (Rule 2156(a)), and corporations and similar entities (Rule 2179(a)).

IV. STATUTORY AUTHORITY

THE MCARE ACT (ACT 13) (Appendix H)

On March 20, 2002, then Governor Mark Schweiker signed the Medical Care Availability and Reduction of Error (Mcare) Act which amends the Health Services Malpractice Act of 1996, 40 Pa.C.S.A. § 1301.101, et seq. Act 13 is designed to maintain and foster comprehensive medical malpractice reform while balancing the objective of assuring health services through a network of highly trained physicians in all specialties and patient safety with prompt determination and fair compensation for every person who has sustained injury or death as a result of medical negligence by a health care provider. Act 13 must be studied in its entirety, for it affects all aspects of medical professional liability claims and will continue to shape the jurisprudential landscape for years to come. The Act strives to achieve insurance reform through the eventual elimination of the Medical Catastrophe Loss Fund (the CAT Fund) now known as the Mcare Fund. Even a cursory survey reveals that Act 13 governs all of the following areas applicable to any medical malpractice case:

- Patient Safety

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[18] Definitions of the terms "health care provider," "medical professional liability action" and "medical professional liability claim" are set forth in 42 Pa.C.S. § 5101.1(c).

- Informed Consent
- Punitive Damages
- Affidavit of Non-involvement
- Advance Payments
- Collateral Sources
- Payment of Damages
- Reduction to Present Value
- Preservation and Accuracy of Medical Records
- Expert Qualifications
- Statute of Repose
- Remittitur
- Ostensible Agency
- Medical Professional Liability Insurance
- Mcare Fund
- Reporting to the State Board of Medicine or the State Board of Osteopathic Medicine
- Notice of a Complaint in a Professional Liability Action Filed Against the Physician or Disciplinary Action Taken Against the Physician
- Confidentiality of Records of Licensure Boards

V. GENERAL CONSIDERATIONS FOR FILING SUIT

Medical professional liability cases require thorough pre-complaint investigation to establish a prima facie legal position on all applicable liability and damages theories. Basic to this exercise of forensic and judgmental evaluation is the fundamental truism that theory flows from the facts, not the converse. Investigation is the blueprint and expert review is the foundation for a well designed Complaint. Basic theories are detailed as follows.

A. Physician Malpractice Based on Negligence

"Medical malpractice is defined as the 'unwarranted departure from generally accepted standards of medical practice resulting in injury to a patient, including all liability-producing conduct arising from the rendition of medical services.'" Ditch v. Waynesboro Hospital, 917 A.2d 317, 321-22 (Pa. Super. 2007), quoting, Toogood v. Rogal, 824 A.2d 1140, 1145 (Pa. 2003); Yee v. Roberts, 878 A.2d 906, 912 (Pa. Super. 2005). To establish a *prima facie* case of medical malpractice under Pennsylvania law, the Plaintiff must satisfy the following four elements: (1) a duty owed by the physician to the patient; (2) breach of that duty by the physician; (3) the breach of the duty was the factual cause of harm suffered by the patient;[19] and (4) the damages suffered by the patient were a direct result of that harm. Id. Hightower-Warren v. Silk, 698 A.2d 52, 54 (Pa. 1997); Rachlin v. Edmison, 813 A.2d 862 (Pa. Super. 2002); Dietzel v. Gurman, 806 A.2d 1264 (Pa. Super. 2002). A Plaintiff must also present expert testimony to a reasonable degree of medical certainty that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of harm suffered. Mitzelfelt v. Kamrin, 584 A.2d 888 (Pa. 1990); Brannan v. Lankenau Hospital, 417 A.2d 196 (Pa. 1980); Joyce v. Boulevard Physical Therapy & Rehabilitation Center, P.C., 694 A.2d 648 (Pa. Super. 1997); Montgomery v. South Philadelphia Medical Group, 456 A.2d 1385 (Pa. Super. 1995).

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[19] In January, 2003, the Civil Instructions Subcommittee of the Pennsylvania Supreme Court for Proposed Standard Jury Instructions finalized the Second Edition of the Proposed Standard Jury Instructions which substitute the phrase "factual cause" for the phrases "substantial factor," "substantial contributing factor" and "legal cause" in the causation instructions. See *Pa.SSJI (Civ.) 3.0, 3.25, 3.26, 3.27, 10.03A and 10.03B.* In October, 2005, the Standard Jury Instructions were revised to include updates in the case law, new Rules of Civil Procedure, new legislation, and comments from lawyers and judges. This Third Edition (2005) includes new charges on factual cause (now 11.02) and damages (11.11A).

Pennsylvania law further recognizes that in certain cases, irrespective of the quality of medical treatment, a certain percentage of patients will suffer harm. In these types of cases, a *prima facie* case of medical malpractice is established under Section 323(a) of the Restatement (Second) of Torts once a Plaintiff has demonstrated that the Defendant's acts or omissions have increased the risk of harm to another, in which case the jury then determines whether the increased risk was a substantial factor in bringing about the resultant harm. See Footnote 19, supra; Mitzelfelt v. Kamrin, supra; Jones v. Montefiore Hospital, 431 A.2d 920 (Pa. 1981); Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); Poleri v. Salkind, 683 A.2d 649 (Pa. Super. 1996); Montgomery vs. South Philadelphia Medical Group, supra. In the typical negligence case, the Plaintiff alleges that the Defendant's act or omission directly resulted in harm; however, the theory in increased risk of harm cases is that the Defendant's act or omission failed to protect against harm from another source. Hamil v. Bashline, supra. Thus, "[a] causal connection between the injuries suffered and the Defendant's failure to exercise reasonable care may be proved by evidence that the risk of incurring those injuries was increased by the Defendant's negligent conduct." Bindschusz v. Phillips, 771 A.2d 803 (Pa. Super. 2001).

B. Physician Malpractice Based on the Theory of Lack of Informed Consent

Informed consent has been part of the medical professional liability landscape for almost forty (40) years. Gray v. Grunnagle, 223 A.2d 663 (Pa. 1966). The doctrine of informed consent is codified in Section 504 of the Mcare Act which provides:

> Informed consent --
>
> **(a) Duty of physicians**. -- Except in emergencies, a physician owes a duty to a patient to obtain the informed consent of the patient or the patient's authorized representative prior to conducting the following procedures:
>
> (1) Performing surgery, including the related administration of anesthesia.
>
> (2) Administering radiation or chemotherapy.

(3) Administering a blood transfusion.

(4) Inserting a surgical device or appliance.

(5) Administering an experimental medication, using an experimental device or using an approved medication or device in an experimental manner.

(b) Description of procedure. -- Consent is informed if the patient has been given a description of a procedure set forth in subsection (a) and the risks and alternatives that a reasonably prudent patient would require to make an informed decision as to that procedure. The physician shall be entitled to present evidence of the description of that procedure and those risks and alternatives that a physician acting in accordance with accepted medical standards of medical practice would provide.

(c) Expert testimony. -- Expert testimony is required to determine whether the procedure constituted the type of procedure set forth in subsection (a) and to identify the risks of that procedure, the alternatives to that procedure and the risk of these alternatives.

(d) Liability. --

(1) A physician is liable for failure to obtain the informed consent only if the patient prov es that receiving such information would have been a substantial factor in the patient's decision whether to undergo a procedure set forth in subsection (a).

(2) A physician may be held liable for failure to seek a patient's informed consent if the physician knowingly represents to the

patient his or her professional credentials, training or experience.

40 P.S. § 1303.504.

Pennsylvania jurisprudence holds that in the absence of an emergency or a situation where a patient is physically or mentally unable to consult about his condition, applicable medical treatment performed without the consent of the patient is considered to be a battery. Thus, consent of the patient is a condition precedent to surgical treatment (as well as the aforementioned procedures) by a physician. Such treatment, without the patient's consent, is a technical battery. Consent given by a patient without a true understanding of the nature of the surgical operation to be performed is invalid; it is, as a result, the physician's duty to give a description of the procedure and to advise the patient of the risks, alternatives, and risks from those alternatives to the procedure.

Recovery on the intentional tort theory of informed consent is premised on the conduct of the unauthorized procedure. "Under Pennsylvania's common law doctrine, however, informed consent has not been required in cases involving non-surgical procedures." Stalsitz v. The Allentown Hospital, 814 A.2d 766 (Pa. Super. 2002). Although doctors need not disclose "all known information," they must "advise the patient of those material facts, risks, complications, and alternatives to surgery that a reasonable person in the patient's situation would consider significant in deciding whether to have the operation." Id., quoting, Gouse v. Cassel, 615 A.2d 331 (Pa. 1992). See also Valles v. Albert Einstein Medical Center, 805 A.2d 1232 (Pa. 2002); Issac v. Jameson Memorial Hospital, 932 A.2d 924 (Pa. Super. 2007). The duty to obtain a patient's informed consent is generally limited to the surgeon performing the operative procedure; this doctrine does not obligate a hospital to obtain a patient's informed consent. Valles, supra., Stalsiz, supra.[20]

A physician is not liable for the failure to obtain informed consent unless the patient proves that receiving the required information would have been a substantial factor in the patient's decision on whether to undergo an applicable procedure. 40 P.S. § 1303.504(d)(1); Hohns v. Gain, 806 A.2d 16 (Pa. Super.

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[20] The informed consent doctrine does not apply to hospitals unless the hospital contracts with the FDA to obtain informed consent from patients participating in clinical investigations. Friter v. Iolab Corp., 607 A.2d 1112 (Pa. Super. 1992). Under such circumstances, the hospital is deemed to have assumed an independent duty that it would not ordinarily bear. Id. See also Isaac v. Jameson, Memorial Hospital, supra.; Stalsiz v. The Allentown Hospital, supra.; Watkins v. Hospital of the University of Pennsylvania, 737 A.2d 263 (Pa. Super. 1999).

2002). A patient cannot recover if the risk was revealed. In Re Silicone Breast Plant Litigation, CCP, Allegheny, PICS Case No. 03-1528 (Wettick, Jr., J.) (Order and Opinion Dated 9/22/03). In order to prove a case grounded on the doctrine of informed consent, there must be expert testimony to establish a causal connection between the lack of informed consent and the suffering of the injury, the risk of which was undisclosed or which would not have occurred had the patient opted for one of the undisclosed methods of treatment. Maliszewski v. Rendon, 542 A.2d 170 (Pa. Super. 1988). But see Grabowski v. Quigley, 684 A.2d 610 (Pa. Super. 1996) (under a theory of battery, it is not necessary for a Plaintiff to prove as a result of the recommended treatment that he/she actually suffered an injury the risk of which was undisclosed when injury that would not have occurred had the patient opted for one of the undisclosed methods of treatment). "Pennsylvania law forbids a claim of corporate negligence against a hospital to be founded upon a theory that the hospital failed to insure the patient's informed consent." Tucker v. Community Medical Center, 833 A.2d 217 (Pa. Super. 2003).

C. Hospital Liability

1. Direct Liability -- The Doctrine of Corporate Negligence

In Thompson v. Nason Hospital, 591 A.2d 703 (1991), the Pennsylvania Supreme Court adopted the doctrine of corporate negligence as the law of Pennsylvania:

> Corporate negligence is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well-being while at the hospital. This theory of liability creates a non-delegable duty which the hospital owes directly to the patient. Therefore, an injured party does not have to rely on and establish the negligence of a third party.

The Supreme Court expressly recognized that a hospital may be found independently negligent if it violated one or more of the following duties:

> (1) Duty to use reasonable care in the maintenance of safe and adequate facilities and equipment;
>
> (2) Duty to select and retain only competent physicians;
>
> (3) Duty to oversee all persons who practice medicine within its walls as to patient care;
>
> (4) A duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients.

Id. at 707. In order to present a prima facie case of corporate negligence, a Plaintiff must demonstrate all of the following elements:

> (1) The hospital acted in deviation from the standard of care;
>
> (2) The hospital had actual or constructive notice of the defects or procedures which created the harm; and
>
> (3) The hospital's conduct was a substantial factor in bringing about the harm.

Butler v. Kennedy Memorial Hospital, 901 A.2d 1042 (Pa. Super. 2006); Brodowski v. Rayve, 885 A.2d 1045 (Pa. Super. 2005); Rauch v. Mike-Mayer, 783 A.2d 815 (Pa. Super. 2001); Whittington v. Episcopal Hospital, 768 A.2d 1144 (Pa. Super. 2001). To establish corporate negligence, the Plaintiff must show more than an act of negligence by an individual for whom the hospital is responsible; rather, the Plaintiff must show that the hospital itself breached a duty and is substandard. Edwards v. Brandywine Hospital, 652 A.2d 1382 (Pa. Super. 1995). "This requires evidence that the hospital knew or should have known about the breach of duty that is harming it's patients." Id. A reasonable hospital standard of care is thus applied when formulating liability through the prism of corporate negligence, i.e., a hospital's corporate negligence will be measured against what a reasonable hospital under similar circumstances would have

done. Further, the doctrine of corporate negligence embraces "systemic negligence;" not strict liability.[21] Corporate liability is predicated on the negligent acts of the institution, i.e., "[a] cause of action for corporate negligence arises from the policies, actions or inaction of the institution itself rather than the specific acts of the individual hospital agents." White v. Behlke, 69 Pa. D&C 4th 353, 363 (Lackawanna 2004). Therefore, individual acts of negligence constitute malpractice for which a hospital as a corporate body cannot be held directly liable. Id. Expert testimony is required to demonstrate that the corporate entity deviated from the standard of care and that such deviation was a factual cause in bringing about the harm. Rauch v. Mike-Mayer, supra. The doctrine of corporate negligence applies to both hospitals and HMOs. Shannon v. McNulty, 718 A.2d 828, 835-36 (Pa. Super.1998).

The doctrine of corporate negligence should be applied to corporate physician practice groups. The Pennsylvania Superior Court, in Kaskie v. Wright, 589 A.2d 213 (Pa. Super. 1991), allocatur denied, 600 A.2d 954 (Pa. 1991), reaffirmed that because professional credentials of physicians who provide health care are the responsibility of professional corporations who offer their services, the failure of the professional corporation to fulfill this oversight obligation becomes a matter of negligence. As such, recovery must be sought against the physician practice group for breach of the duty of oversight of its physicians. Id. See also, Elliot v. O'Brien, CCP, York, No. 2000-SU-08752-01, April 2, 2001 (Horn, J.).

In Risser v. Pepper, CCP, Dauphin, No. 96-6383, March 29, 1996 (Kleinfelter, J.), the Court denied a practice group's motion for summary judgment, holding that various forms of medical groups, clinics, associations and partnerships may be liable under the doctrine of corporate negligence for the failure to fulfill their obligations to make sure that physicians practicing within the group are competent to perform as surgical specialists. Citing Thompson v. Nason and Kaskie v. Wright, the Court applied the doctrine of corporate negligence to the Defendant practice group, reasoning that the partnership was under a duty to oversee all persons practicing medicine within the group.

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[21] Recently, the Superior Court ruled that evidence of "systemic breakdown" in communication is sufficient to state a claim against a hospital for corporate negligence for breach in the standard of care. A hospital is properly charged with constructive notice when it should have known of the patient's condition at issue when the absence of actual notice is caused by the absence of supervision. Brodowski v. Rayve, supra. And, in Hook v. Wilson, PICS Case No. 05-1554 (C.P. Lackawana Aug. 17, 2005) (Minora, J.), the trial court held that a corporate negligence claim was sufficiently stated where there was expert evidence that the hospital Defendant breached its non-delegable duty to formulate, adopt, and enforce adequate rules and policies to ensure quality care for its patients (hospital failed to transfer decedent to ICU given her post-surgical condition as required by its own written policies and the standard of care).

Judge Terrence R. Nealon, in Oven v. Pascucci, CCP, Lackawanna, No. 99-CV-5278, June 9, 2000 (Nealon, J.), engaged in a detailed analysis of the instant issue and found that the doctrine of corporate negligence is properly applied to professional corporations. Judge Nealon, citing Kaskie, supra., stated "that if a professional corporation does not satisfy its duty to retain and offer only competent medical personnel, an injured person may recover from that corporation for negligence." Id. at p. 13. This, in turn, would apply to the second duty identified in Thompson. Accordingly, the Plaintiff was afforded the opportunity to conduct discovery to determine whether the physician-owned-and-operated entity committed systemic negligence that caused the Plaintiff's unfavorable outcome. In the absence of such proof, the issue could be revisited by filing a motion for summary judgment. The preliminary objection seeking to dismiss the corporate negligence count was thus denied. Id. at pp.14-15.

In Rivera v. Lawrence, CCP, Monroe, No. 4325 Civil 1998, October 9, 1998 (Cheslock, J.), the Court overruled the preliminary objections of a medical professional corporation, rejecting the sole argument of the moving Defendants that claims of corporate negligence have not been extended beyond a hospital. The Court held:

> Defendants created a professional corporation for the purpose of diagnosing and treating patients. Plaintiffs may sustain a cause of action against Defendants so long as they can show Defendants breached the duty enunciated in Thompson v. Nason Hosp. Therefore, Defendant's preliminary objections in the nature of a demurrer is dismissed.

Id. at p. 7. See also Patel v. Himalayan International Institute of Yoga Science and Philosophy of the USA, No. CV-94-1118 (M.D. Pa. September 30, 1996)(Vanaskie, J.) (Doctrine of Corporate Negligence applied to Institute that held itself out as providing holistic health care services).

2. Indirect Liability -- Ostensible Agency

Section 516 of the Mcare Act regulates ostensible agency and provides:

> Ostensible agency
>
> **(a) Vicarious liability**. -- A hospital may be held vicariously liable for the acts of another health care provider through principles of ostensible agency only if the evidence shows that:
>
> > (1) 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; or
> >
> > (2) the care in question was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents.
>
> **(b) Staff privileges**. -- Evidence that a physician holds staff privileges at a hospital shall be insufficient to establish vicarious liability through principles of ostensible agency unless the claimant meets the requirements of subsection (a)(1) or (2).

40 P.S. § 1303.516.

Under pre-Act 13 law, a hospital was deemed liable for the negligence of any independent contractor physician where the hospital "held out" the physician as its employee. Cajan v. Devine Providence Hospital, 430 A.2d 647 (Pa. Super. 1980). See also Simmons v. St. Clair Memorial Hospital, 481 A.2d 870 (Pa. Super. 1984). When a hospital acted or omitted to act in a way which led a patient to a reasonable belief that he or she was being treated by the hospital or one of its employees, a holding out was deemed to have occurred. Id. Under Act 13, it appears statutorily insufficient for a Plaintiff to have a personal, but reasonable, belief that a physician is acting as an employee of the hospital. A Plaintiff must prove either (1) that a reasonably prudent person in the Plaintiff's position would be justified in the belief that the care in question was being

rendered by the hospital or its agents, or (2) that the care in question was advertised or otherwise represented to the patient as care being rendered by the hospital or its agents. Again, a mere showing that the physician maintained staff privileges at the hospital is not sufficient to establish secondary hospital liability.

In Faux v. Radan, 2007 WL 5003818 (Lackawanna 2007) (Nealon, J.), Defendant hospital filed a Motion for Summary Judgment seeking to dismiss the Plaintiff's claim that a co-Defendant surgeon was the hospital's ostensible agent at the time of the surgery in dispute. The hospital asserted that the Plaintiff was unable to prove the common law elements of ostensible agency. The Trial Court noted that the issue was governed by the revised standard set forth in 40 P.S. §1303.516, and, based upon the record, concluded that "a triable issue of fact exists as to whether a reasonably prudent patient would have been justified in believing that the surgery in question was being performed by an agent of the hospital." In denying summary judgment, the court observed that Section 516 has modified the burden of proof applicable to ostensible agency claims as follows: (1) Section 516(a)(1) changes the analysis of the patient's perspective from an examination of whether the patient subjectively looked to the hospital for care to an objective determination of whether a reasonably prudent patient would have been justified in believing that the care was being provided by an agent of the hospital; (2) Section 516(a)(2) revises the original definition of "holding out," which included an omission to act, to now require an affirmative act such as an advertisement or other representation; (3) unlike the common law standard which considers whether "the hospital 'holds out' the physician as its employee," Section 516(a)(2) now considers whether the hospital advertised or represented "the care in question" as "being rendered by the hospital or its agents;" (4) under Section 516(a)(1) and (a)(2), a Plaintiff may establish ostensible agency by proving either or both of these factors, rather than both of the common law elements.

D. Damages under Mcare

1. Section 508 - Collateral Sources

The Mcare Act has changed the Collateral Source Rule. Under Section 508, Plaintiff is prohibited from recovering damages for past medical expenses or past lost earnings incurred to the time of trial to the extent they are covered by a private or public benefit or gratuity that the Plaintiff has received prior to trial, not including life insurance, pension or profit sharing plans, or other deferred compensation plans, social security benefits, cash or medical assistance benefits subject to repayment to the Department of Public Welfare, and benefits paid or payable under a program which under Federal statute provides for right of

reimbursement which supercedes State law for the amount of benefits paid from a verdict or settlement. Otherwise stated, a Defendant found liable in a malpractice trial is now entitled to a credit for medical expenses and disability payments paid by private insurance, and medical expenses and wage loss paid by Workers' Compensation. In return, there is no right of subrogation or reimbursement from the Plaintiff's recovery for such payments under Section 508(c). Thus, if a Plaintiff fails to recover medical expenses or wage loss, no insurance carrier or third party who paid such expenses can require repayment by the Plaintiff. Section 508(b) affords the Plaintiff the option of introducing into evidence the amount of medical expenses actually incurred as a gauge of the severity of injuries suffered, but the Plaintiff is not permitted to recover for such expenses as part of any verdict except to the extent that the Plaintiff remains legally responsible for payment. Thus, under Mcare, pain and suffering can be proved through evidence of medical expenses actually incurred to the time of trial. The Mcare Act does not entitle a Defendant to a credit for future payments of medical expenses or lost earnings.

2. Section 509 - Payment of Damages

Mcare Section 509 mandates that a jury issue separate findings specifying the amount of past damages, except as provided under Section 508 for medical and other related expenses in a lump sum, non-economic loss in a lump sum, and future damages for medical and other related expenses by year, loss of earnings or earning capacity in a lump sum and non-economic loss in a lump sum. 40 P.S. §1303.509(a). Mcare further mandates that damages for future medical care be paid periodically and that such payments be terminated upon the Plaintiff's death. 40 P.S. §1303.509(b). If the Plaintiff stipulates that the total amount of future damages for medical care and other related expenses do not exceed $100,000, the statutory periodic payment provision does not apply and the Plaintiff may be awarded such damages, without reduction to present value, in a lump sum. 40 P.S. §1303.509(b)(8). When the total amount of future damages for medical care exceed $100,000, the Plaintiff must present future damages evidence on an annual basis for the expected life of the Plaintiff to account for different annual expenditure requirements, including evidence of immediate needs. The Plaintiff may also vary the amount of future medical care required through evidence of recurring needs such as replacement of medically necessary equipment. As a result, the Plaintiff should properly present a detailed life care plan to the jury on the projected annual future medical and other related expenses.

Section 509(b)(6) regulates the funding mechanism for the awarded periodic payments by means of annuity contract, trust or other qualified funding plan approved by the Court. This methodology protects the Plaintiff and compels the Defendant to select from annuity carriers approved by the Pennsylvania Insurance Commissioner, signifying that any such carrier has received the highest rating for claims paying ability by two independent financial services

within the last twelve months. If any insurer defaults on a required periodic payment because of insolvency, the Plaintiff is entitled to payment from the Mcare Fund, or, if the Fund has ceased operations, from the Pennsylvania Guaranty Association. 40 P.S. §1303.509(b)(7). The Mcare Act requires that future medical and related expenses be reduced to present value and that the proportionate share of counsel fees and costs be paid before structuring the present value calculation. 40 P.S. §1303.509(b)(1). Counsel fees are thus calculated on the present value of the future damages award, not the cost of the annuity purchased to provide such benefits. In practice, therefore, the jury renders its verdict for future medical expenses on a year by year basis based on the actual needs of the Plaintiff. Post verdict, the parties formulate the specific funding mechanism with counsel fees calculated on the present value of the jury's lump sum award for future medical expenses. As a result, Plaintiff's counsel's fees are far smaller than a contingent fee based upon the lump sum verdict of the jury.

3. Section 510 - Reduction of Future Damages for Loss of Earnings or Earning Capacity to Present Value

Section 510 of the Mcare Act mandates that future damages for loss of earnings or earning capacity be reduced to present value based upon the return that the Plaintiff can earn on a reasonably secure fixed income investment. These damages must be presented to the jury based on competent evidence of the effect of productivity and inflation over the time period. By statutory mandate, the jury must determine the applicable discount rate, also based upon competent evidence. This requires that the Plaintiff present expert economic testimony on the appropriate discount rate, future inflation and future productivity. If economists retained by the Plaintiff and the Defendant reach similar conclusions, an appropriate discount rate can be stipulated to and submitted to the jury along with figures on loss of future earnings.

4. Section 505 - Punitive Damages

Mcare recognizes the common law threshold for awarding punitive damages based on willful or wanton conduct or reckless indifference to the rights of others. Section 505 allows the jury to consider the character of the healthcare provider's acts or omissions, the nature and extent of harm to the patient that the healthcare provider caused or intended to cause, and the wealth of the healthcare provider. 40 P.S. §1303.505(a). A showing of gross negligence will not support an award of punitive damages. 40 P.S. §1303.505(b). In vicarious liability situations, punitive damages may not be awarded against a healthcare provider who is only vicariously liable for the actions of its agent that caused the injury unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the injury. Unless the facts allege intentional misconduct, the Mcare Act caps punitive damages against an individual physician at 200% of the compensatory damages awarded.

Further, when awarded, punitive damages may not be less than $100,000, unless a lower verdict amount is returned by the jury. 40 P.S. §1303.505(d). When a verdict including punitive damages is entered, the punitive damages must be apportioned such that 75% are paid to the prevailing party and 25% are paid to the Mcare Fund. 40 P.S. §1303.505(e).

5. Section 515 - Remittitur

Fundamental to our system of justice is the basic precept that "damages are to be compensatory to the full extent of the injury sustained, but the award should be limited to compensation and compensation alone." Moorhead v. Crozer Chester Medical Center, 765 A.2d 786, 790 (Pa. 2001), quoting, Incolingo v. Ewing, 282 A.2d 206, 228 (Pa. 1971). Where the evidence supports an amount of damages awarded by the jury "the determination of the amount to be awarded for pain and suffering is primarily a jury question." Gunn v. Grossman, 178 A.2d 1235, 1241 (Pa. Super. 2000). Pennsylvania Rule of Civil Procedure 223.3 governs non-economic loss, and requires that the trial court give the following instructions to the jury:

> In any action for bodily injury or death in which Plaintiff has raised a claim for a damage award for non-economic loss that is available under the applicable substantive law, the court shall give the following instructions to the jury:
>
> The Plaintiff has made a claim for a damage award for past and future non-economic loss. There are four items that make up a damage award for non-economic loss, both past and future (1) pain and suffering; (2) embarrassment and humiliation; (3) loss of ability to enjoy the pleasures of life; and (4) disfigurement.
>
> The first item to be considered in Plaintiff's claims for damage awards for past non-economic loss and for future non-economic loss is pain and suffering. You are instructed that Plaintiff is entitled to be fairly and adequately compensated for all physical pain, mental anguish, discomfort, inconvenience and distress that you find (he) (she) has endured from the time of the injury until today and that Plaintiff is also entitled to be fairly and adequately compensated for all physical pain, mental anguish, discomfort, inconvenience and distress you find (he) (she) will endure in the future as a result of (his) (her) injuries.

> The second item that goes to make up non-economic loss is embarrassment and humiliation. Plaintiff is entitled to be fairly and adequately compensated for such embarrassment and humiliation as you believe (he) (she) has endured and will continue to endure in the future as a result of (his) (her) injuries.
>
> The third item is loss of enjoyment of life. Plaintiff is entitled to be fairly and adequately compensated for the loss of (his) (her) ability to enjoy any of the pleasures of life as a result of the injuries from the time of the injuries until today and to be fairly and adequately compensated for the loss of (his) (her) ability to enjoy any of the pleasures of life in the future as a result of (his) (her) injuries.
>
> * * *
>
> In consideration of Plaintiff's claims for damages awards for past and future non-economic loss, you will consider the following factors: (1) the age of the Plaintiff; (2) the severity of the injuries (3) whether the injuries are temporary or permanent; (4) the extent to which the injuries affect the ability of the Plaintiff to perform basic activities of daily living and other activities in which the Plaintiff previously engaged; (5) the duration and nature of medical treatment; (6) the duration and extent of the physical pain and mental anguish which the Plaintiff has experienced in the past and will experience in the future; (7) the health and physical condition of the Plaintiff prior to the injury; and (8) in the case of disfigurement, the nature of the disfigurement and the consequences for the Plaintiff.

Pa. R.C.P. 223.3.

"Generally, a jury award for compensatory damages should be reduced only if the award is plainly excessive or exorbitant . . . [;] excessiveness of damages is not determined merely by the size of the verdict." McManamon v. Washko, 906 A.2 1259, 1285 (Pa. Super. 2006). Section 504 of the Mcare Act regulates the remittitur process. In pertinent part, it provides as follows:

> **(a) General rule** – – In any case in which a Defendant health care provider challenges a verdict on grounds of excessiveness, the trial court shall, in deciding a motion for remittitur, consider evidence of the impact, if any, upon

availability or access to health care in the community if the Defendant health care provider is required to satisfy the verdict rendered by the jury.

(b) Factors and evidence – – A trial court denying a motion for remittitur shall specifically set forth the factors and evidence it considered with respect to the impact of the verdict upon availability or access to health care in the community.

(c) Abuse of discretion – – An appellate court reviewing a lower court's denial of remittitur may find an abuse of discretion if evidence of impact of paying the verdict upon availability and access to health care in the community has not been adequately considered by the lower court.

(d) Limit of security – – A trial court or appellate court may limit or reduce the amount of security that a Defendant health care provider must post to prevent execution if the court finds that requiring a bond in excess of the limits of available insurance coverage would effectively deny the right to appeal.

40 P.S. 1303.515. In response to this Mcare remittitur provision, on September 17, 2004, the Supreme Court adopted Pa. R.C.P. 1042.72, governing Post Trial Relief claiming excessive damages awarded for *noneconomic losses* in medical professional liability actions. In relevant part, this new Remittitur Rule provides the following guidance:

(a) In a medical professional liability action in which the trier of fact has made separate findings specifying the amount of noneconomic loss, any Defendant may include in a motion for post-trial relief under Rule 227.1, the ground that the damage award for noneconomic loss is excessive.

(b) <u>A damage award is excessive if it deviates substantially from what could be reasonable compensation. In deciding whether the award deviates substantially from what could be considered reasonable compensation, the court shall consider (1) the evidence supporting the Plaintiff's claim; (2) factors that should have been taken into account in making the award; and (3) whether the damage award, when assessed against the evidentiary record, strongly suggests that the trier of fact was influenced by passion or prejudice</u>.

Pa. R.C.P. 1042.72. (underscore added). **Under this Rule, "a damage award**

for non-economic loss does not include amounts awarded for medical and other related expenses." Pa. R.C.P. 1042.72(a), Note (emphasis added). Furthermore, pursuant to this Rule, "the Defendant has the burden of convincing the court that the award *deviates substantially* from what could be reasonable compensation. Pa. R.C.P. 1042.72(b), Note. **In determining whether the award for non-economic loss deviates substantially from what would be considered reasonable compensation, "the factors that the trier of fact should take into account are those set forth in jury instructions described in Rule 223.3."** Id. (emphasis added). Thus, where the age of the Plaintiff, the severity of the injuries, the permanency of the injuries, their affect on the ability of the Plaintiff to perform basic activities of daily living and other activities in which the Plaintiff previously engaged, the duration and nature of medical treatment, the duration and extent of physical pain and mental anguish which the Plaintiff has and will continue to experience, and the health and physical condition of the Plaintiff prior to the injuries have been considered by the jury in making its award, and the evidence supports the Plaintiffs' claim without passion or prejudice, a motion for remittitur on grounds of excessiveness should properly be denied. Pa. R.C.P. 1042.72(b); Pa. R. C. P. 223.3; 40 P.S. 1303.515(b).

Vogelsperger v. Magee Hospital of UPMC Health System, 903 A.2d 450 (Pa. Super. 2006) is the first appellate decision applying both the new statutory and rule standards on remittitur for non-economic damages and the established common-law standards on remittitur for economic losses. The Pennsylvania Superior Court fully explained the applicable law and emphasized that the new remittitur standard enunciated in Rule 1042.72(b) applies only to remittitur of non-economic damages in medical malpractice cases. Id. at 554 n. 7. For all other forms of remittitur, the common-law standard continues to apply, as follows:

> The Court is not warranted in setting aside, reducing or modifying verdicts for personal injuries unless unfairness, mistake, partiality, prejudice, or corruption is shown, or the damages appear to be grossly exorbitant. The verdict must be clearly and immoderately excessive to justify the granting of a new trial. The amount must not only be greater than that which the court would have awarded, but so excessive as to offend the conscience and judgment of the court.

Id. at 552, quoting Goldberg ex rel v. Goldberg v. Isdaner, 780 A.2d 654, 662 (Pa. Super. 2001). The Superior Court further explained that the 'deviates substantially from what could be reasonable compensation' standard differs from the traditional remittitur standard enunciated in Goldberg." Id. at 554. **While the "deviates substantially" standard of the new Rule appears more flexible, it remains "congruent with the traditional common law precept that 'remittitur should fix the highest amount any jury could properly award, giving due**

weight to all the evidence offered.'" Id., quoting, Cash Dollar v. Mercy Hospital of Pittsburgh, 595 A.2 70, 76 (Pa. Super. 1991) (emphasis added).

The Superior Court in Vogelsperger recognized that it is the policy of Pennsylvania as expressed in the Mcare Act "to 'ensure a fair legal process and reasonable compensation for persons injured due to medical negligence' and to ensure the 'future availability of and access to quality health care.'" Id. at 553, quoting 40 P.S. §1303.502. This policy fostered the new statutory and rule remittitur provisions. Id. In determining whether the new standard is met for non-economic damages, it is mandatory that the trial court consider "(1) the evidence supporting the Plaintiff's claim; (2) factors that should have been taken into account in making the award; and (3) whether the damage, when assessed against the evidentiary record, strongly suggests that the trier of fact was influenced by passion or prejudice." Id. at 454-455. The Superior Court stressed, **as part of its dual application of the new rule and the common-law standard, that in addition to the Rule 223.3 factors, the court must also consider "whether the injury is 'manifested by objective physical evidence or whether it is only revealed by subjective testimony.'"** Id. at 555, quoting, Petrasovits v. Kleiner, 719 A.2d 799, 806 (Pa. Super. 1998) (emphasis added). In the case before it, the Superior Court upheld the trial court's decision to grant remittitur because it found "a lack of evidence to support non-economic damages." Id. at 556. Significantly, the Plaintiff in Vogelsperger did not claim permanent injuries or that any injury incurred interfered with her activities of daily living in which she previously engaged. Id. at 557.

In Haines v. Raven Arms, 640 A.2d 367 (Pa. 1994), the Supreme Court articulated the following scope of review for determining the excessiveness *vel non* of a jury verdict:

> Judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant. The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake or corruption. We have discussed application of the standard at greater length in a more recent case:
>
> > In this area of law, we begin with the well-recognized principle that the grant or refusal of a new trial [or remittitur] because of the excessiveness of the verdict is peculiarly within the discretion of the trial court and will not be reversed unless an abuse of discretion or error of law has been committed. Recognizing the difficult task

> encountered by an appellate court in reviewing the record when a trial court merely assigns conclusory statements – 'interest of justice,' 'shocks the court's conscience' and 'substantial justice' – we have attempted to discourage this practice. . . . The court should state the reasons for this conclusion in order that we may have the opportunity of intelligently determining if an abuse of discretion occurred.

Id. at 369.

A factorial analysis is not new to the approach of Pennsylvania courts in determining whether a jury's verdict is excessive. In Kemp v. Philadelphia Transportation Company, 361 A.2d 362, (Pa. Super. 1976) the Superior Court enumerated the following criteria:

(1) Severity of the injury;

(2) Whether the injury is demonstrated by physical evidence or whether it is only revealed by subjective testimony of the Plaintiff;

(3) Whether the injury has healed or whether it will affect the Plaintiff permanently;

(4) Plaintiff's ability to continue with employment after the injury has occurred;

(5) The amount of out-of-pocket expenses; and

(6) The amount demanded by Plaintiffs in their initial Complaint.

Id. at 364-366. See also Haines v. Raven Arms, supra., at 370, citing, Stoughton v. Kinzly, 445 A.2d 1240, 1242 (Pa. Super. 1982). In Gunn v. Grossman, supra., the Pennsylvania Superior Court upheld a verdict in excess of $1,000,000.00 for nine days of pain and suffering. Similarly, in Togood v. Rogal, 764 A.2d 552 (Pa. Super. 2000), rev'd on other grounds, 824 A.2d 1140 (Pa. 2003), the Superior Court upheld an award of close to a half million dollars to a patient who suffered pain and spent approximately 36 hours in intensive care. More recently, in Gubur v. Golio, 932 A.2d 203 (Pa. Super. 2007), a jury returned a verdict of $766,414.94 in favor of a Plaintiff whose decedent was a 76-year old gentlemen suffering from incurable prostate cancer. The Superior Court began "with the premise that large verdicts are not necessarily excessive verdicts." Id. at 212. The Court stressed

the "[e]ach case is unique and dependent on its own special circumstances and a court should apply only those factors which it finds to be relevant in determining whether or not a verdict is excessive." Id. When the above Kemp criteria were applied to the facts, the Court disregarded the Defendant physician's position that because the decedent was elderly and suffering from an incurable disease the verdict was excessive. Finding no legal merit because the jury was free to accept or reject Plaintiff's pain and suffering argument, the Court observed that "the jury apparently accepted [the Plaintiff's] argument that the decedent was deprived of the opportunity to have 1,000 days of pain-free life." The verdict did, therefore, shock the conscience of the trial court and the Superior Court. Id. at 213.

APPENDIX A

AOPC Statistics

Table 1: Pennsylvania Medical Malpractice Case Filings: 2000 - 2007

	Number of Filings								% Change from 2000 - 2002 Average				
	2000	2001	2002	2003	2004	2005	2006	2007	2003	2004	2005	2006	2007
Adams	6	5	4	8	2	0	1	3	60.0	-60.0	-100.0	-80.0	-40.0
Allegheny	390	372	426	272	297	324	301	262	-31.3	-25.0	-18.2	-24.0	-33.8
Armstrong	5	3	5	2	3	3	3	2	-53.8	-30.8	-30.8	-30.8	-53.8
Beaver	29	18	23	17	14	15	12	10	-27.1	-40.0	-35.7	-48.6	-57.1
Bedford	4	0	1	5	0	0	4	0	200.0	-100.0	-100.0	140.0	-100.0
Berks	41	36	30	12	13	14	27	23	-66.4	-63.6	-60.7	-24.3	-35.5
Blair	25	32	18	21	24	4	10	13	-16.0	-4.0	-84.0	-60.0	-48.0
Bradford	8	4	8	6	10	2	4	5	-10.0	50.0	-70.0	-40.0	-25.0
Bucks	74	38	44	3	43	62	51	66	-94.2	-17.3	19.2	-1.9	26.9
Butler	22	29	26	16	15	13	8	7	-37.7	-41.6	-49.4	-68.8	-72.7
Cambria	28	26	30	32	11	6	11	10	14.3	-60.7	-78.6	-60.7	-64.3
Cameron/Elk	5	3	4	2	2	4	1	3	-50.0	-50.0	0.0	-75.0	-25.0
Carbon	2	5	7	12	4	2	9	6	157.1	-14.3	-57.1	92.9	28.6
Centre	11	17	14	10	7	6	10	5	-28.6	-50.0	-57.1	-28.6	-64.3
Chester	42	34	40	39	35	41	34	35	0.9	-9.5	6.0	-12.1	-9.5
Clarion	2	1	7	5	3	7	1	5	50.0	-10.0	110.0	-70.0	50.0
Clearfield	6	14	6	4	5	7	12	4	-53.8	-42.3	-19.2	38.5	-53.8
Clinton	3	1	3	1	1	0	2	0	-57.1	-57.1	-100.0	-14.3	-100.0
Columbia/Montour	15	12	16	30	15	14	19	26	109.3	4.7	-2.3	32.6	81.4
Crawford	6	1	1	2	5	2	5	0	-25.0	87.5	-25.0	87.5	-100.0
Cumberland	22	21	23	27	12	3	2	2	22.7	-45.5	-86.4	-90.9	-90.9
Dauphin	71	83	82	43	41	44	39	51	-45.3	-47.9	-44.1	-50.4	-35.2
Delaware	66	78	71	36	75	62	66	34	-49.8	4.7	-13.5	-7.9	-52.6
Erie	46	56	59	44	34	34	40	36	-18.0	-36.6	-36.6	-25.5	-32.9
Fayette	22	16	16	13	11	13	7	11	-27.8	-38.9	-27.8	-61.1	-38.9
Forest/Warren	2	5	4	2	2	1	3	1	-45.5	-45.5	-72.7	-18.2	-72.7
Franklin/Fulton	20	10	8	9	4	1	5	5	-28.9	-68.4	-92.1	-60.5	-60.5
Greene	1	1	2	1	3	2	1	0	-25.0	125.0	50.0	-25.0	-100.0
Huntingdon	6	8	8	5	2	0	3	2	-31.8	-72.7	-100.0	-59.1	-72.7
Indiana	1	2	4	4	3	3	3	0	71.4	28.6	28.6	28.6	-100.0
Jefferson	6	3	4	4	6	3	5	3	-7.7	38.5	-30.8	15.4	-30.8
Juniata/Perry	0	0	0	0	0	1	0	0	-----	-----	-----	-----	-----
Lackawanna	71	69	55	34	31	35	35	30	-47.7	-52.3	-46.2	-46.2	-53.8
Lancaster	11	2	9	5	31	31	40	34	-31.8	322.7	322.7	445.5	363.6
Lawrence	2	6	5	4	17	13	20	14	-7.7	292.3	200.0	361.5	223.1
Lebanon	9	11	6	7	7	0	3	4	-19.2	-19.2	-100.0	-65.4	-53.8
Lehigh	81	78	58	101	93	78	70	62	39.6	28.6	7.8	-3.2	-14.3

	Number of Filings								% Change from 2000 - 2002 Average				
	2000	2001	2002	2003	2004	2005	2006	2007	2003	2004	2005	2006	2007
Luzerne	43	31	28	38	79	36	41	46	11.8	132.4	5.9	20.6	35.3
Lycoming	16	23	15	15	18	9	5	4	-16.7	0.0	-50.0	-72.2	-77.8
McKean	5	1	5	0	3	1	4	1	-100.0	-18.2	-72.7	9.1	-72.7
Mercer	46	42	40	41	31	30	21	20	-3.9	-27.3	-29.7	-50.8	-53.1
Mifflin	3	3	3	4	1	1	1	3	33.3	-66.7	-66.7	-66.7	0.0
Monroe	8	14	10	5	3	7	5	7	-53.1	-71.9	-34.4	-53.1	-34.4
Montgomery	18	26	21	14	102	104	95	103	-35.4	370.8	380.0	338.5	375.4
Northampton	64	65	89	47	41	12	2	2	-35.3	-43.6	-83.5	-97.2	-97.2
Northumberland	12	11	5	4	6	2	2	2	-57.1	-35.7	-78.6	-78.6	-78.6
Philadelphia	1,085	1,162	1,365	577	559	540	569	586	-52.1	-53.6	-55.1	-52.7	-51.3
Pike	0	0	1	0	0	0	0	0	-100.0	-100.0	-100.0	-100.0	-100.0
Potter	4	1	5	6	1	2	1	1	80.0	-70.0	-40.0	-70.0	-70.0
Schuylkill	18	35	35	13	12	9	11	5	-55.7	-59.1	-69.3	-62.5	-83.0
Snyder/Union	8	4	8	6	2	2	1	4	-10.0	-70.0	-70.0	-85.0	-40.0
Somerset	6	6	11	8	5	8	3	8	4.3	-34.8	4.3	-60.9	4.3
Sullivan/Wyoming	1	8	4	2	3	1	0	2	-53.8	-30.8	-76.9	-100.0	-53.8
Susquehanna	0	0	0	0	0	1	0	3	-----	-----	-----	——	-----
Tioga	1	4	3	0	0	1	1	1	-100.0	-100.0	-62.5	-62.5	-62.5
Venango	7	6	10	5	3	4	3	2	-34.8	-60.9	-47.8	-60.9	-73.9
Washington	8	11	3	4	21	29	26	25	-45.5	186.4	295.5	254.5	240.9
Wayne	2	3	3	3	7	7	4	0	12.5	162.5	162.5	50.0	-100.0
Westmoreland	59	63	65	49	26	35	27	18	-21.4	-58.3	-43.9	-56.7	-71.1
York	57	40	48	33	13	9	4	0	-31.7	-73.1	-81.4	-91.7	-100.0
State Total	2,632	2,659	2,904	1,712	1,817	1,700	1,693	1,617	-37.3	-33.5	-37.8	-38.0	-40.8

Notes:

- Includes updates and revisions to previously published data.
- A filing refers to the commencement of a civil action by complaint or praecipe for writ of summons. To avoid double-counting, adjustments were made to the filing figures for cases transferred from one judicial district to another pursuant to Pa.R.C.P. 1006(a.1).
- "Percent Change from 2000 - 2002 Average" was computed as follows:

For each year (2003 - 2007) the filing figures for the three-year period 2000 to 2002 were averaged and subtracted from that year's filing figure. The difference was then divided by the 2000 -2002 average. The resulting proportion was multiplied by 100 to convert it to a percentage.

- Liability actions brought against dental professionals may be included in some county counts.

Table 2: Medical Malpractice Jury Verdicts: January 2007 to December 2007

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Adams	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Allegheny	16	76.2	1	4.8	1	4.8	2	9.5	1	4.8	0	0.0	21
Armstrong	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Beaver	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	1
Bedford	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Berks	1	50.0	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Blair	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Bradford	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Bucks	1	50.0	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Butler	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	1
Cambria	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Cameron/Elk	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Carbon	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Centre	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Chester	6	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	6
Clarion	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Clearfield	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Clinton	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Columbia/Montour	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Crawford	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Cumberland	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Dauphin	5	71.4	2	28.6	0	0.0	0	0.0	0	0.0	0	0.0	7
Delaware	13	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	13
Erie	2	50.0	1	25.0	0	0.0	1	25.0	0	0.0	0	0.0	4
Fayette	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Forest/Warren	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Franklin/Fulton	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Greene	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Huntingdon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Indiana	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Jefferson	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Juniata/Perry	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0

Prepared March 19, 2008

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Lackawanna	7	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	7
Lancaster	7	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	7
Lawrence	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Lebanon	2	66.7	0	0.0	1	33.3	0	0.0	0	0.0	0	0.0	3
Lehigh	17	89.5	1	5.3	1	5.3	0	0.0	0	0.0	0	0.0	19
Luzerne	5	71.4	0	0.0	1	14.3	1	14.3	0	0.0	0	0.0	7
Lycoming	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
McKean	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Mercer	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Mifflin	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Monroe	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Montgomery	12	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	12
Northampton	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Northumberland	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Philadelphia	27	73.0	4	10.8	2	5.4	3	8.1	0	0.0	1	2.7	37
Pike	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Potter	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Schuylkill	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Snyder/Union	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Somerset	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Sullivan/Wyoming	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Susquehanna	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Tioga	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Venango	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Washington	3	75.0	1	25.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Wayne	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Westmoreland	3	75.0	1	25.0	0	0.0	0	0.0	0	0.0	0	0.0	4
York	2	66.7	1	33.3	0	0.0	0	0.0	0	0.0	0	0.0	3
State Total	**153**	**82.7**	**15**	**8.1**	**7**	**3.8**	**8**	**4.3**	**1**	**0.5**	**1**	**0.5**	**185**

Note: verdict amounts are compensatory damages, but in a few instances may include punitive and delay damages as well as judicial offsets and adjustments. They do not reflect post-trial settlements or actions of an appellate court. They are not a report of actual payouts. Percentages may include rounding.

Table 2: Medical Malpractice Jury Verdicts: January 2006 to December 2006

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Adams	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Allegheny	19	86.4	1	4.5	1	4.5	1	4.5	0	0.0	0	0.0	22
Armstrong	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Beaver	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Bedford	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Berks	1	33.3	1	33.3	0	0.0	1	33.3	0	0.0	0	0.0	3
Blair	1	33.3	0	0.0	1	33.3	1	33.3	0	0.0	0	0.0	3
Bradford	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	1
Bucks	4	80.0	0	0.0	1	20.0	0	0.0	0	0.0	0	0.0	5
Butler	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Cambria	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Cameron/Elk	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Carbon	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Centre	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Chester	9	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	9
Clarion	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Clearfield	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Clinton	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Columbia/Montour	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Crawford	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Cumberland	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Dauphin	6	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	6
Delaware	17	89.5	1	5.3	1	5.3	0	0.0	0	0.0	0	0.0	19
Erie	5	71.4	2	28.6	0	0.0	0	0.0	0	0.0	0	0.0	7
Fayette	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Forest/Warren	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Franklin/Fulton	2	66.7	0	0.0	0	0.0	1	33.3	0	0.0	0	0.0	3
Greene	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Huntingdon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Indiana	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Jefferson	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Juniata/Perry	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0

Updated March 19, 2008

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Lackawanna	8	80.0	1	10.0	0	0.0	1	10.0	0	0.0	0	0.0	10
Lancaster	5	83.3	0	0.0	1	16.7	0	0.0	0	0.0	0	0.0	6
Lawrence	5	83.3	0	0.0	0	0.0	1	16.7	0	0.0	0	0.0	6
Lebanon	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Lehigh	7	87.5	0	0.0	1	12.5	0	0.0	0	0.0	0	0.0	8
Luzerne	5	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	5
Lycoming	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
McKean	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Mercer	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Mifflin	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Monroe	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Montgomery	13	81.3	2	12.5	0	0.0	0	0.0	0	0.0	1	6.3	16
Northampton	5	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	5
Northumberland	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Philadelphia	33	71.7	4	8.7	3	6.5	3	6.5	2	4.3	1	2.2	46
Pike	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Potter	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Schuylkill	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Snyder/Union	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Somerset	2	66.7	1	33.3	0	0.0	0	0.0	0	0.0	0	0.0	3
Sullivan/Wyoming	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Susquehanna	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Tioga	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Venango	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Washington	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Wayne	2	66.7	1	33.3	0	0.0	0	0.0	0	0.0	0	0.0	3
Westmoreland	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
York	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
State Total	**191**	**83.0**	**16**	**7.0**	**9**	**3.9**	**10**	**4.3**	**2**	**0.9**	**2**	**0.9**	**230**

Note: verdict amounts are compensatory damages, but in a few instances may include punitive and delay damages as well as judicial offsets and adjustments. They do not reflect post-trial settlements or actions of an appellate court. They are not a report of actual payouts. Percentages may include rounding.

Table 2: Medical Malpractice Jury Verdicts: January 2005 to December 2005

Judicial District	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Adams	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Allegheny	16	69.6	2	8.7	4	17.4	1	4.3	0	0.0	0	0.0	23
Armstrong	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Beaver	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Bedford	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Berks	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Blair	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Bradford	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Bucks	6	85.7	1	14.3	0	0.0	0	0.0	0	0.0	0	0.0	7
Butler	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Cambria	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Cameron/Elk	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Carbon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Centre	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Chester	5	71.4	1	14.3	0	0.0	1	14.3	0	0.0	0	0.0	7
Clarion	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Clearfield	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Clinton	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Columbia/Montour	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Crawford	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Cumberland	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Dauphin	9	81.8	1	9.1	0	0.0	1	9.1	0	0.0	0	0.0	11
Delaware	10	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	10
Erie	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Fayette	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Forest/Warren	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Franklin/Fulton	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Greene	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Huntingdon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Indiana	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Jefferson	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Juniata/Perry	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0

Prepared March 21, 2006

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Lackawanna	4	66.7	1	16.7	0	0.0	1	16.7	0	0.0	0	0.0	6
Lancaster	4	66.7	2	33.3	0	0.0	0	0.0	0	0.0	0	0.0	6
Lawrence	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Lebanon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Lehigh	14	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	14
Luzerne	6	85.7	0	0.0	0	0.0	0	0.0	1	14.3	0	0.0	7
Lycoming	1	50.0	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0	2
McKean	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Mercer	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Mifflin	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Monroe	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Montgomery	15	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	15
Northampton	3	75.0	0	0.0	1	25.0	0	0.0	0	0.0	0	0.0	4
Northumberland	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Philadelphia	35	62.5	6	10.7	7	12.5	6	10.7	2	3.6	0	0.0	56
Pike	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Potter	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Schuylkill	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Snyder/Union	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Somerset	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Sullivan/Wyoming	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Susquehanna	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Tioga	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Venango	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Washington	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Wayne	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Westmoreland	6	85.7	1	14.3	0	0.0	0	0.0	0	0.0	0	0.0	7
York	5	71.4	2	28.6	0	0.0	0	0.0	0	0.0	0	0.0	7
State Total	**179**	**80.3**	**19**	**8.5**	**12**	**5.4**	**10**	**4.5**	**3**	**1.3**	**0**	**0.0**	**223**

Note: verdict amounts are compensatory damages, but in a few instances may include punitive and delay damages as well as judicial offsets and adjustments. They do not reflect post-trial settlements or actions of an appellate court. They are not a report of actual payouts. Percentages may include rounding.

Table 2: Medical Malpractice Jury Verdicts: January 2005 to December 2005

Judicial District	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Adams	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Allegheny	16	69.6	2	8.7	4	17.4	1	4.3	0	0.0	0	0.0	23
Armstrong	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Beaver	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Bedford	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Berks	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Blair	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Bradford	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Bucks	6	85.7	1	14.3	0	0.0	0	0.0	0	0.0	0	0.0	7
Butler	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Cambria	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Cameron/Elk	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Carbon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Centre	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Chester	5	71.4	1	14.3	0	0.0	1	14.3	0	0.0	0	0.0	7
Clarion	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Clearfield	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Clinton	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Columbia/Montour	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Crawford	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Cumberland	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Dauphin	9	81.8	1	9.1	0	0.0	1	9.1	0	0.0	0	0.0	11
Delaware	10	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	10
Erie	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Fayette	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Forest/Warren	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Franklin/Fulton	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Greene	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Huntingdon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Indiana	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Jefferson	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Juniata/Perry	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0

Prepared March 21, 2006

Judicial District	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Milon to $10 Million		Over $10 Million		TOTAL
	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Lackawanna	4	66.7	1	16.7	0	0.0	1	16.7	0	0.0	0	0.0	6
Lancaster	4	66.7	2	33.3	0	0.0	0	0.0	0	0.0	0	0.0	6
Lawrence	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Lebanon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Lehigh	14	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	14
Luzerne	6	85.7	0	0.0	0	0.0	0	0.0	1	14.3	0	0.0	7
Lycoming	1	50.0	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0	2
McKean	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Mercer	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Mifflin	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Monroe	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Montgomery	15	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	15
Northampton	3	75.0	0	0.0	1	25.0	0	0.0	0	0.0	0	0.0	4
Northumberland	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Philadelphia	35	62.5	6	10.7	7	12.5	6	10.7	2	3.6	0	0.0	56
Pike	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Potter	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Schuylkill	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Snyder/Union	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Somerset	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Sullivan/Wyoming	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Susquehanna	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Tioga	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Venango	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Washington	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Wayne	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Westmoreland	6	85.7	1	14.3	0	0.0	0	0.0	0	0.0	0	0.0	7
York	5	71.4	2	28.6	0	0.0	0	0.0	0	0.0	0	0.0	7
State Total	**179**	**80.3**	**19**	**8.5**	**12**	**5.4**	**10**	**4.5**	**3**	**1.3**	**0**	**0.0**	**223**

Note: verdict amounts are compensatory damages, but in a few instances may include punitive and delay damages as well as judicial offsets and adjustments. They do not reflect post-trial settlements or actions of an appellate court. They are not a report of actual payouts. Percentages may include rounding.

Table 2: 7/1/03 - 12/31/04 Medical Malpractice Jury Verdicts

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Adams	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Allegheny	36	73.5	4	8.2	4	8.2	2	4.1	3	6.1	0	0.0	49
Armstrong	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Beaver	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Bedford	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Berks	8	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	8
Blair	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Bradford	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Bucks	4	80.0	0	0.0	0	0.0	1	20.0	0	0.0	0	0.0	5
Butler	7	87.5	1	12.5	0	0.0	0	0.0	0	0.0	0	0.0	8
Cambria	5	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	5
Cameron/Elk	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Carbon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Centre	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Chester	13	92.9	0	0.0	0	0.0	1	7.1	0	0.0	0	0.0	14
Clarion	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Clearfield	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Clinton	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Columbia/Montour	2	66.7	0	0.0	0	0.0	1	33.3	0	0.0	0	0.0	3
Crawford	3	75.0	1	25.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Cumberland	4	66.7	2	33.3	0	0.0	0	0.0	0	0.0	0	0.0	6
Dauphin	14	87.5	0	0.0	1	6.3	1	6.3	0	0.0	0	0.0	16
Delaware	18	90.0	1	5.0	0	0.0	1	5.0	0	0.0	0	0.0	20
Erie	7	77.8	2	22.2	0	0.0	0	0.0	0	0.0	0	0.0	9
Fayette	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Forest/Warren	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Franklin/Fulton	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Greene	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Huntingdon	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Indiana	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Jefferson	2	66.7	1	33.3	0	0.0	0	0.0	0	0.0	0	0.0	3
Juniata/Perry	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Lackawanna	7	87.5	0	0.0	1	12.5	0	0.0	0	0.0	0	0.0	8
Lancaster	5	71.4	2	28.6	0	0.0	0	0.0	0	0.0	0	0.0	7
Lawrence	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Lebanon	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Lehigh	10	90.9	0	0.0	0	0.0	1	9.1	0	0.0	0	0.0	11
Luzerne	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Lycoming	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
McKean	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Mercer	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Mifflin	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Monroe	5	62.5	2	25.0	0	0.0	0	0.0	1	12.5	0	0.0	8
Montgomery	21	91.3	0	0.0	0	0.0	2	8.7	0	0.0	0	0.0	23
Northampton	10	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	10
Northumberland	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Philadelphia	123	68.0	26	14.4	8	4.4	18	9.9	3	1.7	3	1.7	181
Pike	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Potter	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Schuylkill	1	50.0	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Snyder/Union	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Somerset	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Sullivan/Wyoming	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Susquehanna	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Tioga	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Venango	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Washington	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Wayne	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Westmoreland	8	88.9	0	0.0	1	11.1	0	0.0	0	0.0	0	0.0	9
York	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
State Total	**352**	**78.4**	**44**	**9.8**	**15**	**3.3**	**28**	**6.2**	**7**	**1.6**	**3**	**0.7**	**449**
Annualized State Total**	**235**	**78.4**	**29**	**9.8**	**10**	**3.3**	**19**	**6.2**	**5**	**1.6**	**2**	**0.7**	**299**

**computed by dividing the state total by 1.5, the number of years covered by the survey. Includes rounding adjustment.

Note: verdict amounts are compensatory damages, but in a few instances may include punitive and delay damages as well as judicial offsets and adjustments. They do not reflect post-trial settlements or actions of an appellate court. They are not a report of actual payouts. Percentages may include rounding.

Table 2: Medical Malpractice Jury Verdicts: January 2000 to July 2003

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Adams	2	66.7	0	0.0	1	33.3	0	0.0	0	0.0	0	0.0	3
Allegheny	119	81.0	14	9.5	8	5.4	5	3.4	1	0.7	0	0.0	147
Armstrong	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Beaver	4	57.1	1	14.3	1	14.3	1	14.3	0	0.0	0	0.0	7
Bedford	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Berks	6	60.0	2	20.0	0	0.0	2	20.0	0	0.0	0	0.0	10
Blair	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Bradford	3	60.0	2	40.0	0	0.0	0	0.0	0	0.0	0	0.0	5
Bucks	33	91.7	1	2.8	2	5.6	0	0.0	0	0.0	0	0.0	36
Butler	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Cambria	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Cameron/Elk	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Carbon	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Centre	4	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4
Chester	26	74.3	7	20.0	1	2.9	0	0.0	0	0.0	1	2.9	35
Clarion	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	1
Clearfield	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Clinton	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Columbia	1	50.0	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Crawford	5	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	5
Cumberland	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Dauphin	26	74.3	5	14.3	2	5.7	2	5.7	0	0.0	0	0.0	35
Delaware	62	84.9	3	4.1	3	4.1	5	6.9	0	0.0	0	0.0	73
Erie	15	83.3	2	11.1	0	0.0	1	5.6	0	0.0	0	0.0	18
Fayette	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Franklin/Fulton	6	75.0	1	12.5	1	12.5	0	0.0	0	0.0	0	0.0	8
Greene	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3
Huntingdon	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Indiana	4	66.7	1	16.7	0	0.0	0	0.0	1	16.7	0	0.0	6
Jefferson	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Lackawanna	24	88.9	2	7.4	1	3.7	0	0.0	0	0.0	0	0.0	27
Lancaster	17	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	17

	Defense Verdicts		$500,000 or Less		More than $500,000 to $1 Million		More than $1 Million to $5 Million		More than $5 Million to $10 Million		Over $10 Million		TOTAL
Judicial District	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Lawrence	2	33.3	3	50.0	0	0.0	1	16.7	0	0.0	0	0.0	6
Lebanon	2	66.7	1	33.3	0	0.0	0	0.0	0	0.0	0	0.0	3
Lehigh	54	90.0	2	3.3	1	1.7	1	1.7	0	0.0	2	3.3	60
Luzerne	14	87.5	1	6.3	0	0	1	6	0	0	0	0	16
Lycoming	9	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	9
Mckean	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Mercer	3	75.0	0	0.0	0	0.0	0	0.0	0	0.0	1	25.0	4
Mifflin	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Monroe	8	72.7	3	27.3	0	0.0	0	0.0	0	0.0	0	0.0	11
Montgomery	58	73.4	13	16.5	3	3.8	5	6.3	0	0.0	0	0.0	79
Montour	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Northampton	17	73.9	1	4.4	2	8.7	3	13.0	0	0.0	0	0.0	23
Northumberland	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Perry/Juniata	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Philadelphia	241	59.2	54	13.3	29	7.1	58	14.3	16	3.9	9	2.2	407
Pike	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Potter	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Schuylkill	4	50.0	2	25.0	1	12.5	1	12.5	0	0.0	0	0.0	8
Snyder/Union	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Somerset	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Sullivan/Wyoming	1	50.0	0	0.0	0	0.0	1	50.0	0	0.0	0	0.0	2
Susquehanna	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0
Tioga	2	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2
Venango	2	66.7	1	33.3	0	0.0	0	0.0	0	0.0	0	0.0	3
Warren/Forest	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Washington	6	66.7	2	22.2	0	0.0	0	0.0	0	0.0	1	11.1	9
Wayne	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	1
Westmoreland	15	79.0	4	21.1	0	0.0	0	0.0	0	0.0	0	0.0	19
York	7	77.8	0	0.0	2	22.2	0	0.0	0	0.0	0	0.0	9
State Total	**835**	**73.0**	**130**	**11.4**	**60**	**5.2**	**87**	**7.6**	**18**	**1.6**	**14**	**1.2**	**1,144**
Annualized State Total**	**239**	**73.0**	**37**	**11.4**	**17**	**5.2**	**25**	**7.6**	**5**	**1.6**	**4**	**1.2**	**326**

**computed by dividing the state total by 3.5, the number of years covered by the survey. Includes rounding adjustment.

Note: verdict amounts are compensatory damages, but in a few instances may include punitive and delay damages as well as judicial offsets and adjustments. They do not reflect post-trial settlements or actions of an appellate court. They are not a report of actual payouts.

Updated March 22, 2006

APPENDIX B

Sample Complaints

NEGLIGENT ORTHOPAEDIC SURGERY

PLAINTIFF	:	**COURT OF COMMON PLEAS**
and	:	**CIVIL ACTION - LAW**
PLAINTIFF PARENTS	:	**JURY TRIAL DEMANDED**
Plaintiffs	:	
vs.	:	
DEFENDANT SURGEON	:	
and	:	**NO.**
DEFENDANT SURGICAL PRACTICE	:	
Defendants	:	

COMPLAINT - CIVIL ACTION

Plaintiff, individually, and Plaintiffs, individually and as parents and guardians of Plaintiff, by and through their undersigned attorneys hereby file the following Complaint - Civil Action, making claim for damages against the Defendants herein, jointly and severally, upon the following causes of action:

1. Plaintiff was a minor at the time of the events giving rise to the instant medical professional liability claim who has since attained majority and is an adult resident and citizen of the Commonwealth of Pennsylvania, who at all times relevant and material hereto has resided with her parents at the above-captioned address.

2. Plaintiff Parents are wife and husband and parents and, at the time of the events giving rise to the instant medical professional liability claim, the authorized

representatives and natural guardians of Plaintiff, _____, who at all times relevant and material hereto, have been residents and citizens of the Commonwealth of Pennsylvania, residing at the above-captioned address.

3. Defendant Surgeon (hereinafter "Dr. _____"), is a practicing physician, duly licensed by and under the laws of Commonwealth of Pennsylvania, specializing in the field of orthopaedic surgery, with a clinical focus on arthroscopic knee surgery and a professional office located at the above-captioned address. Plaintiffs are asserting a professional liability against this Defendant.

4. Defendant, _____, (hereinafter "_____"), is a professional corporation or other business entity, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business and/or professional office located at the above-captioned address. The purpose of _____ is to provide professional medical services including combined orthopaedic clinical and surgical services. Plaintiffs are asserting a professional liability claim against this Defendant.

5. At all times relevant and material hereto, Defendant, Dr. _____, acted or appeared to be acting as the real, apparent and/or ostensible agent, servant, employee, administrator and/or representative of Defendant, _____. In the alternative, Dr. _____ was acting as an independent medical practitioner specializing in the field of orthopaedic surgery.

6. At all times relevant and material hereto, Defendant, _____, acted or appeared to be acting through its agents, servants, employees, administrators and/or representatives in the course and scope of their

employment and/or appointment and in the furtherance of the business of said Defendant. In the alternative, _____ was acting as an independent healthcare provider.

7. On or about _____, 20__, _____ sustained an injury to her right knee.

8. On or about _____, 20__, _____ became a patient under the care of Defendants, Dr. _____ and _____, at which time Dr. _____ obtained a history from Ms. _____, performed a physical examination and diagnosed Ms. _____ as having an acute hemarthrosis of her right knee for which he recommended the performance of a diagnostic arthroscopy.

9. On or about _____, 20__, Dr. _____ performed an examination of the ligament structures under general anesthesia and partial arthroscopic medial meniscectomy of _____' right knee, as a result of which he rendered a post-operative diagnosis of torn anterior cruciate ligament, right knee and torn medial meniscus right knee.

10. On or about _____ 20__, Dr. _____ reevaluated his patient, _____, and recommended arthroscopically- assisted anterior cruciate ligament reconstruction of her right knee.

11. On or about _____, 20__, Dr. _____ admitted _____ to _____ Hospital in _____ Pennsylvania for the purpose of undergoing an arthroscopically-assisted anterior cruciate ligament reconstruction with allograft of the right knee. At all times relevant and material hereto, Defendant, Dr. _____, failed to advise Plaintiff, _____ and/or her parents, Plaintiffs, _____ ,

that there was any risk of peroneal nerve injury from his recommended operative procedure; had Plaintiffs been advised of any risk of peroneal nerve damage and its attendant consequences, Plaintiff, _____, would not have undergone the surgery as recommended by Dr. _____.

12. On _____, 20__, Dr. _____ performed the recommended arthroscopically-assisted anterior cruciate reconstruction right knee (allograft) upon _____ under general anesthesia.

13. During the subject arthroscopically-assisted anterior cruciate reconstruction right knee (allograft) operation for repair of the anterior cruciate ligament insufficiency of Plaintiff, _____' right knee, Defendant, Dr. _____, negligently and carelessly transected his patient's peroneal nerve immediately causing catastrophic and permanent injury to _____as more particularly described hereinbelow.

14. Immediately following the subject ACL reconstruction and allograft of Plaintiff, _____' right knee, Plaintiff showed signs and symptoms of neurologic injury including the inability to dorsiflex her right foot with significant numbness.

15. Following the _____, 20__, arthroscopically-assisted anterior cruciate reconstruction right knee (allograft) surgery, Dr. _____ advised and admitted to Plaintiffs that he caused nerve injury and damage during the surgery.

16. As a further result of the negligence and careless of the Defendants herein, Plaintiff, _____, suffered a right foot drop as well as chronic denervation changes and other severe damage to her nerves and nervous system as well as various other ills, injuries and losses.

17. Presented with the increasing parathesias and right foot drop, on or about _____, 20__, within six hours of his ACL surgery on _____, Defendant, Dr. _____, recommended and performed an exploration of the peroneal nerve, right side of Ms. _____, during which procedure Dr. _____ identified the peroneal nerve distally, traced it proximally and determined that the nerve proximally was transected and markedly hemorrhagic.

18. The injuries suffered by Plaintiff, _____, were caused solely as a result of the negligence and carelessness of the Defendants herein, jointly and severally, as more particularly set forth below and were due in no manner to any act or failure to act on the part of the Plaintiff, _____.

19. As a further result of the negligence and carelessness of the Defendants herein, on _____, 20__, _____ underwent an attempted repair of her right common peroneal nerve that had been negligently lacerated by Dr. _____ as aforesaid; unfortunately, this attempted surgical repair was not successful.

20. Dr. _____ irrepairably lacerated Plaintiff, _____' peroneal nerve during the aforementioned ACL procedure as there has been no evidence of re-innervation.

21. As a further result of the negligence and carelessness of the Defendants herein, on _____ 20__, in a further attempt to mitigate the permanent damage caused, Plaintiff, _____, underwent a right posterior tibial tendon transfer through the interosseuous membrane to the dorsum of the foot.

22. As a further result of the negligence and carelessness of the Defendants herein, specifically, Dr. _____'s transection of the peroneal nerve during right anterior

cruciate ligament reconstruction on _____, 20__, Plaintiff has suffered severe denervation with no activation or recruitment and sensory loss in the upper lateral cutaneous nerve of her calf and severe involvement of the motor components of both the deep and superficial peroneal nerves with no recovery and no evidence for recovery.

23. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff, _____, suffered severe physical pain and suffering, disfigurement, disability, mental anguish, humiliation, embarrassment, depression and emotional distress and will continue to suffer from the same for an indefinite time in the future, all to her great detriment and loss.

24. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff, _____, has been obliged to receive and undergo medical/surgical/rehabilitative attention and care, all of which she will continue to incur for an indefinite time in the future, and Plaintiffs have been obliged to incur various and substantial expenses to pay for that medical/surgical/rehabilitative attention and care and Plaintiff, _____, will be obliged to undergo such treatment and Plaintiffs will be obliged to expend further various and substantial expenditures for medical treatment, including necessary equipment and accommodations for her permanent and disabling injuries, for an indefinite time in the future, all to her and her parents' great financial detriment and loss.

25. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff, _____, has suffered and will continue to suffer a loss of earnings and earning capacity.

26. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff, _____, has been unable and/or impaired in her ability to attend to her usual daily duties, labors, avocations, occupational, academic and social activities and will continue to be so restricted for an indefinite time in the future, all to her great financial detriment and loss.

27. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff, _____, has suffered and will continue to suffer a loss of enjoyment of life and life's pleasures, all to her great detriment and loss.

COUNT I (NEGLIGENCE)
PLAINTIFF vs. DEFENDANT SURGEON

28. Plaintiffs incorporate by reference paragraphs one (1) through twenty-seven (27) above as if fully set forth at length.

29. The pain, suffering, injuries, disfigurement, disability and other losses of Plaintiff, _____, were directly and proximately caused by the negligence and carelessness of the Defendant, Dr. _____, individually and/or collectively with the Defendant, _____, and in the following particular respects:

(a) failure to use due care to provide proper and adequate medical and surgical care, examination, testing and treatment;

(b) failure in general to properly position the Plaintiff and to identify, isolate, position and protect Plaintiff, _____' peroneal nerve during surgery;

(c) failure to possess the required degree of skill and knowledge under the circumstances to properly protect Plaintiff's peroneal nerve during the aforementioned arthroscopically-assisted anterior cruciate reconstruction right knee (allograft) operative procedure;

(d) failure to appreciate the anatomy of Plaintiff before dissecting into her knee and transecting her peroneal nerve;

(e) failure to adequately and completely physically evaluate the operative site and anatomic landmarks within Plaintiff's right knee during the anterior cruciate ligament reconstructive surgery;

(f) failure to use due care during the course of the arthroscopically-assisted anterior cruciate reconstruction right knee (allograft) operative procedure, by blindly dissecting into Plaintiff's right knee area to enable fixation of the allograft, negligently transecting Plaintiff's peroneal nerve;

(g) failure to supervise and manage any physicians or other staff who in any way contributed to the transection of Plaintiff's peroneal nerve during the ACL surgery on _____, 20__;

(h) failure to exercise due care by improperly performing the surgical technique below the standard of care, severing the peroneal nerve;

(i) failure to arrange, coordinate and communicate upon all aspects of Plaintiff's medical/surgical treatment and care so as to appreciate the harm caused the Plaintiff; and

(j) failure to comply with accepted standards of care in the conduct and supervision of the surgery to avoid injury to the peroneal nerve.

30. Defendant, Dr. _____, undertook to render care to Plaintiff, _____, which he knew or should have known under the circumstances was necessary for the protection of Plaintiff, _____, and the negligence and carelessness of the Defendant as set forth herein was a cause of harm and injury sustained by Plaintiff which negligent conduct of Defendant exposed Plaintiff to an increased risk of harm and was a factual cause in bringing about Plaintiff's serious and permanent injuries and other losses.

31. In addition to proof of specific negligence of Defendant, Dr. _____ herein, Plaintiffs reserve the right to rely upon the doctrine of *res ipsa loquitur* to show fault, liability

and/or negligence of the Defendant, jointly and severally with Defendant, _____.

WHEREFORE, Plaintiffs demand judgment in their favor against Defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT II (INFORMED CONSENT)
PLAINTIFF AND PLAINTIFF'S PARENTS vs. DEFENDANT SURGEON

32. Plaintiffs incorporate by reference paragraphs one (1) through thirty-one (31) above as if fully set forth at length.

33. At all times relevant and material hereto, Defendant, Dr. _____, had a duty to inform the then minor Plaintiff, _____, and her parents, as authorized representatives and natural guardians, _____ and _____, of Plaintiff, _____' medical condition, available options and alternatives, of the nature and scope of the surgical procedure which was being undertaken upon her, of the other risks, complications, benefits and alternatives attendant to the procedure and the risks of the alternatives to the procedure, of the qualifications and experience of the persons who would be participating in the procedure, the extent to which physician assistants and/or residents and/or inexperienced practitioners would be participating in the procedure, and all material facts which a reasonably prudent patient would require to make an informed decision as to that procedure.

34. At all times relevant and material hereto, Defendant, Dr. _____, in violation of 40 P.S.§1303.504, failed to properly advise Plaintiffs of the nature of Plaintiff, _____' condition, of the precise nature and scope of the surgery, of the

material risks attendant to the surgery, of other treatment options and alternatives to the surgery, of risks of such alternatives, of injuries which could occur during the surgery and of the extent of participation of inexperienced and/or resident physicians and/or physician assistants in her surgery, of the qualifications and experience of persons who were to participate in her surgery, and all of the material facts which a prudent person would need to consider in making decisions regarding the surgical treatment.

35. Had the Plaintiff, _____, and/or her parents, _____ and _____, received all of the material facts which a reasonable, prudent patient would need to consider to make an informed decision regarding her treatment, it would have been a substantial factor in her decision whether to undergo the surgery.

36. As a direct and proximate result of the failure of Defendant, Dr. _____, to properly advise Plaintiffs of all facts material to the undertaking of the surgery upon her, that surgery was undertaken without proper informed consent, constituting a battery upon the Plaintiff, _____.

37. As a direct and proximate result of Defendant's failure to obtain proper and informed consent to the surgery and commission of a battery upon Plaintiff, _____, the Plaintiffs were caused to suffer injuries and damages more fully set forth herein and incorporated by reference.

WHEREFORE, Plaintiffs demand judgment in their favor against Defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT III (RESPONDEAT SUPERIOR)
PLAINTIFF vs. DEFENDANT SURGICAL PRACTICE

38. Plaintiffs incorporate by reference paragraphs one (1) through thirty-seven (37) above as if fully set forth at length.

39. The pain, suffering, injuries and other losses of Plaintiff, _____, were directly and proximately caused by the negligence of Defendant, _____, acting by and through its agents, servants, employees and/or contractors or those who appeared to be the agents, servants, employees and/or contractors of Defendant, and especially Defendant, Dr. _____, in the following particular respects:

(a) failure to use due care to provide proper and adequate medical and surgical care, examination, testing and treatment;

(b) failure in general to properly position the Plaintiff and to identify, isolate, position and protect Plaintiff, _____' peroneal nerve during surgery;

(c) failure to possess the required degree of skill and knowledge under the circumstances to properly protect Plaintiff's peroneal nerve during the aforementioned arthroscopically-assisted anterior cruciate reconstruction right knee (allograft) operative procedure;

(d) failure to appreciate the anatomy of Plaintiff before dissecting into her knee and transecting her peroneal nerve;

(e) failure to adequately and completely physically evaluate the operative site and anatomic landmarks within Plaintiff's right knee during the anterior cruciate ligament reconstructive surgery;

(f) failure to use due care during the course of the arthroscopically-assisted anterior cruciate reconstruction right knee (allograft) operative procedure, by blindly dissecting into Plaintiff's right knee area to enable fixation of the allograft, negligently transecting Plaintiff's peroneal nerve;

(g) failure to supervise and manage any physicians or other staff who in any way contributed to the transection of Plaintiff's peroneal nerve during the ACL surgery on _____, 20__;

(h) failure to exercise due care by improperly performing the surgical technique below the standard of care, severing the peroneal nerve;

(i) failure to arrange, coordinate and communicate upon all aspects of Plaintiff's medical/surgical treatment and care so as to appreciate the harm caused the Plaintiff; and

(j) failure to comply with accepted standards of care in the conduct and supervision of the surgery to avoid injury to the peroneal nerve.

40. Defendant, _____, acting through its agents and employees, including Defendant, Dr. _____, undertook to render care to Plaintiff, _____, which they knew or should have known under the circumstances was necessary for the protection of Plaintiff, _____, and the negligence and carelessness of the Defendants as set forth herein, was a cause of harm and injury sustained by Plaintiff which negligent conduct of Defendants exposed Plaintiff to a substantial increased risk of harm and was a factual cause in bringing about Plaintiff's serious and permanent injuries and other losses, all of which Defendant, _____, is liable under the theory of respondeat superior.

41. In addition to proof of specific negligence of Defendants herein, Plaintiffs reserve the right to rely upon the doctrine of *res ipsa loquitur* to show fault, liability and/or negligence of the Defendants, jointly and severally.

WHEREFORE, Plaintiffs demand judgment in their favor against Defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT IV (CORPORATE NEGLIGENCE)
PLAINTIFF vs. DEFENDANT SURGICAL PRACTICE

42. Plaintiffs incorporate by reference paragraphs one (1) through forty-one (41) above as if fully set forth at length.

43. At all times relevant and material hereto, Defendant, _____, had a duty to ascertain that the physicians in its employ, particularly, Defendant, Dr. _____, were and remain competent and qualified to treat and care for patients within its office and all outpatient and inpatient hospital settings, including the minor Plaintiff, _____, to determine that appropriate policies and procedures were implemented and carried out within the professional corporation, to supervise the medical services and treatment rendered by its corporate employee physicians and to take all steps necessary to ensure that appropriate and necessary monitoring, treatment, care, testing facilities and equipment were available, provided and utilized in the treatment and care of the minor Plaintiff, _____.

44. At all times relevant and material hereto, Defendant, _____, breached its foregoing duties, knew of the existence of certain conditions which required its supervision of the practice and surgical procedures of Dr. _____ in connection with the care and treatment of Plaintiff, _____, and was negligent in the following particular respects:

(a) failure to exercise due care in prescribing proper policies, guidelines, protocols, procedures, rules and regulations to be followed by physicians, staff, personnel and/or independent contractors in connection with the arthroscopically-assisted anterior cruciate reconstruction (allograft) of Plaintiff's right knee to avoid negligent laceration of the peroneal nerve with its catastrophic consequences;

(b) failure to exercise due care in prescribing proper policies, guidelines, protocols, procedures, rules and regulations to be followed by physicians, staff, personnel and/or independent contractors in connection with the performance of the arthroscopically-assisted anterior cruciate reconstructive surgery (allograft) of Plaintiff's right knee to avoid catastrophic injury, including negligent and careless transection of Plaintiff's peroneal nerve;

(c) failure to select and retain only competent physicians, staff, personnel and/or independent contractors in connection with the examination, testing, diagnosis, treatment, monitoring and care of individuals undergoing arthroscopically-assisted reconstructive knee surgery so as to avoid catastrophic harm to the underlying nerves, including the peroneal nerve;

(d) failure to formulate, adopt and enforce adequate policies, guidelines, protocols, procedures, rules and regulations to ensure safe quality care for its patients undergoing operative treatment including arthroscopically-assisted knee reconstruction;

(e) failure to monitor, manage and review ongoing medical and surgical services being provided within its corporate structure pursuant to the rules and regulations governing the corporation;

(f) failure to implement and determine compliance with proper policies, guidelines, protocols, procedures, rules and regulations necessary to the provision of safe and proper medical care and informed consent to its patients and, in particular, necessary to the safety and care of minor Plaintiff herein;

(g) failure to maintain its equipment in good and proper working order for use in monitoring, testing and surgical care of the Plaintiff; and

(h) failure to properly and adequately supervise the physicians practicing and working within its corporate structure to determine that safe and proper care and treatment was being provided to Plaintiff and that operative technique was accomplished within the standard of care without causing permanent and catastrophic harm.

45. As a result of the negligence of the Defendant, _____, Plaintiff was caused to suffer injuries and damages more fully set forth herein and incorporated by reference.

WHEREFORE, Plaintiffs demand judgment in their favor against Defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT V
PLAINTIFF PARENTS vs. DEFENDANT SURGICAL CENTER

46. Plaintiffs incorporate by reference paragraphs one (1) through forty-five (45) above as if fully set forth at length.

44. As a direct and proximate result of the injuries and other losses to their daughter, _____, Plaintiffs, _____ and _____, have sustained and may in the future incur financial losses directly and proximately related to the injuries to their daughter, including various and substantial expenses to pay for the medical, surgical and rehabilitative attention and care to their daughter, including equipment and accommodations, and they will be obliged to expend such sums or incur such expenditures for an indefinite period of time in the future, all to their great financial detriment and loss.

WHEREFORE, Plaintiffs demand judgment in their favor against Defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

BY: _____

Attorneys for Plaintiffs

HOSPITAL, COLLEGE, STUDENT AND PHYSICIAN LIABILITY FOR INJECTION OF WRONG CONTRAST AGENT DURING RADIOGRAPHIC PROCEDURE INCLUDING CLAIMS FOR NEGLIGENCE, CORPORATE LIABILITY, INFORMED CONSENT, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, LOSS OF CONSORTIUM, FRAUD/NEGLIGENT MISREPRESENTATION, AND PUNITIVE DAMAGES

PLAINTIFFS	:	**COURT OF COMMON PLEAS**
Plaintiffs	:	
v.	:	
HOSPITAL	:	**JURY TRIAL DEMANDED**
	:	**NO.**
and	:	
COLLEGE	:	
and	:	
STUDENT	:	
and	:	
JOHN or JANE DOE STUDENT of College	:	
and	:	
RADIOLOGIST	:	
Defendants	:	

COMPLAINT – CIVIL ACTION

Plaintiffs, _____wife and husband, by and through their undersigned attorneys hereby file the Complaint – Civil Action, making claim for damages against the defendants herein, jointly and severally upon the following causes of action:

1. Plaintiffs, _____, at all times relevant and material hereto, were and are wife and husband, who are residents and citizens of the Commonwealth of Pennsylvania, residing at the above-captioned address.

2. Defendant Hospital hereinafter "_____"), is a Pennsylvania corporation engaged in the business of providing health care services, including contrast myelography, licensed under the laws of the Commonwealth of Pennsylvania, with its principal business offices located at the above-captioned address.

3. At all times relevant and material hereto, _____ acted by and through its agents, servants, workers, employees, representatives, students, staff and/or contractors or those who appeared to be its agents, servants, workers, employees, representatives, students, staff and/or contractors, acting within the course and scope of their agency and scope of their authority.

4. Defendant College (hereinafter "_____"), is a Pennsylvania corporation or other business entity engaged in the business of education, including the placement of its students in health care facilities such as _____for clinical training, education and experience, licensed under the laws of the Commonwealth of Pennsylvania, with its principal business offices located at the above-captioned address.

5. At all times relevant and material hereto, _____ acted by and through its agents, servants, workers, employees, representatives, students, staff and/or contractors or those who appeared to be its agents, servants, workers, employees, representatives, students, staff and/or contractors, acting within the course and scope of their employment and scope of their authority.

6. Upon information and belief, at all times relevant and material hereto, _____ and _____ had a student cooperative program whereby _____ would

furnish students to _____for the purpose of providing clinical knowledge, education, training and experience through and by_____ and/or _____ for patients of _____, including, but not limited to, defendants, _____ and/or John or Jane Doe Student of _____.

7. At all times relevant and material hereto, defendants, _____ and/or _____, employed, engaged, or otherwise clinically trained authorized agents, ostensible agents, servants and employees, including, but not limited to, student nurses, nurses, residents, interns, pharmacists, physicians, physician assistants, technicians, etc., and any act or omission complained of in this action that was committed by defendants and/or any of their authorized agents, imposes liability on defendants according to the laws of agency of the Commonwealth of Pennsylvania.

8. Defendant Student (hereinafter "_____"), was a _____ student in clinical training and/or working at _____ pursuant to the aforementioned student cooperative program and acting as the agent and/or ostensible agent of defendants, _____and _____, at the above-captioned address.

9. At all times relevant and material hereto, _____ was acting or appeared to be acting as the agent, servant, representative and/or employee of _____, including its Radiology Department and staff and of _____.

10. Defendant, John or Jane Doe Student of College was a _____ student in clinical training and/or working at _____ pursuant to the aforementioned student cooperative program and acting as the agent and/or ostensible agent of defendants, _____ and _____, at the above-captioned address.

11. At all times relevant and material hereto, defendant, John or Jane Doe Student of College, was acting or appeared to be acting as the agent, servant,

representative and/or employee of _____, including its Radiology Department and staff and _____.

12. Defendant Radiologist (hereinafter "Dr. _____"), is a practicing physician, duly licensed by and under the laws of the Commonwealth of Pennsylvania, specializing in the field of radiology, with a professional office located at the above-captioned address.

13. At all times relevant and material hereto, Dr. _____ was acting or appeared to be acting as the agent, servant and/or employee of _____ in its Radiology Department.

14. Defendants, _____ and/or _____, by and through their respective and/or shared employees, servants and agents, provided medical care and other services to plaintiff, _____, during the period of _____ 20__, through _____, 20__.

15. Defendants, _____, _____ and Dr. _____ are licensed health care providers approved by the Commonwealth to provide health care and/or professional medical services as a hospital, university and physician respectively, and as an employee or agent of any of them acting in the course and scope of agency and/or employment. Plaintiffs are asserting professional liability claims against these defendants, jointly and severally, including their liability for the acts and omissions of defendants, _____, John or Jane Doe Student of _____ and Dr. _____. See Pa. R.C.P. 1042.2(a).

16. On _____, 20__, plaintiff, _____, was a patient of defendant _____ and Dr. _____ for the purpose of undergoing a myelogram with contrast dye.

17. On _____, 20__, while a patient of _____ in its Department of Radiology, plaintiff, _____, underwent myelography with contrast dye performed by Dr. _____ with the assistance of _____, John or Jane Doe Student of

_____ and/or other employees, pharmacists, agents and/or personnel of _____ and/or _____.

18. During the course of the subject _____, 20__, myelogram, defendants improperly dispensed, prepared, set up and intrathecally injected the wrong contrast agent into _____'s spinal cord and/or surrounding area causing the serious and permanent injuries and other losses more fully set forth herein.

19. Shortly after the administration of the wrong contrast for the myelogram, plaintiff, _____, experienced spasms of the lower back and legs, seizure activity which progressively worsened, resulting in grand mal seizure, respiratory failure, myoclonus and hypertension requiring emergency code interventions to sustain life, including intubation, mechanical ventilation and paralysis of the patient, with the development of further complications, including acute renal failure, rhabdomyolysis, acidosis, aspiration pneumonia, pulmonary congestion, fever and other ills and injuries, as well as an aggravation and exacerbation of her prior condition, as detailed herein below.

20. This medication error which caused serious and permanent injury to plaintiff, _____, was a sentinel event under the MCare Act, that occurred while M_____ was under the exclusive control of defendants, for which plaintiffs also claim liability against defendants under the doctrine of *res ipsa loquitur.*

21. The _____ medical chart of plaintiff, _____, fails to document the medication error described herein.

22. Prior to her Code on _____, 20__, defendants ignored, temporized and failed to recognize the serious adverse reactions M_____ was experiencing due to the medication error, all to the great horror, distress and shock of plaintiffs.

23. Despite clear signs and symptoms of adverse drug reactions, defendants abandoned the care of M_____, ignoring her adverse reactions before she lapsed into respiratory failure, seizures and other complications.

24. Defendants have since admitted that they caused and/or failed to prevent the occurrence of the medication error as described herein.

25. The negligent, careless and reckless preparation, dispensing, set up and intrathecal administration of contraindicated contrast as aforesaid directly resulted in the respiratory arrest of M_____, and caused her to undergo prolonged and permanent severe physical injuries, pain and suffering, mental anguish, anxiety, depression, humiliation, and emotional distress, from which she will continue to suffer for an indefinite time in the future, all to her great detriment and loss.

26. The negligent, careless and reckless intrathecal administration of contraindicated contrast material into M_____ on _____, 20__, would not have occurred but for the negligence, carelessness and recklessness of the defendants.

27. As a further consequence of the respiratory arrest secondary to the medication error as aforesaid, plaintiff, _____, was caused to suffer aspiration pneumonia, acidosis, fever, paralysis, and hypotension.

28. As a further result of the negligence, carelessness and recklessness of the defendants, jointly and severally, plaintiff, _____, has suffered and will continue to suffer from further serious and permanent injuries, including, but not limited to arachnoiditis, cognitive injury, memory impairment, attention and concentration impairment, severe headaches, shooting nerve pains in her face, chronic and severe pain in her lower back and legs, absent lower extremity reflexes with decreased strength and sensation, weight gain, narcotic habituation, sleep disorder, diabetic aggravation resulting in insulin

dependency, and severe damage, aggravation and exacerbation of her nerves, nervous system and other conditions, as well as various other ills and injuries.

29. As a further result of the negligence, carelessness and recklessness of the defendants, jointly and severally, plaintiff, _____, has been obliged to receive and undergo medical/rehabilitative attention and care and plaintiffs have incurred various and substantial expenses to pay for that medication/rehabilitative attention and care, and they will be obliged to expend such sums or incur such expenditures for an indefinite time in the future, all to their great financial detriment and loss.

30. As a further result of the negligence, carelessness and recklessness of the defendants, plaintiff, _____, has been unable to attend to her usual daily activities, household services, labors, avocations and social activities, and she will continue to be so restricted for an indefinite time in the future, all to her great detriment and loss.

31. As a further result of the negligence, carelessness and recklessness of the defendants, plaintiff, _____, has suffered and will continue to suffer a loss of enjoyment of life and life's pleasures, all to her great detriment and loss.

COUNT I
(NEGLIGENCE)

PLAINTIFF v. HOSPITAL, COLLEGE, STUDENT, JOHN OR JANE DOE STUDENT and RADIOLOGIST

32. Paragraphs one (1) through thirty-one (31) above are incorporated herein by reference as if fully set forth in length.

36. The pain, suffering, injuries and other losses of plaintiff, _____, were directly and proximately caused by the negligence,

carelessness and recklessness of the defendants, _____, M.D. and _____, jointly and severally with the other defendants, and in the following particular respects:

(a) Negligent preparation for and/or performance of myelography on _____, 20___;

(b) negligent setup and/or intrathecal administration of the wrong contrast agent during myelography on _____, 20__;

(c) failure to exercise due care by ordering, dispensing, preparing, setting up, using and/or intrathecally injecting the contraindicated contrast agent, Conray, directly into the spinal cord and/or fluid that surrounds the spinal cord, causing respiratory failure and arrest and catastrophic complications described above;

(d) failure to take precautions to avoid medication error before, during and after myelography;

(e) failure to timely recognize and treat the life-threatened conditions of plaintiff that occurred as the result of the medication error;

(f) negligently failing to secure and inspect the dispensed contrast agent to assure it was the correct or indicated agent before injecting the contraindicated agent, Conray, into plaintiff, _____;

(g) failing to recognize the severe adverse reactions to the contraindicated administration of Conray;

(h) failure to assure that the myelogram was set up and performed by skilled, experienced and competent personnel;

(i) failure to supervise the preparation for and performance of the myelogram;

(j) failure to use due care to provide proper and reasonable medical care, examination, testing and treatment;

(k) failure in general to timely intervene, examine, diagnose, attend to and treat plaintiff, _____;

(l) failure to exercise due care according to appropriate standards of care by erroneously ordering, dispensing, obtaining, setting up and/or preparing the wrong and contraindicated myelography contrast agent before its injection into plaintiff;

(m) failing to timely monitor and/or discover the medication error, thereby increasing the risk of harm to plaintiff;

(n) failure to possess the required degree of skill and knowledge under the circumstances to properly monitor the plaintiff's signs, symptoms and condition, as she was being improperly injected with Conray;

(o) failure to prevent plaintiff from lapsing into an unresponsive state from adverse reactions which could have been avoided or mitigated by defendants;

(p) failure to properly and competently order, fill, check and/or confirm that the proper contrast agent was ordered, filled, prepared and/or set up before injection into plaintiff;

(q) failure to properly observe and monitor the plaintiff after injection of the contrast agent;

(r) failure to utilize accepted techniques to prevent medication error;

(s) failure to supervise, attend and/or assess whether plaintiff was being properly injected with the correct contrast during myelography;

(t) failure to timely search for, recognize and appreciate the cause of the severity of the condition of the plaintiff due to the medication error;

(u) failure to immediately seek and obtain the advice, experience and expertise of qualified specialists regarding the condition of and necessary treatment for the plaintiff as the result of severe respiratory distress, acidosis and adverse reaction from the medication error;

(v) failing to recognize the potential for severe adverse reactions to the contraindicated administration of Conray;

(w) abandoning the patient prior to her arrest and Code so as to increase the risk of harm to the plaintiff;

(x) failure to exercise due care according to appropriate standards of care by improperly temporizing the medical treatment, care and/or advice provided to plaintiff until the condition of plaintiff became irreversible and permanent requiring life-saving measures, all of which could have been avoided;

(y) failure to properly select, place, train and supervise the agents, ostensible agents, servants, employees, students, staff and/or

contractors involved in the subject myelogram, and preparations therefor;

(z) failure to exercise due care by employing inadequate methods, techniques and/or procedures for dispensing, delivering, inspecting, preparing, and administering the contrast agent to plaintiff during myelography;

(aa) failure to render due care by failing to timely intervene and timely and adequately resuscitate the plaintiff;

(bb) departing from accepted and approved medical, hospital, radiologic, pharmacologic, emergency medical, anesthesiology, neurologic, nursing and/or other techniques, standards, practices and/or procedures;

(cc) failure to provide appropriate supervision of nursing staff and/or student personnel in the pre and post-myelogram care of patients, including Mrs. Voglino.

37. In addition to proof of specific negligence of defendants herein, plaintiff reserves the right to rely upon the doctrine of *res ipsa loquitur* to show fault, liability and/or negligence of the defendants, jointly and severally.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT II
(NEGLIGENCE)

PLAINTIFF v. STUDENT, JOHN or JANE DOE
STUDENT OF COLLEGE _____ and HOSPITAL and COLLEGE

38. Paragraphs one (1) through thirty-seven (37) above are incorporated herein by reference as if fully set forth in length.

39. The pain, suffering, injuries and other losses of plaintiff, _____, were further caused by the negligence, carelessness and

recklessness of the defendants, _____, John or Jane Doe Student of College, Hospital and College, jointly and severally with the other defendants, and in the following particular respects:

(a) Negligent preparation for the performance of myelography on _____, 20___;

(b) negligent setup, preparation and provision of the wrong contrast dye for and/or during myelography on _____, 20__;

(c) failure to properly inspect, obtain, label and/or dispense the appropriate contrast agent for performance of myelography upon plaintiff;

(d) failure to take precautions to avoid medication error before, during and after myelography;

(e) failure to timely recognize, and correct the medication error;

(f) negligently failing to secure and inspect the dispensed contrast dye to assure it was the correct or indicated agent before it was injected into plaintiff, _____;

(g) failing to recognize the potential for severe adverse reactions to the contraindicated administration of Conray;

(h) failure to possess the required degree of skill and knowledge under the circumstances to properly set up and secure medication for myelography;

(i) failure to properly monitor the plaintiff's signs, symptoms and condition, as she was being improperly injected with the wrong contrast agent;

(j) failure to adequately and competently order, fill, check, label and/or confirm that the proper contrast agent was ordered, filled, checked, labeled and confirmed before injection into plaintiff;

(k) failure to properly observe and monitor the plaintiff after injection of the wrong contrast agent;

(l) failure to properly mark and label the appropriate medication for use in performance of myelogram upon plaintiff;

(m) mislabeling the medication for use in performance of myelogram upon plaintiff;

(n) failure to inform appropriate supervisory personnel of questions surrounding the selection, preparation, set up and dispensing of medication for use in the myelogram upon plaintiff;

(o) failure to be in a fit and proper condition for the purpose of properly setting up, preparing, and dispensing medication for use in the myelogram;

(p) failure to supervise, attend and/or assess whether plaintiff was being properly injected with the correct contrast during myelography;

(q) failure to utilize accepted techniques to prevent medication error;

(r) failure to timely search for, recognize and appreciate the severity of the condition of the plaintiff due to the medication error;

(s) failure to immediately seek and obtain the advice, experience and expertise of qualified specialists regarding the condition of and necessary treatment for the plaintiff as the result of severe respiratory distress, acidosis and adverse reaction from the medication error;

(t) vicarious liability for the negligence of all of their agents, ostensible agents and employees, including, but not limited to _____ and/or John or Jane Doe Student of College.

40. In addition to proof of specific negligence of defendants herein, plaintiff reserves the right to rely upon the doctrine of *res ipsa loquitur* to show fault, liability and/or negligence of the defendants, jointly and severally.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT III
(NEGLIGENCE)

PLAINTIFF v. HOSPITAL and COLLEGE

41. Paragraphs one (1) through forty (40) above are incorporated herein by reference as if fully set forth in length.

42. The pain, suffering, injuries and other losses of plaintiff, _____, were directly and proximately caused by the negligence, carelessness and recklessness of the defendants, Hospital and College, jointly and severally with the other defendants, and in the following particular respects:

(a) Failure to ensure that the _____, 20__, myelogram was set up and performed by skilled, experienced and competent personnel;

(b) failure to assure that the myelogram was set up and performed under the direction, supervision and control of personnel skilled, experienced and competent in the procedure;

(c) failure to adequately and competently order, fill, check and/or confirm that the proper contrast agent was ordered, filled, checked and confirmed before injection into plaintiff;

(d) failure to properly select, place, educate, train and supervise their agents, ostensible agents, servants, employees, students, staff and/or contractors;

(e) failure to implement and determine compliance with necessary policies, procedures and guidelines for the training of and participation of students in the preparations for including medication set up for procedures to be performed upon patients;

(f) failure to devise, require and implement accepted and approved medical, hospital, radiologic, pharmacologic, nursing and/or other diagnostic techniques, standards, practices and/or procedures to prevent medication error;

(g) failure to provide appropriate supervision and oversight of nursing staff and/or student personnel in the pre, intra and post-myelogram set up and care of patients, including Plaintiff;

(h) failure to provide necessary and proper education and training to their agents and ostensible agents participating in the set up and delivery of medical and radiologic testing and care;

(i) breach of the duty to use reasonable care in the maintenance of safe and adequate facilities and equipment in the preparation, inspection, delivery and administration of contrast myelography and post-myelographic care and treatment;

(j) breach of the duty to select and retain competent physicians, nurses, technicians, orderlies, aids, student-assistants, therapists and others;

(k) breach of the duty to oversee all persons who participate in the practice of medicine within the hospital and who participate in the provision of care to patients;

(l) breach of the duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for all patients, including patients receiving contrast myelography and post-myelographic care and treatment.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT IV
(CORPORATE LIABILITY)

PLAINTIFF v. HOSPITAL

43. Paragraphs one (1) through forty-two (42) above are incorporated herein by reference as if fully set forth in length.

44. The pain, suffering, injuries and other losses of plaintiff, _____, was further directly caused by the independent negligence, carelessness and recklessness of defendant Hospital, jointly and severally with the other defendants, acting by and through its agents, servants, employees, representatives, students, staff and/or contractors or those who appeared to be respective and shared

agents, servants, employees, representatives, students, staff and/or contractors, and in the following particular respects:

(a) Failure to select, place and/or retain only competent physicians, nurses, technologists and/or student personnel;

(b) failure to maintain a safe and adequate hospital facility for the care and treatment of patients requiring appropriate pharmacy and medical management before, during and after contrast diagnostic procedures to avoid medication error and associated risks and adverse effects;

(c) failure to exercise due care in representing to and giving false information to the public, including plaintiffs, that they did in fact possess adequate hospital facilities, physicians, staff, nurses, nursing assistants, personnel, technologists, students and/or independent contractors for the care and treatment of patients who undergo myelographic procedures with contrast;

(d) failure to implement proper policies and procedures to be followed by physicians, pharmacists, staff, personnel, students and/or independent contractors in connection with ordering, dispensing, preparing, setting up, inspecting, delivering and/or administering contrast medication;

(e) failure to select, place and/or retain only competent physicians, staff, personnel, students and/or independent contractors to order, inspect, prepare, set up, inspect and dispense correct and indicated contrast agents during myelography;

(f) failure to formulate, adopt and enforce adequate rules, policies and regulations to ensure quality care for their patients, of which the hospital had actual or constructive knowledge, including the dispensing, setting up, inspecting, preparing; and delivering contrast agents, medications and/or other solutions during myelographic procedures;

(g) failure to formulate, adopt and enforce adequate rules, regulations, policies and procedures to ensure that plaintiff received the indicated contrast dye during the subject myelographic procedure;

(h) failure to arrange and coordinate plaintiff's medical treatment so as to appreciate the danger associated with the failure to properly administer the correct contrast agent which ultimately resulted in her respiratory arrest, Code and multiple serious and permanent injuries;

(i) failure to monitor all aspects of its physicians, nurses, technologists, assistants, students, personnel and/or independent contractors or their respective agents, servants, associates, employees, personnel and/or contractors;

(j) failure to oversee and review the competence of all persons practicing medicine within the hospital as to patient care, including dispensing and inspecting contrast medication for myelography, and preparing, supervising and performing contrast myelography and monitoring patients post-myelogram for adverse reaction due to contrast medication error;

(k) failure to protect and safeguard the health and well-being of patients, particularly plaintiff herein;

(l) failure to monitor, manage and review on-going medical, nursing, student-nursing/technologist, teaching, pharmacological, radiographic and/or emergency medical services being provided within the medical facility.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT V
(INFORMED CONSENT)

PLAINTIFF v. RADIOLOGIST

45. Paragraphs one (1) through forty-four (44) above are incorporated herein by reference as if fully set forth in length.

46. At all times relevant and material hereto, defendant, Dr. _____, had a duty to inform plaintiff, _____, of plaintiff's medical condition, available options and alternatives, of the nature and scope of the invasive procedure which was being undertaken upon her, of the other risks, complications, benefits and alternatives attendant to the procedure and the risks of the alternatives to the procedure, of the qualifications and

experience of the persons who would be participating in the procedure, the extent to which the physician assistants, residents, technologists, students and/or inexperienced personnel would be participating in the procedure and its set up and all material facts which a reasonable prudent person would require to make an informed decision as to the invasive procedure.

47. At all times relevant and material hereto, defendant, Dr. _____, failed to properly advise plaintiff of the nature of her condition, of the precise nature and scope of the procedure, of the material risks attendant to the procedure, of other treatment options and alternatives, of risks of such alternatives, of injuries which could occur during the procedure and of the extent of the participation of inexperienced and/or student assistants in her procedure, of the qualifications and experience of persons who were to participate in the set up of the procedure and all of the material facts which a prudent person would need to consider in making decisions regarding the invasive radiographic procedure.

48. Had the plaintiff, _____, received all of the material facts of which a reasonable, prudent patient would need to consider to make an informed decision regarding her treatment, it would have been a substantial factor in her decision whether to undergo the invasive procedure.

49. As a direct and proximate result of the failure of defendant, Dr. _____, to properly advise plaintiff of all facts material to the undertaking of the procedure upon her, that procedure was undertaken without proper informed consent, constituting a battery upon the plaintiff, _____.

50. Further, plaintiff was not informed of the fact that Dr. _____, the radiologist ultimately responsible for the myelogram, was not supervising the set up of the myelogram, including the ordering, dispensing, inspecting, and preparation of the appropriate contrast

medium and/or was not going to perform the procedure, but would only read its outcome, leaving the actual set-up and performance of the procedure to other _____ agents, employees, personnel and/or contractors, which facts a person of average prudence would want to know.

51. Performing the myelogram and injection of the wrong contrast agent into M_____'s spinal cord without first obtaining informed consent was an unconsented touching, which is a battery under Pennsylvania law.

52. As the attending physician responsible for the myelogram performed on _____ 20__, and for Student and any other personnel who prepared and/or performed the erroneous dye injection during myelography, it was Dr. _____'s responsibility to make sure proper informed consent was obtained.

53. As the result of the failure by Dr. _____ to obtain informed consent, plaintiff suffered injuries and damages more fully set forth and incorporated herein by reference.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT VI
(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)

HUSBAND PLAINTIFF V. HOSPITAL, COLLEGE STUDENT, JOHN or JANE DOE STUDENT OF COLLEGE and RADIOLOGIST

54. Paragraphs one (1) through fifty-three (53) above are incorporated herein by reference as if fully set forth in length.

55. At all times relevant and material hereto, husband-plaintiff, _____, was a close family relative of plaintiff, _____.

56. At all times relevant and material hereto, husband-plaintiff witnessed and observed _____'s adverse reaction to the improperly injected medication, including severe pain, suffering, seizures, restlessness, anxiety, altered mental status and mentation, incoherence, respiratory arrest and near-fatal Code, and defendants' negligent failure to respond and treat such condition.

57. Plaintiff was immediately concerned about the foregoing adverse condition of his wife and associated that with the care and treatment which had been rendered to his wife by the defendants.

58. Upon his witnessing the foregoing shocking adverse condition of his wife, husband plaintiff communicated to defendants his concern over the condition of his wife.

59. Husband plaintiff was shocked and horrified to witness and observe the near-death condition of his wife, the impact of her arrest with tubes, lines, respirator and other medical assistance devices and equipment attached to her body and thereby contemporaneously suffered a discrete, identifiable, traumatic event, resulting in severe emotional distress.

60. At the time of his observance of the foregoing shocking, near-death condition of his wife and suffering the discrete, identifiable, traumatic event producing severe emotional distress, husband plaintiff associated the condition of his wife with the care and treatment by defendants and the defendants' failure to properly investigate, respond to and treat the adverse reaction following the medication error, resulting in respiratory arrest and other near-fatal, adverse events as above described.

61. At all times relevant and material hereto, husband-plaintiff's shock and emotional distress resulted from his sensory and contemporaneous observation of the foregoing shocking, traumatic, near-death condition of his wife.

62. As a result of husband-plaintiff's observation of the foregoing shocking and traumatic events, husband-plaintiff, _____, was caused to suffer severe emotional distress, anxiety, fear for the life, health and well-being of his wife, mental anguish, horror, shock and fright.

63. At all relevant times, husband-plaintiff's emotional distress was accompanied by nervousness, anxiety, nausea, dizziness, depression, distress and other physical and emotional symptoms and conditions.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT VII
(LOSS OF CONSORTIUM)

HUSBAND PLAINTIFF v. HOSPITAL, COLLEGE STUDENT, JOHN or JANE DOE STUDENT OF COLLEGE and RADIOLOGIST

64. Paragraphs one (1) through sixty-three (63) above are incorporated herein by reference as if fully set forth in length.

65. As a direct and proximate result of the injuries and other losses to his wife, _____, husband-plaintiff, _____, has been deprived of the society, consortium, companionship, comfort and services of his wife and will continue to be so deprived for an indefinite time in the future, all to his great detriment and loss.

66. Husband-plaintiff, _____, has also sustained and may in the future incur financial losses directly and proximately caused by the injuries to his wife, including various and substantial expenses to pay for the medical and rehabilitative attention, care and treatment for his wife, and he will be obliged to expend such sums or incur such expenditures for an indefinite period of time in the future, all to his great financial detriment and loss.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, in an amount of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT VIII
(FRAUD/NEGLIGENT MISREPRESENTATION)

PLAINTIFFS v. HOSPITAL, COLLEGE and RADIOLOGIST

67. Paragraphs one (1) through sixty-six (66) above are incorporated herein by reference as if fully set forth in length.

68. At all times relevant and material hereto, defendants, individually and collectively and/or acting through their agents and employees with full knowledge thereof, misrepresented the condition of plaintiff, _____, fraudulently concealed evidence of the circumstances surrounding the medication error and injuries to M_____ with the intention to induce plaintiffs to act or fail to act on account of defendants' negligence and/or intentional misrepresentations and fraud upon which plaintiffs justifiably relied upon, suffering the injuries and damages more fully detailed above.

69. The fraudulent, deceptive acts and omissions and/or negligent misrepresentations of defendants included:

(a) Failing to immediately determine that the grave medication error had occurred;

(b) failing to properly document plaintiff's chart to indicate that the wrong contrast agent was ordered, dispensed, prepared and/or administered to plaintiff, _____, causing her immediate adverse reactions and permanent injuries and losses;

(c) withholding information concerning the circumstances surrounding the medication error that occurred involving plaintiff, _____;

(d) covering-up the medication error which resulted in immediate, near-fatal consequences to _____;

(e) misleading plaintiffs as to the cause of plaintiff, _____'s respiratory arrest and other sequalae, leading plaintiffs to believe than an allergic reaction to appropriate medication had occurred, initially withholding from plaintiffs the fact that Conray or some other contraindicated contrast medium had been intrathecally injected into M_____ to avoid admitting fault to plaintiffs;

(f) inducing plaintiffs to believe that defendants would accept responsibility for the injuries caused to plaintiff and thereby inducing plaintiff to delay and/or forgo her legal cause of action;

(g) exacerbating plaintiff's physical and emotional injuries and conditions by misleading plaintiff as to the cause of her condition.

70. As a result of the fraudulent and deceptive actions of the defendants, plaintiffs were caused to suffer exacerbation of physical and emotional injuries and caused to suffer additional emotional distress and further nervousness, depression, anxiety, nausea, dizziness, nightmares and disruption of their basic senses of security and well-being.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT IX
(PUNITIVE DAMAGES)

PLAINTIFFS v. HOSPITAL, COLLEGE and RADIOLOGIST

71. Paragraphs one (1) through sixty-nine (69) above are incorporated herein by reference as if fully set forth at length.

72. At all times relevant and material hereto, the defendants knew of and allowed conditions and personnel deficiencies which increased the risk of harm to patients and willfully, knowingly and recklessly failed to properly ascertain and guard against medication error, despite full knowledge of the risks of harm which could and did, in fact, befall plaintiff, _____.

73. At all times relevant and material hereto, the defendants knew of and allowed conditions and personnel deficiencies which increased the risk of harm to patients and willfully, knowingly and recklessly prepared, supervised, performed and monitored the injection of the wrong contrast medication into plaintiff, _____, in reckless disregard of the increased risks of harm presented thereby.

74. At all times relevant and material hereto, the defendants of knew of and allowed their agents to knowingly, willfully and recklessly disregard indications of medication error causing trauma, distress, respiratory arrest and near death of plaintiff and, in fact, abandoned the plaintiff, _____, before she Coded, resulting in grave

and permanent injuries as detailed herein above, yet defendants failed to act to avoid such occurrence.

75. At all times relevant and material hereto, the defendants knew of and allowed conditions and personnel deficiencies which increased the risk of harm to patients, and defendants knowingly, willfully, and recklessly endangered the life, health and well-being of plaintiff, _____, and/or acted with reckless indifference to the health, welfare, well-being and life of the plaintiff.

76. At all times relevant and material hereto, the defendants acted callously and recklessly indifferent to the emotional health and well-being of the plaintiffs, _____ and _____, when defendants knew their agents were ignoring the complaints of plaintiffs and the complaints of others that there was something wrong following the subject myelogram, as they pleaded for immediate intervention before plaintiff, _____, convulsed, seized and went into respiratory failure and arrest requiring emergency Code interventions to sustain life with the development of further serious and permanent complications as described herein.

77. At all times relevant and material hereto, the conduct of the defendants detailed above, including, *inter alia,* the near-fatal medication error was intentionally covered-up by the defendants following the arrest, Code and adverse sentinel events to Plaintiffs.

78. At all times relevant and material hereto, the defendants engaged in fraudulent and/or deceptive acts or omissions to induce plaintiffs to believe that the cause of plaintiff, _____'s near-fatal respiratory arrest was an allergic reaction in order to avoid legal liability and responsibility for their medication error.

79. At all times relevant and material hereto, the defendants knew that their agents intentionally, willfully and with reckless indifference to the rights of the plaintiffs, created a medical record that was false, incomplete and misrepresentative of the cause of plaintiff's suffering, injuries and losses, in order to discourage, hinder and obstruct the plaintiffs from investigating and pursuing their rights to full compensation allowed by law for all their losses caused by the defendants' medication error and other conduct.

80. At all times relevant and material hereto, the defendants refused to account for and to take responsibility for their conduct and the conduct they allowed, and to provide all relevant and necessary information as to the involvement of any and all students in the medication error, including Student, in further indifference to the rights and safety of the plaintiffs.

81. At all times relevant and material hereto, the defendants allowed an inexperienced, untrained, unsupervised and incompetent student or students to unsafely participate in medical and diagnostic treatment and care, including contrast myelography on patients without their knowledge and consent, wantonly and willfully increasing the risk of harm to such patients in violation of their rights, health, welfare and safety.

82. At all times relevant and material hereto, the defendants intentionally and indifferently secreted the occurrence of this sentinel event in violation of Pennsylvania law, concealing their medical error under the cloak of a deceptive medical record devoid of the complete truth as to plaintiff's sudden and near-fatal death at the hands of the defendants, jointly and severally.

83. At all times relevant and material hereto, the conduct of the defendants detailed above, including, *inter alia,* the near-fatal medication error and cover-up of the

error following the arrest, Code and adverse events caused the Plaintiffs, was intentional, willful, wanton or reckless conduct.

84. At all times relevant and material hereto, the conduct of the defendants detailed above displayed outrageous and reckless indifference to the rights, health, welfare and safety of the Plaintiffs.

WHEREFORE, plaintiffs demand judgment in their favor against defendants, jointly and severally, for punitive damages in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

Respectfully submitted,

By:_____

HOSPITAL, PHYSICIAN GROUP AND PHYSICIAN LIABILITY FOR STROKE AND OTHER LOSSES, INCLUDING PUNITIVE DAMAGES CLAIM

ATTORNEYS FOR PLAINTIFF

PLAINTIFF **Plaintiff** **v.** **DEFENDANT HOSPITAL** **and** **DEFENDANT ER CORPORATION** **and** **DEFENDANT ER DOCTOR** **and** **DEFENDANT ER DOCTOR** **and** **DEFENDANT PCP PRACTICE** **and** **DEFENDANT PCP** **and** **DEFENDANT PCP** **Defendants**	**COURT OF COMMON PLEAS** **CIVIL ACTION - LAW** **JURY TRIAL DEMANDED** **NO.**

COMPLAINT - CIVIL ACTION - MEDICAL PROFESSIONAL LIABILITY ACTION

Plaintiff by and through his undersigned attorneys hereby files the following Complaint - Civil Action, making claim for damages against the Defendants herein, jointly and severally, upon the following causes of action:

1. Plaintiff is an adult resident and citizen of the Commonwealth of Pennsylvania, who at all times relevant and material hereto, has resided at the above-captioned address.

2. Defendant Hospital (hereinafter "_____"), is a Pennsylvania Corporation engaged in the business of providing health care services, including emergency medical services, licensed by and under the laws of the Commonwealth of Pennsylvania, with its principal business offices located at the above-captioned address.

3. At all times relevant and material hereto, Defendant, _____ acted by and through its agents, servants, workers, employees, representatives, physicians, nurses, staff and/or contractors or those who appeared to be its agents, servants, workers, employees, representatives, staff and/or contractors, acting within the course and scope of their agency, employment and authority and in the furtherance of the business of said Defendant.

4. Defendant, _____ (hereinafter "_____"), is a professional corporation or other business entity, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business and/or professional office located at _____, Emergency Department, _____ Pennsylvania, with its registered corporate address designed at the above-captioned address. The purpose of _____ was and remains to staff the Emergency Department at _____ with physicians specializing in emergency medicine who are experienced in treating patients needing emergency medical care, including, in particular, the Plaintiff.

5. At all times relevant and material hereto, Defendant, _____. acted by and through its agents, servants, workers, employees, representatives, physicians, nurses, staff and/or contractors or those who appeared to be its agents, servants, workers, employees, representatives, staff and/or contractors, acting within the course and scope of their agency, employment and authority and in the furtherance of the business of said Defendant.

6. Defendant ER Doctor (hereinafter "Dr. _____"), is a practicing physician, duly licensed by and under the laws of the Commonwealth of Pennsylvania, specializing in the field of emergency medicine, with a professional office located in the Emergency Department at _____ located at the above-captioned address.

7. Defendant, ER Doctor (hereinafter "Dr. _____"), is a practicing physician, duly licensed by and under the laws of the Commonwealth of Pennsylvania, specializing in the field of emergency medicine, with a professional office located in the Emergency Department at _____ located at the above-captioned address.

8. At all times relevant and material hereto, Defendant Hospital and/or Defendant ER Corporation held Dr. _____ and Dr. _____ out and represented to the public that they were staff physicians of said Hospital specializing in Emergency Medicine.

9. At all times relevant and material hereto, Defendants, Dr. _____ and Dr. _____, acted or appeared to be acting as the real, apparent and/or ostensible agents, servants, employees, administrators and/or representatives of Defendants, _____ and/or _____ within the course and scope of their employment and authority in the furtherance of the business of said Defendants.

10. At all times relevant and material hereto, Defendants, _____ and _____ acted or appeared to be acting through their respective and/or shared agents, servants, employees, administrators and/or representatives in the course and scope of their employment and/or appointment and in the furtherance of the business of said Defendants.

11. At all times relevant and material hereto, Defendant Hospital, held itself out and represented it to the public, including Plaintiff that it possessed competent and adequate physicians, staff and Emergency Department facilities for the diagnosis, management, treatment and care of injuries and illnesses, upon which Plaintiff and his family reasonably relied.

12. At all times relevant and material hereto, Defendant Hospital, provided emergency medical services to the public pursuant to a contract, understanding or other agreement with _____ and their respective agents, servants, representatives, workmen, employees and/or independent contractors, who were engaged or appeared to be engaged in the business of Defendant Hospital, within the course and scope of their agency, employment and authority and in the furtherance of the business of Defendant Hospital, including particularly Drs. _____ and _____.

13. Defendant, _____,(hereinafter "_____"), is a professional corporation or other business entity, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business and/or professional office located at the above-captioned address. The purpose of _____ is to provide professional medical services, including primary care services in the field of family medicine and referrals to consulting or specialized physicians.

14. At all times relevant and material hereto, Defendant, _____, acted or appeared to be acting through its agents, servants, employees, administrators, officers, physicians, technicians, nurses, physician's assistants, staff and/or representatives in the course and scope of their employment and/or appointment and in the furtherance of the business of said Defendant.

15. Defendant, _____ (hereinafter "Dr. _____"), is a practicing physician, duly licensed by and under the laws of the Commonwealth of Pennsylvania, specializing in the field of family medicine, with a professional office located at the above-captioned address.

16. At all times relevant and material hereto, Defendant, Dr. _____, acted or appeared to be acting as the real, apparent and/or ostensible agent, servant, employee, administrator, officer and/or representative of Defendant, _____.

17. Defendant, _____ (hereinafter "Dr. _____"), is a practicing physician, duly licensed by and under the laws of the Commonwealth of Pennsylvania, specializing in the field of family medicine, with a professional office located at the above-captioned address.

18. At all times relevant and material hereto, Defendant, Dr. _____, acted or appeared to be acting as the real, apparent and/or ostensible agent, servant, employee, administrator, officer and/or representative of Defendant, _____.

19. Plaintiff is asserting professional liability claims against all Defendants.

20. Beginning in _____1983, Plaintiff came under the care of the Defendant, _____, whose physicians, including Dr. _____and Dr. _____, have served as his primary care physicians.

21. At all times relevant and material hereto, Plaintiff was under the care of Defendants, _____, Dr. _____ and Dr. _____, who were obliged to properly treat and supervise the treatment of Plaintiff, including proper diagnostic tests, examination, diagnosis, management and referral to specialists for the purpose of proper medical diagnosis, management, treatment and care.

22. Beginning in _____, Plaintiff complained to Defendants, _____ and its staff and physicians, including Dr. _____ and Dr. _____, of syncope, headache, passing out, dizziness, visual disturbance, chest pain, heart pain and/or shortness of breath, among other signs and symptoms.

23. In and about ____, Plaintiff was seen and evaluated by Defendants, Dr. _____ and _____ for the foregoing symptoms, particularly, syncope, passing out, dizziness and visual disturbance, among other symptoms.

24. Despite these serious complaints in an otherwise healthy, young person, Defendants, Dr. _____ and _____ failed to properly diagnose and treat Plaintiff's condition and failed to render and recommend necessary follow-up care, diagnosis and treatment.

25. On or about _____ 20__, Plaintiff, was seen and evaluated by Defendant, Dr. _____ and _____ for chronic shortness of breath for years, complaints of "heart pain", chest pain and dyspnea, among other complaints, symptoms and history.

26. Defendants, Dr. _____ and _____. despite these serious, ongoing complaints, signs and symptoms failed to properly care for, diagnose and treat Plaintiff's cardiac condition, instead unreasonably and negligently misdiagnosing the pain

as musculoskeletal, with an EKG reported as showing signs of bradycardia with increased amplitude and left ventricular hypertrophy, and misdiagnosing the dyspnea as asthma related.

27. At all relevant times, Defendants, _____, Dr. _____ and Dr. _____ failed to properly diagnose and treat a patent foramen ovale ("PFO") from which Plaintiff was suffering, and/or failed to properly refer Plaintiff for complete cardiology workup.

28. On or about _____, 20__, Plaintiff presented to the Emergency Room of Defendant Hospital, and became a patient of said Hospital and Defendants ER Corporation, Dr. _____ and Dr. _____ with complaints, signs and symptoms, including shortness of breath, nausea, vomiting, headache, central chest discomfort, lightheadedness, dizziness, anxiety, tingling/numbness in the hands, racing heart, tachycardia, irregular pulse, confusion, trouble speaking, inability to raise his arms, trouble walking, loss of balance and coordination and a history of dyspnea.

29. Defendants, _____Hospital, _____, Drs. _____ and _____, improperly discharged Plaintiff to home with a diagnosis of hyperventilation, advising Plaintiff that he was suffering from a panic attack and that he should breathe into a paper bag despite his ongoing symptoms including nausea, vomiting, inability to stand and walk without assistance, loss of balance, arm weakness and continued chest pain, headache, lightheadedness, dizziness and other signs and symptoms of impending stroke.

30. Plaintiff's above symptoms continued and progressed with slurred speech, gait and balance disturbance, nausea, persistent weakness of especially his right arm,

blurred vision, and other physical symptoms, as a result of which he again presented to _____Hospital for assessment and treatment on _____, 20__.

31. On or about _____, 20__, at or about 12:36 P.M., Plaintiff was admitted to _____Hospital and thereafter diagnosed with multifocal infarcts in the superior medial cerebellum-vermis on the right side, described as an acute right cerebral stroke.

32. On or about _____, 20__, Plaintiff was referred to _____ Hospital for transesophageal echocardiogram, which study showed hypermobile interatrial septum with evidence of PFO with spontaneous right to left shunting which condition increased Plaintiff's risk for paradoxical emboli and led to him suffering the embolic cerebellar CVA.

33. As a result of the negligence, carelessness and tortious conduct of the Defendants in failing to diagnose, manage and/or treat Plaintiff for his PFO condition and/or his signs and symptoms of impending stroke as described above, Plaintiff was caused to suffer a preventable acute cerebral stroke and its sequelae resulting in permanent and catastrophic injuries and other losses as detailed herein.

34. As a result of the negligence, carelessness and tortious conduct, of the Defendants, jointly and severally, Plaintiff has suffered and will continue to suffer from serious and permanent injuries including but not limited to acute multifocal infarcts in the right cerebellum and cerebellar-vermis, blurred vision, persistent headaches, head numbness and pain, loss of motor function and strength in all extremities, right-sided weakness, dysarthria, gait disturbance, disequilibrium, nausea, chronic fatigue, pain in all extremities, dizziness, impaired visual function, memory loss, cognitive affective cerebellar syndrome, learning and memory impairments, brain damage, cognitive injury, memory impairment, attention and concentration impairment and sleep disturbance.

35. As a further result of the negligence, carelessness and tortious conduct of the Defendants, jointly and severally, Plaintiff has been caused to undergo prolonged and permanent severe physical, emotional and mental injuries, pain and suffering, mental anguish, anxiety, depression, humiliation and emotional distress, from which he will continue to suffer for an indefinite time in the future, all to his great detriment and loss.

36. As a further result of the negligence, carelessness and tortious conduct of the Defendants, jointly and severally, Plaintiff has been obliged to receive and undergo medical/rehabilitative attention and care and Plaintiff has incurred various and substantial expenses to pay for that medical/rehabilitative attention and care and he will continue to receive such attention and care and will be required to expend such sums or incur such expenditures for an indefinite time in the future, all to his great detriment and loss.

37. As a further result of the negligence, carelessness and tortious conduct of the Defendants, jointly and severally, Plaintiff has been unable to attend to his usual daily activities, household services, labors, avocations and social activities, and he will continue to be so restricted for an indefinite time in the future, all to his great detriment and loss.

38. As a further result of the negligence, carelessness and tortious conduct of the Defendants, jointly and severally, Plaintiff has suffered and will continue to suffer a loss of earnings and earning capacity, all to his great detriment and loss.

39. As a further result of the negligence, carelessness and tortuous conduct of the Defendants, jointly and severally, Plaintiff has suffered and will continue to suffer a loss of enjoyment of life and life's pleasures, all to his great detriment and loss.

COUNT I (NEGLIGENCE)
PLAINTIFF v. PCP PRACTICE

40. Paragraphs 1 through 39 above are incorporated herein by reference as if fully set forth at length.

41. At all times relevant, Defendant, _____, acting by the through its real, ostensible and/or apparent agents, servants and/or employers, particularly Dr. _____ and Dr. _____, had a duty to care for, diagnose and treat Plaintiff in accordance with accepted standards of medical care.

42. At all relevant times, Defendant breached its duties to Plaintiff and was negligent and careless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to obtain a full, complete and adequate history;

(b) Failure to properly perform complete and thorough physical, cardiac and respiratory examinations of Plaintiff;

(c) Failure to order, evaluate and take appropriate action in response to the signs, symptoms and medical history of Plaintiff;

(d) Failure to consider, investigate and diagnose a cardiac course for Plaintiff's symptoms;

(e) Failure to refer Plaintiff to appropriate specialists, including cardiology and neurology consultations, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(f) Failure to timely order and perform diagnostic testing, including but not limited to echocardiogram and transesophageal echocardiogram;

(g) Failure to closely monitor the condition of Plaintiff;

(h) Failure to initiate therapy to treat Plaintiff's condition;

(i) Failure to promptly and properly advise the Plaintiff of the risks of his medical condition and increased risk of harm and stroke from his condition;

(j) Causing delay in the diagnosis and treatment of Plaintiff's PFO;

(k) Permitting Plaintiff's condition to progress, leading to acute cerebral stroke;

(l) Failure to properly and promptly evaluate, diagnose and treat the medical condition, health and well-being of Plaintiff;

(m) Misrepresenting and/or misinforming Plaintiff that his medical condition was not serious and failing to properly inform Plaintiff of the severity of his condition and the need for urgent follow-up, care, monitoring and treatment;

(n) Failure to recognize and treat the condition of the Plaintiff that progressed to a stroke that could have been avoided by timely diagnosis, management and intervention;

(o) Failure to prevent stroke secondary to the PFO;

(p) Failure in general to give adequate care and to timely intervene, study and attend to Plaintiff's PFO, thereby increasing the risks of harm to Plaintiff, including acute cerebral stroke;

(q) Failure to properly recognize and appreciate the seriousness of Plaintiff's symptomatology, in particular, his persistent shortness of breath, chest pain; and/or lightheadedness;

(r) Failure to properly investigate and determine the etiology of Plaintiff's syncope and dizziness;

(s) Failure to properly investigate and determine the etiology of Plaintiff's shortness of breath and chest pain;

(t) Failure to exercise due care by rendering an erroneous diagnosis of musculoskeletal pain and asthma;

(u) Failure to timely search for, recognize and appreciate the severity of the condition and risks of emboli to Plaintiff and to immediately seek and obtain the advice, experience and expertise of qualified specialists;

(v) Failure to act reasonably by reducing the risks of harm to Plaintiff;

(w) Failure to select, train and supervise properly its agents, servants and/or employees and/or those who appeared to be its agents; servants and/or employees;

(x) Failure to provide total health care management to its minor patient.

43. Defendant undertook to render care to Plaintiff which it knew or should have known under the circumstances was necessary for the protection of Plaintiff and the negligence and carelessness of the Defendant as set forth herein increased the risk of the harm, injuries and other losses sustained by the Plaintiff, and was a cause in fact of Plaintiff's serious and permanent injuries and other losses.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT II (NEGLIGENCE)
PLAINTIFF v. PCP

44. Paragraphs 1 through 43 above are incorporated herein by reference as if fully set forth at length.

45. At all times relevant, Defendant, Dr. _____, had a duty to care for, diagnose and treat Plaintiff in accordance with accepted standards of medical care.

46. At all relevant times, Defendant, Dr. _____, breached his duties to Plaintiff and was negligent and careless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to obtain a full, complete and adequate history;

(b) Failure to properly perform complete and thorough physical, cardiac and respiratory examinations of Plaintiff;

(c) Failure to order, evaluate and take appropriate action in response to the signs, symptoms and medical history of Plaintiff;

(d) Failure to consider, investigate and diagnose a cardiac course for Plaintiff's symptoms;

(e) Failure to refer Plaintiff to appropriate specialists, including cardiology and neurology consultations, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(f) Failure to timely order and perform diagnostic testing, including but not limited to echocardiogram and transesophageal echocardiogram;

(g) Failure to closely monitor the condition of Plaintiff;

(h) Failure to initiate therapy to treat Plaintiff's condition;

(i) Failure to promptly and properly advise the Plaintiff of the risks of his medical condition and increased risk of harm and stroke from his condition;

(j) Causing delay in the diagnosis and treatment of Plaintiff's PFO;

(k) Permitting Plaintiff's condition to progress, leading to acute cerebral stroke;

(l) Failure to properly and promptly evaluate, diagnose and treat the medical condition, health and well-being of Plaintiff;

(m) Misrepresenting and/or misinforming Plaintiff that his medical condition was not serious and failing to properly inform Plaintiff of the severity of his condition and the need for urgent follow-up, care, monitoring and treatment;

(n) Failure to recognize and treat the condition of the Plaintiff that progressed to a stroke that could have been avoided by timely diagnosis, management and intervention;

(o) Failure to prevent stroke secondary to the PFO;

(p) Failure in general to give adequate care and to timely intervene, study and attend to Plaintiff's PFO, thereby increasing the risks of harm to Plaintiff, including acute cerebral stroke;

(q) Failure to properly recognize and appreciate the seriousness of Plaintiff's symptomatology, in particular, his persistent shortness of breath, chest pain; and/or lightheadedness;

(r) Failure to properly investigate and determine the etiology of Plaintiff's syncope and dizziness;

(s) Failure to properly investigate and determine the etiology of Plaintiff's shortness of breath and chest pain;

(t) Failure to exercise due care by rendering an erroneous diagnosis of musculoskeletal pain and asthma;

(u) Failure to timely search for, recognize and appreciate the severity of the condition and risks of emboli to Plaintiff and to immediately seek and obtain the advice, experience and expertise of qualified specialists;

(v) Failure to act reasonably by reducing the risks of harm to Plaintiff;

(w) Failure to select, train and supervise properly his agents, servants and/or employees and/or those who appeared to be his agents, servants and/or employees;

(x) Failure to provide total health care management to his minor patient.

47. Defendant undertook to render care to Plaintiff which he knew or should have known under the circumstances was necessary for the protection of Plaintiff and the negligence and carelessness of the Defendant as set forth herein increased the risk of the harm, injuries and other losses sustained by the Plaintiff, and was a cause in fact of Plaintiff's serious and permanent injuries and other losses.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____, M.D., jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT III (NEGLIGENCE)
PLAINTIFF v. PCP

48. Paragraphs 1 through 47 above are incorporated herein by reference as if fully set forth at length.

49. At all times relevant, Defendant, Dr. _____, had a duty to care for, diagnose and treat Plaintiff in accordance with accepted standards of medical care.

50. At all relevant times, Defendant, Dr. _____, breached his duties to Plaintiff and was negligent and careless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to obtain a full, complete and adequate history;

(b) Failure to properly perform complete and thorough physical, cardiac and respiratory examinations of Plaintiff;

(c) Failure to order, evaluate and take appropriate action in response to the signs, symptoms and medical history of Plaintiff;

(d) Failure to consider, investigate and diagnose a cardiac course for Plaintiff's symptoms;

(e) Failure to refer Plaintiff to appropriate specialists, including cardiology and neurology consultations, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(f) Failure to timely order and perform diagnostic testing, including but not limited to echocardiogram and transesophageal echocardiogram;

(g) Failure to closely monitor the condition of Plaintiff;

(h) Failure to initiate therapy to treat Plaintiff's condition;

(i) Failure to promptly and properly advise the Plaintiff of the risks of his medical condition and increased risk of harm and stroke from his condition;

(j) Causing delay in the diagnosis and treatment of Plaintiff's PFO;

(k) Permitting Plaintiff's condition to progress, leading to acute cerebral stroke;

(l) Failure to properly and promptly evaluate, diagnose and treat the medical condition, health and well-being of Plaintiff;

(m) Misrepresenting and/or misinforming Plaintiff that his medical condition was not serious and failing to properly inform Plaintiff of the severity of his condition and the need for urgent follow-up, care, monitoring and treatment;

(n) Failure to recognize and treat the condition of the Plaintiff that progressed to a stroke that could have been avoided by timely diagnosis, management and intervention;

(o) Failure to prevent stroke secondary to the PFO;

(p) Failure in general to give adequate care and to timely intervene, study and attend to Plaintiff's PFO, thereby increasing the risks of harm to Plaintiff, including acute cerebral stroke;

(q) Failure to properly recognize and appreciate the seriousness of Plaintiff's symptomatology, in particular, his episodes of syncope and persistent dyspnea;

(r) Failure to properly investigate and determine the etiology of Plaintiff's syncope and dizziness;

(s) Failure to properly investigate and determine the etiology of Plaintiff's shortness of breath;

(t) Failure to timely search for, recognize and appreciate the severity of the condition and risks of emboli to Plaintiff and to immediately seek and obtain the advice, experience and expertise of qualified specialists;

(u) Failure to act reasonably by reducing the risks of harm to Plaintiff;

(v) Failure to select, train and supervise properly his agents, servants and/or employees and/or those who appeared to be his agents, servants and/or employees;

(w) Failure to provide total health care management to his minor patient.

51. Defendant undertook to render care to Plaintiff which he knew or should have known under the circumstances was necessary for the protection of Plaintiff and the negligence and carelessness of the Defendant as set forth herein increased the risk of the harm, injuries and other losses sustained by the Plaintiff, and was a cause in fact of Plaintiff's serious and permanent injuries and other losses.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____, M.D., jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT IV (CORPORATE NEGLIGENCE)
PLAINTIFF v. PCP PRACTICE

52. Paragraphs 1 through 51 above are incorporated by reference as if fully set forth at length.

53. At all times relevant and material hereto, Defendant, _____, had a duty to ascertain that the physicians, nurses and staff in its employ, particularly, Defendants, Dr. _____ and Dr. _____, were and remained competent and qualified to treat and care for patients within its office and all outpatient and inpatient Hospital settings, including Plaintiff to determine that appropriate policies and procedures were implemented and carried out within the professional corporation, to supervise the medical services and treatment rendered by its physicians and staff, and to take all steps necessary to ensure that appropriate and necessary monitoring, treatment and care, referrals, testing, facilities and equipment were available, provided and utilized in the treatment and care of Plaintiff.

54. At all times relevant and material hereto, Defendant, _____, breached its foregoing duties and was negligent in the following particular respects:

(a) Failure to exercise due care in formulating, adopting and enforcing adequate policies, guidelines, protocols, procedures, rules and regulations to be followed by physicians in connection with the diagnosis, treatment, management and care of its patient's cardiac conditions;

(b) Failure to select and retain only competent and qualified physicians and staff, who were skilled and knowledgeable of the signs and symptoms of cardiac conditions and the diagnosis and management of cardiac conditions, particularly in pediatric patients;

(c) Failure to formulate, adopt and enforce adequate policies, guidelines, protocols, procedures, rules and regulations to ensure safe quality of care for its patients, including timely referral to cardiac specialists;

(d) Failure to monitor, manage and review ongoing medical services being provided within its corporate structure pursuant to rules and regulations governing the corporation;

(e) Failure to implement and determine compliance with proper policies, guidelines, protocols, procedures, rules and regulations necessary for the provision of safe and proper medical diagnosis, management, planning and care of its patients, and in particular, necessary to the safety and total health care of Plaintiff herein;

(f) Failure to use reasonable care to maintain its facilities and equipment in good and proper working order for use in examining, diagnosing, testing, monitoring, managing and caring for the Plaintiff;

(g) Failure to properly and adequately supervise the physicians practicing and working within its corporate structure to determine that safe and proper care and treatment was being provided to Plaintiff within the standard of care.

55. The foregoing negligent acts and omissions of Defendant, _____, increased the risk of harm and were substantial causes in fact of the harm suffered by Plaintiff.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT V (NEGLIGENCE)
PLAINTIFF v. HOSPITAL

56. Paragraphs 1 through 55 above are incorporated herein by reference as if fully set forth at length.

57. At all relevant times, Defendant, _____ Hospital, acting by and through its real, ostensible, and/or apparent agents, servants, employees and/or contractors, particularly Dr. _____, Dr. _____ and _____, had a duty to care

for, diagnose and treat Plaintiff in accordance with accepted standards of medical and emergency care.

58. At all relevant times, Defendant breached its duties to Plaintiff and was negligent, careless and/or reckless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to obtain a full, complete and adequate history;

(b) Failure to properly perform a thorough physical examination of Plaintiff;

(c) Failure to order, evaluate and take appropriate action in response to the signs, symptoms and medical history;

(d) Failure to properly consider and investigate the diagnosis of impending stroke;

(e) Failure to obtain neurology consultation, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(f) Failure to obtain cardiology consultation, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(g) Failure to timely order and perform diagnostic testing, including but not limited to CT scan, MRI, echocardiogram, blood work and transesophageal echocardiogram;

(h) Failure to promptly initiate therapy to treat Plaintiff's condition;

(i) Failure to promptly and properly advise the Plaintiff of the risks of his medical condition and the potential for stroke;

(j) Causing delay in the diagnosis and treatment of Plaintiff's impending stroke;

(k) Permitting Plaintiff's condition to progress, leading to acute cerebral stroke;

(l) Failure to properly and promptly evaluate, diagnose and treat the medical condition, health and well-being of Plaintiff;

(m) Failure to recognize and treat the condition of the Plaintiff that progressed to a stroke that could have been avoided by timely diagnosis, management and intervention;

(n) Failure to prevent stroke;

(o) Failure to exercise due care according to appropriate standards of care by improperly temporizing the medical treatment, care and/or advice provided to Plaintiff until the condition of Plaintiff became irreversible and permanent, all of which could have been avoided;

(p) Failure in general to give adequate care and to timely intervene, study and attend to Plaintiff's impending stoke, thereby increasing the risks of harm to Plaintiff, including acute cerebral stroke;

(q) Failure to properly recognize and appreciate the seriousness of Plaintiff's symptomatology, in particular his blurred vision, slurred speech, loss of balance, inability to stand and walk, arm weakness, headache, vomiting, chest pain, shortness of breath, lightheadedness, dizziness, anxiety, tingling and numbness in the hands, racing heart and other complaints and symptoms of impending stroke;

(r) Failure to timely search for, recognize and appreciate the severity of the condition and risks of impending stroke and to immediately seek and obtain the advice, experience and expertise of qualified specialists;

(s) Failure to act reasonably by failing to prevent harm to Plaintiff;

(t) Failure to select, train and supervise properly its agents, servants and/or employees and/or those who appeared to be its agents, servants and/or employees;

(u) Failure to admit Plaintiff for observation, management, testing, diagnosis and treatment;

(v) Failure to render due care by rendering the incorrect diagnosis of hyperventilation and panic attack;

(w) Failure to perform testing of any kind, discharging Plaintiff to home in an unstable condition when it knew or should have known that Plaintiff could not walk, had slurred speech, tingling sensation, extremity weakness, central chest pain and other signs and symptoms of impending stroke;

(x) Failure to order and perform full neurologic and/or cardiac work-up;

(y) Failure to promptly initiate anti-coagulation therapy;

(z) Failure to promptly initiate thrombolysis;

(aa) Misrepresenting to Plaintiff the nature of his medical condition and failing to properly inform Plaintiff of the severity of his condition and need for immediate or urgent follow-up care;

(bb) Failure to promptly and properly determine the cause of Plaintiff's abnormal complaints, signs and symptoms;

(cc) Failure to emergently and/or urgently investigate and rule out life-threatening differential diagnoses for Plaintiff's condition;

(dd) Failure to initiate required medical treatment in a Hospital setting, instead, discharging Plaintiff to home without appropriate instructions;

(ee) Failure to take all possible steps to avoid the development and spread of emboli and thereafter failing to promptly and properly assess and monitor the patient in order to make a timely diagnosis of his condition so that appropriate and necessary medical attention, intervention and care could be administered in a timely fashion to avoid and reduce the risks of harm from acute cerebral stroke.

59. The foregoing negligent acts, omissions and recklessness of Defendant, _____ Hospital, increased the risk of harm and was a cause in fact of the harm suffered by Plaintiff.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____ Hospital, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT VI (NEGLIGENCE)
PLAINTIFF v. ER CORPORATION

60. Paragraphs 1 through 59 above are incorporated herein by reference as if fully set forth at length.

61. At all relevant times, Defendant, _____, acting by and through its real, ostensible, and/or apparent agents, servants employees, and/or

contractors, particularly Dr. _____ and Dr. _____, had a duty to care for, diagnose and treat Plaintiff in accordance with accepted standards of medical and emergency care.

62. At all relevant times, Defendant breached its duties to Plaintiff and was negligent, careless and/or reckless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to obtain a full, complete and adequate history;

(b) Failure to properly perform a thorough physical examination of Plaintiff;

(c) Failure to order, evaluate and take appropriate action in response to the signs, symptoms and medical history;

(d) Failure to properly consider and investigate the diagnosis of impending stroke;

(e) Failure to obtain neurology consultation, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(f) Failure to obtain cardiology consultation, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(g) Failure to timely order and perform diagnostic testing, including but not limited to CT scan, MRI, echocardiogram, blood work and transesophageal echocardiogram;

(h) Failure to promptly initiate therapy to treat Plaintiff's condition;

(i) Failure to promptly and properly advise the Plaintiff of the risks of his medical condition and the potential for stroke;

(j) Causing delay in the diagnosis and treatment of Plaintiff's impending stroke;

(k) Permitting Plaintiff's condition to progress, leading to acute cerebral stroke;

(l) Failure to properly and promptly evaluate, diagnose and treat the medical condition, health and well-being of Plaintiff;

(m) Failure to recognize and treat the condition of the Plaintiff that progressed to a stroke that could have been avoided by timely diagnosis, management and intervention;

(n) Failure to prevent stroke;

(o) Failure to exercise due care according to appropriate standards of care by improperly temporizing the medical treatment, care and/or advice provided to Plaintiff until the condition of Plaintiff became irreversible and permanent, all of which could have been avoided;

(p) Failure in general to give adequate care and to timely intervene, study and attend to Plaintiff's impending stoke, thereby increasing the risks of harm to Plaintiff, including acute cerebral stroke;

(q) Failure to properly recognize and appreciate the seriousness of Plaintiff's symptomatology, in particular his blurred vision, slurred speech, loss of balance, inability to stand and walk, arm weakness, headache, vomiting, chest pain, shortness of breath, lightheadedness, dizziness, anxiety, tingling and numbness in the hands, racing heart and other complaints and symptoms of impending stroke;

(r) Failure to timely search for, recognize and appreciate the severity of the condition and risks of impending stroke and to immediately seek and obtain the advice, experience and expertise of qualified specialists;

(s) Failure to act reasonably by failing to prevent harm to Plaintiff;

(t) Failure to select, train and supervise properly its agents, servants and/or employees and/or those who appeared to be its agents, servants and/or employees;

(u) Failure to admit Plaintiff for observation, management, testing, diagnosis and treatment;

(v) Failure to render due care by rendering the incorrect diagnosis of hyperventilation and panic attack;

(w) Failure to perform testing of any kind, discharging Plaintiff to home in an unstable condition when it knew or should have known that Plaintiff could not walk, had slurred speech, tingling sensation, extremity weakness, central chest pain and other signs and symptoms of impending stroke;

(x) Failure to order and perform full neurologic and/or cardiac work-up;

(y) Failure to promptly initiate anti-coagulation therapy;

(z) Failure to promptly initiate thrombolysis;

(aa) Misrepresenting to Plaintiff the nature of his medical condition and failing to properly inform Plaintiff of the severity of his condition and need for immediate or urgent follow-up care;

(bb) Failure to promptly and properly determine the cause of Plaintiff 's abnormal complaints, signs and symptoms;

(cc) Failure to emergently and/or urgently investigate and rule out life-threatening differential diagnoses for Plaintiff's condition;

(dd) Failure to initiate required medical treatment in a Hospital setting, instead, discharging Plaintiff to home without appropriate instructions;

(ee) Failure to take all possible steps to avoid the development and spread of emboli and thereafter failing to promptly and properly assess and monitor the patient in order to make a timely diagnosis of his condition so that appropriate and necessary medical attention, intervention and care could be administered in a timely fashion to avoid and reduce the risks of harm from acute cerebral stroke.

63. The foregoing negligent acts, omissions and recklessness of Defendant, _____, increased the risk of harm and was a cause in fact of the harm suffered by Plaintiff.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT VII (NEGLIGENCE)
PLAINTIFF v. ER DOCTOR

64. Paragraphs 1 through 63 above are incorporated herein by reference as if fully set forth at length.

65. At all relevant times, Defendant, Dr. _____, had a duty to care for, diagnose and treat Plaintiff in accordance with accepted standards of medical and emergency care.

66. At all relevant times, Defendant, Dr. _____, breached his duties to Plaintiff and was negligent, careless and/or reckless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to obtain a full, complete and adequate history;

(b) Failure to properly perform a thorough physical examination of Plaintiff;

(c) Failure to order, evaluate and take appropriate action in response to the signs, symptoms and medical history;

(d) Failure to properly consider and investigate the diagnosis of impending stroke;

(e) Failure to obtain neurology consultation, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(f) Failure to obtain cardiology consultation, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(g) Failure to timely order and perform diagnostic testing, including but not limited to CT scan, MRI, echocardiogram, blood work and transesophageal echocardiogram;

(h) Failure to promptly initiate therapy to treat Plaintiff's condition;

(i) Failure to promptly and properly advise the Plaintiff of the risks of his medical condition and the potential for stroke;

(j) Causing delay in the diagnosis and treatment of Plaintiff's impending stroke;

(k) Permitting Plaintiff's condition to progress, leading to acute cerebral stroke;

(l) Failure to properly and promptly evaluate, diagnose and treat the medical condition, health and well-being of Plaintiff;

(m) Failure to recognize and treat the condition of the Plaintiff that progressed to a stroke that could have been avoided by timely diagnosis, management and intervention;

(n) Failure to prevent stroke;

(o) Failure to exercise due care according to appropriate standards of care by improperly temporizing the medical treatment, care and/or advice provided

to Plaintiff until the condition of Plaintiff became irreversible and permanent, all of which could have been avoided;

(p) Failure in general to give adequate care and to timely intervene, study and attend to Plaintiff's impending stoke, thereby increasing the risks of harm to Plaintiff, including acute cerebral stroke;

(q) Failure to properly recognize and appreciate the seriousness of Plaintiff's symptomatology, in particular his blurred vision, slurred speech, loss of balance, inability to stand and walk, arm weakness, headache, vomiting, chest pain, shortness of breath, lightheadedness, dizziness, anxiety, tingling and numbness in the hands, racing heart and other complaints and symptoms of impending stroke;

(r) Failure to timely search for, recognize and appreciate the severity of the condition and risks of impending stroke and to immediately seek and obtain the advice, experience and expertise of qualified specialists;

(s) Failure to act reasonably by failing to prevent harm to Plaintiff;

(t) Failure to select, train and supervise properly his agents, servants and/or employees and/or those who appeared to be his agents, servants and/or employees;

(u) Failure to admit Plaintiff for observation, management, testing, diagnosis and treatment;

(v) Failure to render due care by rendering the incorrect diagnosis of hyperventilation and panic attack;

(w) Failure to perform testing of any kind, discharging Plaintiff to home in an unstable condition when he knew or should have known that Plaintiff could not walk, had slurred speech, tingling sensation, extremity weakness, central chest pain and other signs and symptoms of impending stroke;

(x) Failure to order and perform full neurologic and/or cardiac work-up;

(y) Failure to promptly initiate anti-coagulation therapy;

(z) Failure to promptly initiate thrombolysis;

(aa) Misrepresenting to Plaintiff the nature of his medical condition and failing to properly inform Plaintiff of the severity of his condition and need for immediate or urgent follow-up care;

(bb) Failure to promptly and properly determine the cause of Plaintiff 's abnormal complaints, signs and symptoms;

(cc) Failure to emergently and/or urgently investigate and rule out life-threatening differential diagnoses for Plaintiff's condition;

(dd) Failure to initiate required medical treatment in a Hospital setting, instead, discharging Plaintiff to home without appropriate instructions;

(ee) Failure to take all possible steps to avoid the development and spread of emboli and thereafter failing to promptly and properly assess and monitor the patient in order to make a timely diagnosis of his condition so that appropriate and necessary medical attention, intervention and care could be administered in a timely fashion to avoid and reduce the risks of harm from acute cerebral stroke.

67. The foregoing negligent acts, omissions and recklessness of Defendant, Dr. _____, increased the risk of harm and was a cause in fact of the harm suffered by Plaintiff.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____ jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT VIII (NEGLIGENCE)
PLAINTIFF v. ER DOCTOR

68. Paragraphs 1 through 67 above are incorporated herein by reference as if fully set forth at length.

69. At all relevant times, Defendant, Dr. _____, had a duty to care for, diagnose and treat Plaintiff in accordance with accepted standards of medical and emergency care.

70. At all relevant times, Defendant, Dr. _____, breached his duties to Plaintiff and was negligent, careless and/or reckless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to obtain a full, complete and adequate history;

(b) Failure to properly perform a thorough physical examination of Plaintiff;

(c) Failure to order, evaluate and take appropriate action in response to the signs, symptoms and medical history;

(d) Failure to properly consider and investigate the diagnosis of impending stroke;

(e) Failure to obtain neurology consultation, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(f) Failure to obtain cardiology consultation, for specialized examination, testing, monitoring, diagnosis, management, treatment and care;

(g) Failure to timely order and perform diagnostic testing, including but not limited to CT scan, MRI, echocardiogram, blood work and transesophageal echocardiogram;

(h) Failure to promptly initiate therapy to treat Plaintiff's condition;

(i) Failure to promptly and properly advise the Plaintiff of the risks of his medical condition and the potential for stroke;

(j) Causing delay in the diagnosis and treatment of Plaintiff's impending stroke;

(k) Permitting Plaintiff's condition to progress, leading to acute cerebral stroke;

(l) Failure to properly and promptly evaluate, diagnose and treat the medical condition, health and well-being of Plaintiff;

(m) Failure to recognize and treat the condition of the Plaintiff that progressed to a stroke that could have been avoided by timely diagnosis, management and intervention;

(n) Failure to prevent stroke;

(o) Failure to exercise due care according to appropriate standards of care by improperly temporizing the medical treatment, care and/or advice provided to Plaintiff until the condition of Plaintiff became irreversible and permanent, all of which could have been avoided;

(p) Failure in general to give adequate care and to timely intervene, study and attend to Plaintiff's impending stoke, thereby increasing the risks of harm to Plaintiff, including acute cerebral stroke;

(q) Failure to properly recognize and appreciate the seriousness of Plaintiff's symptomatology, in particular his blurred vision, slurred speech, loss of balance, inability to stand and walk, arm weakness, headache, vomiting, chest pain, shortness of breath, lightheadedness, dizziness, anxiety, tingling and numbness in the hands, racing heart and other complaints and symptoms of impending stroke;

(r) Failure to timely search for, recognize and appreciate the severity of the condition and risks of impending stroke and to immediately seek and obtain the advice, experience and expertise of qualified specialists;

(s) Failure to act reasonably by failing to prevent harm to Plaintiff;

(t) Failure to select, train and supervise properly his agents, servants and/or employees and/or those who appeared to be his agents, servants and/or employees;

(u) Failure to admit Plaintiff for observation, management, testing, diagnosis and treatment;

(v) Failure to render due care by rendering the incorrect diagnosis of hyperventilation and panic attack;

(w) Failure to perform testing of any kind, discharging Plaintiff to home in an unstable condition when he knew or should have known that Plaintiff could not walk, had slurred speech, tingling sensation, extremity weakness, central chest pain and other signs and symptoms of impending stroke;

(x) Failure to order and perform full neurologic and/or cardiac work-up;

(y) Failure to promptly initiate anti-coagulation therapy;

(z) Failure to promptly initiate thrombolysis;

(aa) Misrepresenting to Plaintiff the nature of his medical condition and failing to properly inform Plaintiff of the severity of his condition and need for immediate or urgent follow-up care;

(bb) Failure to promptly and properly determine the cause of Plaintiff 's abnormal complaints, signs and symptoms;

(cc) Failure to emergently and/or urgently investigate and rule out life-threatening differential diagnoses for Plaintiff's condition;

(dd) Failure to initiate required medical treatment in a Hospital setting, instead, discharging Plaintiff to home without appropriate instructions;

(ee) Failure to take all possible steps to avoid the development and spread of emboli and thereafter failing to promptly and properly assess and monitor the patient in order to make a timely diagnosis of his condition so that appropriate and necessary medical attention, intervention and care could be administered in a timely fashion to avoid and reduce the risks of harm from acute cerebral stroke.

71. The foregoing negligent acts, omissions and recklessness of Defendant, Dr. _____, increased the risk of harm and was a cause in fact of the harm suffered by Plaintiff.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____, jointly and severally, in an amount in excess of Thirty Thousand (30,000.00) Dollars, together with interest and costs of suit.

COUNT IX - CORPORATE LIABILITY
PLAINTIFF v. HOSPITAL

72. Paragraphs 1 through 71 above are incorporated herein by reference as if fully set forth at length.

73. At all times relevant and material hereto, Defendant, _____, had a duty to ascertain that the physicians and nurses practicing, working and holding privileges in the Hospital Emergency Department were properly qualified, competent and skilled to evaluate, diagnose, treat and render emergency medical and medical and nursing care to patients presenting to the Hospital; to determine that appropriate multi-disciplinary policies and procedures were implemented and carried out within the Hospital; to supervise the multi-disciplinary care rendered in the Hospital; and to take all necessary steps to ensure that appropriate and necessary diagnoses, monitoring, care, testing, facilities and

equipment were available, provided and utilized in the examination, diagnosis, treatment, management and care of Plaintiff.

74. At all times relevant and material hereto, Defendant, _____, in its delivery of comprehensive emergency medical and multi-disciplinary health care services within the Hospital, knew or had reason to know that the physicians and staff practicing in the Emergency Department were not qualified or competent to care for its patients; that the policies and protocols were not adequate and/or were not adequately enforced; and that proper supervision of the practice of the physicians and nurses working in the Emergency Department was not being performed.

75. At all relevant times, Defendant breached its duties to Plaintiff and was negligent, careless and/or reckless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to ascertain that the physicians, nurses, staff and/or personnel working in the Emergency Department and Hospital were qualified, competent and skilled in the evaluation and treatment of patients presenting to the Emergency Department with symptoms of impending stroke;

(b) Failure to select, place and/or retain only competent physicians, nurses, staff, personnel and/or independent contractors to work in the Hospital Emergency Department;

(c) Allowing physicians to evaluate, attend to and treat patients presenting to the Emergency Department with symptoms of impending stroke who were not properly qualified and competent to recognize, evaluate and assess those symptoms;

(d) Failure to implement and/or enforce appropriate policies and procedures for the recognition, evaluation, assessment, management and treatment of impending stroke;

(e) Failure to implement and enforce appropriate policies and procedures for the timely and urgent performance of diagnostic studies upon the patient presenting with complaints, symptoms and signs of impending stroke;

(f) Failure to implement and enforce appropriate policies and procedures for the admission of patients to the Hospital presenting with complaints, signs and symptoms consistent with impending stroke;

(g) Failure to implement and enforce appropriate policies and procedures relating to the assessment and "triage" of patients presenting to the Emergency Department with complaints, signs and symptoms consistent with impending stroke;

(h) Failure to implement and enforce appropriate policies and procedures regarding timely undertaking of consultations;

(I) Failure to maintain safe and adequate Hospital facilities and equipment for the care and treatment of patients requiring appropriate emergency medical triage, examination, diagnosis, management and care;

(j) Failure to determine that Defendants, Drs. _____ and/or _____ and/or other agents, and ostensible agents who participated in the care of Plaintiff, were in fit and proper condition at the time of their care and treatment of Plaintiff;

(k) Failure to formulate, adopt and enforce adequate rules, policies, and regulations to ensure quality care for its patients, of which Defendant had actual or constructive knowledge, including the failure of the Emergency Department personnel to recognize, evaluate, assess, manage and treat patients for impending stroke;

(l) Failure to oversee and monitor all aspects of care being rendered by its physicians, nurses, personnel, staff and/or independent contractors in the Emergency Department;

(m) Failure to oversee and review the competence of all persons practicing emergency medicine within the Hospital as to patient care, including the evaluation, diagnosis, management and treatment of patients with signs and symptoms of impending stroke;

(n) Failure to protect and safeguard the health and well-being of patients, particularly Plaintiff herein;

(o) Failure to monitor, manage and review on-going medical, nursing and/or emergency medical services being provided by its physicians, agents, staff, nurses, personnel and/or independent contractors within the Hospital.

76. The foregoing negligent acts and omissions of Defendant, _____, increased the risk of harm and was a cause in fact of the harm suffered by Plaintiff.

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT X - CORPORATE LIABILITY
PLAINTIFF v. ER CORPORATION

77. Paragraphs 1 through 76 above are incorporated herein by reference as if fully set forth at length.

78. At all times relevant and material hereto, Defendant, _____, had a duty to ascertain that the physicians and nurses practicing, working and holding privileges in the _____ Hospital Emergency Department were properly qualified, competent and skilled to evaluate, diagnose, treat and render emergency medical and medical and nursing care to patients presenting to the Hospital; to determine that appropriate multi-disciplinary policies and procedures were implemented and carried out within the Hospital; to supervise the multi-disciplinary care rendered in the Practice Group and Hospital; and to take all necessary steps to ensure that appropriate and necessary diagnoses, monitoring, care, testing, facilities and equipment were available, provided and utilized in the examination, diagnosis, treatment, management and care of Plaintiff.

79. At all times relevant and material hereto, Defendant, _____, in its delivery of comprehensive emergency medical and multi-disciplinary health care services within the Practice Group and Hospital,

knew or had reason to know that the physicians and staff practicing in the Practice Group and Hospital Emergency Department were not qualified or competent to care for their patients; that the policies and protocols were not adequate and/or were not adequately enforced; and that proper supervision of the practice of the physicians and nurses working in the Practice Group and the Emergency Department was not being performed.

80. At all relevant times, Defendant breached its duties to Plaintiff and was negligent, careless and/or reckless, jointly and severally with the other Defendants, and in the following particular respects:

(a) Failure to ascertain that the physicians, nurses, staff and/or personnel working in the Practice Group and/or Hospital Emergency Department were qualified, competent and skilled in the evaluation and treatment of patients presenting to the Emergency Department with symptoms of impending stroke;

(b) Failure to select, place and/or retain only competent physicians, nurses, staff, personnel and/or independent contractors to work in the Practice Group and Hospital Emergency Department;

(c) Allowing physicians to evaluate, attend to and treat patients presenting to the Practice Group and/or the Hospital Emergency Department with symptoms of impending stroke who were not properly qualified and competent to recognize, evaluate and assess those symptoms;

(d) Failure to implement and/or enforce appropriate policies and procedures for the recognition, evaluation, assessment, management and treatment of impending stroke;

(e) Failure to implement and enforce appropriate policies and procedures for the timely and urgent performance of diagnostic studies upon the patient presenting with complaints, symptoms and signs of impending stroke;

(f) Failure to implement and enforce appropriate policies and procedures for the admission of patients to the Practice Group and/or Hospital presenting with complaints, signs and symptoms consistent with impending stroke;

(g) Failure to implement and enforce appropriate policies and procedures relating to the assessment and "triage" of patients presenting to the Practice

Group and/or Hospital Emergency Department with complaints, signs and symptoms consistent with impending stroke;

(h) Failure to implement and enforce appropriate policies and procedures regarding timely undertaking of consultations;

(I) Failure to maintain safe and adequate Hospital facilities and equipment for the care and treatment of patients requiring appropriate emergency medical triage, examination, diagnosis, management and care;

(j) Failure to determine that Defendants, Drs. _____ and/or _____ and/or other agents, and ostensible agents who participated in the care of Plaintiff, were in fit and proper condition at the time of their care and treatment of Plaintiff;

(k) Failure to formulate, adopt and enforce adequate rules, policies, and regulations to ensure quality care for its patients, of which Defendant had actual or constructive knowledge, including the failure of its Practice Group and/or Hospital Emergency Department personnel to recognize, evaluate, assess, manage and treat patients for impending stroke;

(l) Failure to oversee and monitor all aspects of care being rendered by its physicians, nurses, personnel, staff and/or independent contractors in the Practice Group and/or Hospital Emergency Department;

(m) Failure to oversee and review the competence of all persons practicing emergency medicine within the Practice Group and/or Hospital as to patient care, including the evaluation, diagnosis, management and treatment of patients with signs and symptoms of impending stroke;

(n) Failure to protect and safeguard the health and well-being of patients, particularly Plaintiff herein;

(o) Failure to monitor, manage and review on-going medical, nursing and/or emergency medical services being provided by its physicians, agents, staff, nurses, personnel and/or independent contractors within the Hospital.

81. The foregoing negligent acts and omissions of Defendant, _____, increased the risk of harm and was a cause in fact of the harm suffered by Plaintiff

WHEREFORE, Plaintiff demands judgment in his favor against Defendant, _____, jointly and severally, in an amount in excess of Thirty Thousand ($30,000.00) Dollars, together with interest and costs of suit.

COUNT XI - PUNITIVE DAMAGES
PLAINTIFF v. ER DOCTOR, ER DOCTOR, ER CORPORATION AND HOSPITAL

82. Paragraphs 1 through 81 above are incorporated herein by reference as if fully set forth at length.

83. At all times relevant and material hereto, Defendants, Dr. _____, Dr. _____, _____ Hospital and _____ knew of and allowed conditions and personnel deficiencies which increased the risk of harm to patients and willfully, knowingly and recklessly failed to properly ascertain and guard against such deficiencies, despite full knowledge of the risks of harm which could and did in fact befall Plaintiff.

84. At all times relevant and material hereto, the Defendants knew of and allowed conditions and personnel deficiencies which increased the risk of harm to patients and willfully, knowingly and recklessly misdiagnosed Plaintiff's condition on _____, 20__ and discharged him without further examination, assessment, consultation, testing and/or instructions, when they knew Plaintiff was visibly and obviously severely ill, vomiting, unable to stand or walk and demonstrating signs and symptoms of impending stroke, abandoning him in reckless disregard of the increased risks of harm presented thereby.

85. At all times relevant and material hereto, the Defendants, and/or their agents, employees and contractors, knew of and allowed their agents to knowingly, willfully and recklessly disregard indications of impending stroke causing trauma, distress, irreversible

brain damage and other serious and permanent injuries and, in fact, discharged the Plaintiff when they knew he was in a gravely ill condition, resulting in totally disabling and permanent injuries as detailed above, yet Defendants failed to act to avoid such occurrence.

86. At all times relevant and material hereto, Defendants, and/or their agents, employees and contractors, knew of and allowed conditions and personnel deficiencies which increased the risk of harm to patients, and Defendants knowingly, and willfully, and recklessly endangered the life, health and well being of the Plaintiff and/or acted with reckless indifference to the health, welfare, well being and life of the Plaintiff.

87. At all times relevant and material hereto, the Defendants acted callously and recklessly indifferent to the physical and emotional health and well being of Plaintiff when Defendants knew that they and/or their agents and contractors were indifferent to the ongoing complaints of Plaintiff and the complaints of his family that there was something drastically wrong, discharging Plaintiff knowing that he was seriously ill, unable to walk, vomiting, had slurred speech, headache, loss of balance, dyspnea, chest discomfort and other conditions that went unrecognized and untreated.

88. At all times relevant and material hereto, the conduct of Defendants detailed above, including, *inter alia*, the reckless indifference to the consequences of discharge and abandonment without further evaluation, assessment, consultation and/or testing was outrageous and with reckless indifference toward the health, safety and welfare of Plaintiff.

89. At all times relevant and material hereto, the Defendants directly acted and/or knew that their agents, employees and/or contractors acted intentionally, willfully and with reckless indifference to the rights of the Plaintiff.

90. At all times relevant and material hereto, the Defendants recklessly ignored the signs, symptoms, complaints and history of the Plaintiff discharging him in a gravely ill condition when they knew, were advised of and/or ignored the facts that he was unable to walk, vomiting and in need of immediate medical management, care, monitoring, testing and specialized intervention.

91. At all times relevant and material hereto, the conduct of the Defendants detailed above was intentional, willful, wanton or reckless conduct, including, *inter alia*, the misdiagnosis of a panic attack and the refusal to monitor, manage and treat Plaintiff's gravely ill condition, discharging him when they knew that he suffered from ongoing vomiting and an inability to walk with multiple symptoms indicative of an impending stroke.

92. At all times relevant and material hereto, the conduct of the Defendants detailed above displayed outrageous and reckless indifference to the rights, health, welfare and safety of the Plaintiff.

WHEREFORE, Plaintiff demands judgment against Defendants, _____, _____, _____ Hospital, and _____ jointly and severally, for punitive damages in an amount in excess of Thirty Thousand Dollars ($30,000.00), together with interest and costs of suit.

By: _____
Attorneys for Plaintiff

PODIATRIC MALPRACTICE

		ATTORNEYS FOR PLAINTIFF
PLAINTIFF	:	COURT OF COMMON PLEAS
Plaintiff	:	CIVIL ACTION - LAW
v.	:	JURY TRIAL DEMANDED
DEFENDANT PODIATRIST	:	
and	:	NO:
DEFENDANT PODIATRIST	:	
and	:	
DEFENDANT CORPORATE PRACTICE	:	
Defendants	:	

CIVIL ACTION COMPLAINT

Plaintiff, by and through her undersigned attorneys hereby files the following Complaint - Civil Action making claim for damages against Defendants herein, jointly and severally, on the following causes of action:

1. Plaintiff is a resident and citizen of the Commonwealth of Pennsylvania, residing therein at the above captioned address.

2. Defendant, Podiatrist, hereinafter ("Dr. _____"), is a physician who, at all times pertinent hereto, has been a Doctor of Podiatry, duly licensed by and under the Commonwealth of Pennsylvania, with offices and a place of business located at the above-captioned address.

3. Defendant, Podiatrist, hereinafter ('Dr. _____"), is a physician who, at all times pertinent hereto, has been a Doctor of Podiatry, duly licensed by and under the Commonwealth of Pennsylvania, with offices and a place of business located at the above-captioned address.

4. Defendant, Corporate Practice, hereinafter ("_____"), is a professional corporation or other business entity, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business and/or professional office located at the above-captioned address. The purpose of _____ is to provide professional podiatry services, including surgical services. It is believed and therefore averred that at all times relevant and material hereto, Drs. _____ and _____were officers and shareholders in the corporation and thus, both the individual Defendants and the corporation are each responsible and liable for the acts of the other.

5. At all times relevant and material hereto, Drs. _____ and _____acted or appeared to be acting as the real, apparent and/or ostensible agents, employees, administrators and/or representatives of _____.

6. At all times relevant and material hereto, _____ acted or appeared to be acting through its agents, servants, employees, administrators and/or representatives in the course and scope of their employment and/or appointment and in the furtherance of the business of said defendant, including particularly, Drs _____ and _____.

7. At all times relevant and material hereto, Drs. _____ and _____were engaged in the practice of podiatry and were obliged to bring to bear in the practice of their profession, the professional skill, knowledge and care which they possessed and to pursue their profession in accordance with reasonably safe and acceptable standards of medicine in general and podiatry in particular.

8. Plaintiff is asserting a professional liability claim against Defendants.

9. From _____, 20___through _____, 20__, Plaintiff was treated by Defendants; during said period of time, a physician-podiatric/patient relationship existed between Plaintiff and Defendants.

10. During the aforementioned treatment, Plaintiff was under the care of and subject to the supervision of Defendants; said Defendants were obliged to properly treat and supervise the treatment of _____, including proper diagnostic tests, examination, diagnosis and medical, podiatric and surgical treatment and care and post-surgical follow-up, management, treatment and care.

11. On or about _____, 20__, Plaintiff, presented to Defendant, _____ with bilateral enlargement and inflamation to her first metatarsal joints, which radiographically demonstrated hallux limitus with a first metatarsal elevatus.

12. On or about _____, 20__, Defendants performed bilateral bunionectomy with osteotomy of first metatarsal and K-Y fixation, excision of the bone of the second metatarsal cuneiform joint and Tailor's bunionectomy upon their patient, Plaintiff.

13. Defendants post-operatively followed Plaintiff noting, in part, that Plaintiff demonstrated plantar flexion of the left hallux with guarding and instability of the left foot.

14. As a result of the _____, 20__ surgical procedure, Defendants caused Plaintiff to develop a hallux varus deformity of the left foot with an inability to extend her great toe, which Defendants failed to recognize, evaluate or treat.

15. At no time did Defendants, or anyone from _____, advise Plaintiff that Defendants caused the hallux varus deformity that required further intervention and surgery.

16. As a result of the negligence and carelessness of the Defendants herein, Plaintiff required corrective surgery of her left foot on _____, 20__ consisting of a first metatarsal osteotomy, great toe osteotomy, cotton medial cuneiform osteotomy with allograft bone and plantar fasciotomy, and she will likely require further surgical intervention and treatment of both feet.

17. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff suffered severe physical pain and suffering, disfigurement, disability, mental anguish, humiliation, embarrassment, depression, and emotional distress and will continue to suffer from the same for an indefinite time in the future, all to her great detriment and loss.

18. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff has been obliged to receive and undergo medical, pediatric, surgical and rehabilitative attention and care, all of which she will continue to incur for an indefinite time in the future, and Plaintiff has been obliged to incur various and substantial expenses to pay for the attention and care, and she will likely require further intervention in the future involving both of her feet, resulting in the expenditure of further various and substantial expenditures for such attention and care, all to her great financial detriment and loss.

19. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff has suffered and will continue to suffer a loss of earnings and earning capacity.

20. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff has been unable and/or impaired in her ability to attend to her usual daily duties, labors, avocations, occupational and social activities and household services and will continue to be so restricted for an indefinite time in the future, all to her great personal and financial detriment and loss.

21. As a further result of the negligence and carelessness of the Defendants herein, Plaintiff has suffered and will continue to suffer a loss of enjoyment of life and life's pleasures, all to her great detriment and loss.

COUNT I
(NEGLIGENCE/RESPONDEAT SUPERIOR)

PLAINTIFF v. DEFENDANT PODIATRIST, DEFENDANT PODIATRIST AND DEFENDANT CORPORATE PRACTICE

22. Plaintiff incorporates by reference paragraphs one 1 through 21 above as if fully set forth in length.

23. The pain, suffering, injuries, disfigurement, disability and other losses of Plaintiff were directly and proximately caused by the negligence and carelessness of Defendants, Dr. _____ and _____, jointly and severally, with each other and/or Defendant, _____, and in the following particular respects:

(a) Failure to use due care to provide proper and adequate medical/podiatric and surgical care, examination, testing and treatment within the standard of care;

(b) Failure to possess the required degree of skill and knowledge under the circumstances to properly evaluate Plaintiff's condition, make the correct

diagnosis and perform the appropriate procedure indicated for Plaintiff's condition as initially presented to Defendants;

(c) Failure to perform a proper pre-surgical history and physical evaluation and diagnosis of the Plaintiff;

(d) Failure to formulate an appropriate surgical plan for Plaintiff;

(e) Performance of a bilateral surgical procedure that was not indicated for the Plaintiff's condition, particularly bilaterally bunionectomy with osteotomy, first metatarsal and K-Y fixation, excision of bone, second metatarsal cuneiform joint and Tailor's bunionectomy;

(f) Performance of incorrect, improper and inappropriate surgical technique resulting in hallux varus deformity;

(g) Negligent surgical over-correction or shift of the capital fragment of the first metatarsal head of the left foot;

(h) Failure to take necessary precautions to avoid over-correction of the capital fragment of the first metatarsal head;

(i) Failure to adequately and completely physically evaluate the operative site and anatomic landmarks and to technically perform the procedure correctly and in accordance with the standard of care;

(j) In relation to the history given, physical complaints, radiographic studies and overall status of Plaintiff's condition as presented to Defendants, failure to employ proper and accepted medical, podiatric and diagnostic modalities necessary to make proper decisions in the planning and performance of the appropriate surgical procedure upon Plaintiff;

(k) Failure to consider the contraindications, indications and risks of harm to Plaintiff before and during the course of the subject _____, 20__ incorrectly performed surgery as aforesaid, including joint shifting, failure, and/or over-correction;

(l) Failure to arrange, coordinate and communicate with Plaintiff and appropriate specialists upon all aspects of Plaintiff's medical-podiatric/surgical treatment and care so as to appreciate the risks of harm to Plaintiff from the negligently performed surgical procedure;

(m) Negligently exposing Plaintiff to increased risks of harm by performing the operative procedures simultaneously on both feet instead of separately with adequate healing in between procedures;

(n) Failure to timely recognize and treat the negligently caused over-correction of the capital fragment of the first metatarsal head of the left foot, which caused the joint to fail, requiring additional corrective surgery;

(o) Failure to exercise due care according to appropriate standards of care by improperly temporizing the post-surgical medical-podiatric treatment, care and/or advice provided to Plaintiff;

(p) Failure to immediately determine that their surgery was neither indicated nor correctly performed, covering up their surgical error resulting in further unnecessary exacerbation of Plaintiff's physical and emotional injuries and conditions by misleading Plaintiff as to the cause of her condition that required her to have additional appropriate intervention and corrective surgery due to Defendants' negligence as aforesaid;

(q) Failure to exercise due care by prematurely removing the K wire fixation post-operatively, increasing the risk of joint failure;

(r) Causing Plaintiff's left foot to become unstable and failing to advise Plaintiff on the appropriate post-surgical activity and rehabilitative regimen to follow, increasing the risk of harm to Plaintiff from joint failure;

(s) Failure to timely intervene, adequately protect and rehabilitate and correct the surgical error and post-surgical condition as aforesaid.

24. Defendants, Drs. _____ and _____, undertook to render care to Plaintiff, which they knew or should have known under the circumstances was necessary for the protection of Plaintiff, and the negligence and carelessness of the Defendants, jointly and severally, as set forth herein, was a cause of harm and injury sustained by Plaintiff which negligent conduct of Defendants exposed Plaintiff to increased risks of harm and was a factual cause in bringing about Plaintiff's serious and permanent injuries and other losses more fully set forth herein and incorporated by reference.

25. Defendant, _____, acting through its agents and employees, including Defendants, Drs. _____ and _____, undertook to render care to Plaintiff which they knew or should have known under the circumstances was necessary for the protection of Plaintiff, and the negligence and carelessness of Defendants as set forth herein, was a cause of harm and injuries sustained by Plaintiff, which negligent conduct of Defendants exposed Plaintiff to increased risks of harm and was a factual cause in bringing about Plaintiff's serious and permanent injuries and other losses, more

fully set forth herein and incorporated by reference, for which Defendant, _____, is liable under the theory of *respondeat superior*.

WHEREFORE, Plaintiff demands judgment in her favor against Defendants, jointly and severally, in an amount in excess of Fifty Thousand Dollars ($50,000.00), together with interest and costs of suit.

COUNT II (INFORMED CONSENT)

PLAINTIFF v. DEFENDANT PODIATRIST, DEFENDANT PODIATRIST AND DEFENDANT CORPORATE PRACTICE

26. Paragraphs 1 through 25 above are incorporated herein and by reference as if fully set forth at length.

27. At all times relevant hereto, Defendants, Drs. _____ and _____, had a duty to inform Plaintiff of Plaintiff's medical condition, available options and alternatives, and the nature and scope of the surgical procedure which was being undertaken upon her, of the other risks, complications, benefits and alternatives attendant to the procedure, and all material facts which a reasonable, prudent person would require to make an informed decision as to the surgical procedure.

28. At all times relevant and material hereto, Defendants, Drs. _____ and _____, failed to properly advise Plaintiff of the nature of her condition, of the precise nature and scope of the procedure, of the material risks attendant to the procedure, of other treatment options and alternatives, of the risks of such alternatives, of injuries which could occur during the procedure, and of the material facts which a reasonable, prudent person would need to consider in making decisions regarding the surgical procedure.

29. Had the Plaintiff received all of the material facts of which a reasonable, prudent patient would need to consider to make an informed decision regarding her

treatment, it would have been a substantial factor in her decision whether to undergo the invasive procedure.

30. As a direct and proximate result of the failure of Defendants, Drs. _____ and _____, to properly advise Plaintiff of all facts material to the understanding of the surgical procedure upon her, that procedure was undertaken without proper and informed consent constituting a battery upon the Plaintiff.

31. Performing the surgical procedure without first obtaining informed consent was an unconsented to touching, which is a battery under Pennsylvania law.

32. As the attending physicians/podiatrists responsible for the surgical procedure performed on _____, 20__, Drs. _____ and _____ were responsible to make sure that proper informed consent was obtained.

33. As a result of the failure by Drs. _____ and _____, individually and collectively, to obtain informed consent, Plaintiff suffered injuries and damages more fully set forth and incorporated herein by reference.

WHEREFORE, Plaintiff demands judgment in her favor against Defendants, jointly and severally, in an amount in excess of Fifty Thousand Dollars ($50,000.00), together with interest and costs of suit.

COUNT III (CORPORATE NEGLIGENCE)

PLAINTIFF V. DEFENDANT CORPORATE PRACTICE

34. Paragraphs 1 through 33 above are incorporated herein by reference as if fully set forth in length.

35. At all times relevant and material hereto, Defendant, _____, had a duty to ascertain that the physicians/podiatrists and staff in its employ, particularly, Defendants, Dr. _____ and Dr. _____, were and

remain competent and qualified to treat and care for patients within its office and all outpatient and inpatient hospital settings, including Plaintiff to determine that appropriate policies and procedures were implemented and carried out within the professional corporation, to supervise the medical services and treatment rendered by its corporate employee physicians/podiatrists and/or staff, and to take all steps necessary to ensure that appropriate and necessary monitoring, treatment and care, testing facilities and equipment were available, provided and utilized in the treatment and care of Plaintiff.

36. At all times relevant and material hereto, Defendant, _____, breached its foregoing duties, knew of the existence of certain conditions which required its supervision of the practice and surgical procedures of Dr. _____ and Dr. _____in connection with the care and treatment of Plaintiff and was negligent in the following particular respects:

(a) Failure to exercise due care in formulating, adopting and enforcing adequate policies, guidelines, protocols, procedures, rules and regulations to be followed by physicians, podiatrists, staff, personnel and/or independent contractors in connection with the bunionectomy with osteotomy, first metatarsal and K-Y fixation, excision of bone, second metatarsal cuneiform joint and Tailor's bunionectomy performed on both of Plaintiff's feet to avoid negligent surgical technique with its serious and permanent sequelae;

(b) Failure to exercise due care in the formulation, adoption and enforcement of adequate policies, guidelines, protocols, procedures, rules and regulations to be followed by physicians, podiatrists, staff, personnel and/or independent contractors in connection with the performance of the bunionectomy with osteotomy, first metatarsal and K-Y fixation, excision of bone, second metatarsal cuneiform joint and Tailor's bunionectomy of Plaintiff's feet to avoid serious and permanent injury;

(c) Failure to select and retain only competent physicians, podiatrists, staff, personnel and/or independent contractors in connection with the examination, testing, diagnosis, treatment, monitoring, management and care of individuals undergoing foot surgery so as to avoid harm by correctly performing indicated surgery for the conditions presented;

(d) Failure to formulate, adopt and enforce adequate policies, guidelines, protocols, procedures, rules and regulations to ensure safe quality of care for its patients undergoing operative treatment and post-operative management,

including bilateral bunionectomy with osteotomy, first metatarsal and K-Y fixation, excision of bone, second metatarsal cuneiform joint and Tailor's bunionectomy;

(e) Failure to monitor, manage and review ongoing medical, podiatric and surgical services being provided within its corporate structure pursuant to rules and regulations governing the corporation;

(f) Failure to implement and determine compliance with proper policies, guidelines, protocols, procedures, rules and regulations necessary for the provision of safe and proper medical/podiatric planning and care and for informed consent to its patients, and in particular, necessary to the safety and care of Plaintiff herein;

(g) Failure to use reasonable care to maintain its equipment in good and proper working order for use in examining, diagnosing, testing, monitoring, managing and surgically caring for the Plaintiff;

(h) Failure to properly and adequately supervise the physicians/podiatrists practicing and working within its corporate structure to determine that safe and proper care and treatment was being provided to Plaintiff and that pre-operative, operative and post-operative planning, technique and management was accomplished within the standard of care so as to avoid causing permanent and serious harm to Plaintiff.

WHEREFORE, Plaintiff demands judgment in her favor against Defendants, jointly and severally, in an amount in excess of Fifty Thousand Dollars ($50,000.00), together with interest and costs of suit.

By:_____

Attorneys for Plaintiff

WRONGFUL DEATH AND SURVIVIAL ACTION (HOSPITAL LIABILITY FOR NEGLIGENCE AND CORPORATE NEGLIGENCE AFTER GASTRIC BYPASS PROCEDURE)

ATTORNEYS FOR PLAINTIFF

PLAINTIFF **Plaintiff** **v.** **HOSPITAL** **and** **HOSPITAL** **Defendants**	**COURT OF COMMON PLEAS** **CIVIL ACTION - LAW** **JURY TRIAL DEMANDED** **NO.:**

COMPLAINT - CIVIL ACTION

Plaintiff, Administrator of the Estate of _____, individually and on behalf of the next of kin of _____, Deceased, by and through their undersigned attorneys hereby files the following Complaint - Civil Action against the Defendants named herein, jointly and severally, upon the following averments of fact:

1. Plaintiff, (hereinafter "Mr. _____"), is the Administrator of the Estate of _____, Deceased, having been so appointed by the _____ County Register of Wills on _____, 20__. At all times relevant material hereto,

Plaintiff resided at the above-captioned address; he and _____ were husband and wife.

2. Defendant Hospital, (hereinafter "_____") is and was, at all times relevant and material hereto, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, conducting business operations from a principal place of business located at the above-captioned address.

3. Defendant Hospital (hereinafter "_____"), is and was, at all times relevant and material hereto, a corporation organized and existing under the Laws of the Commonwealth of Pennsylvania, conducting business operations from a principal place of business located at the above-captioned address.

4. At all times relevant and material hereto, _____ and _____ were acting by and through their agents, servants, workers, employees, representatives, students, staff, physicians, nurses, dieticians, aides, ostensible agents, and/or contractors or those who appeared to be their agents, servants, workers, employees, representative, students, staff and/or contractors, who were acting within the course and scope of their employment/agency relationship and the scope of their authority in the furtherance of the business of the Defendants which operate and maintain hospital facilities for the care and treatment of patients at the above-captioned address.

5. On or about _____, 20__, Plaintiff's decedent, _____, underwent a laparoscopic gastric bypass surgical procedure involving extensive laparoscopic lysis of adhesions, laparoscopic hiatal hernial repair, laparoscopic distal Roux-en-Y gastric bypass and intraoperative upper endoscopy.

6. Following the subject gastric bypass procedure on _____, 20___ , Mrs. _____'s physicians ordered that her diet be "NPO until after swallow study."

7. On or about _____, 20__, Mrs. _____ underwent an upper GI contrast study that was negative for extravasation.

8. On or about _____, 20__, Mrs. _____'s diet was altered to a "Gastric Bypass Stage 1 - clear liquid, dietician may adjust the order -- one ounce per hour only".

9. On or about _____, 20__, the diet ordered for Mrs. _____ was changed to "Gastric Bypass Stage 1 - clear liquid, dietician may not adjust order – clear liquids 2 oz/hr."

10. On or about _____, 20__, despite the foregoing physicians' orders, and in disregard of such orders, Defendants negligently and carelessly placed Mrs. _____ on a modified diet where she reportedly consumed 80 percent of the food and/or liquid delivered to her contrary to physicians' orders for delivery of a Gastric Bypass Stage 1 diet.

11. On or about _____, 20__, Plaintiff's decedent, Mrs. _____ showed signs of a gastrojejunostomy leak.

12. On or about _____, 20__, in disregard of the foregoing physicians' orders and other orders that Mrs. _____ be maintained on a Gastric Bypass Stage 1 clear liquid diet, Defendants negligently and carelessly continued Mrs. _____ on a modified diet where she reportedly consumed 80% of the food and/or liquid delivered to her, contrary to all orders.

13. On or about _____, 20__, Mrs. _____ was ordered NPO.

14. As a result of the negligence of the defendants in providing an inappropriate, incorrect and improper diet to, Mrs. _____, she required intensive care treatment, was

found to have a positive methylene blue swallow study indicative of a gastrojejunostomy leak for which she underwent an exploratory laparotomy procedure to repair the leak on _____, 20__, revealing "frank food contents" within her abdomen.

15. As a result of the negligence of the defendants increasing the risks of and causing the gastrojejunostomy leak, Plaintiff's decedent, Mrs. _____, developed, inter alia, extensive and severe infectious peritonitis leading to septic shock, multi-organ failure, cardiogenic shock, cardiac arrest, respiratory failure with multiple prolonged codes, ultimately causing her death on _____, 20__ at approximately 3:05 A.M.

COUNT I (NEGLIGENCE)

PLAINTIFF v. DEFENDANT HOSPITALS

16. Paragraphs 1 through 15 above are incorporated herein by reference as if fully set forth at length.

17. The pain, suffering, injuries, losses and death of Plaintiff's decedent, _____, were directly and proximately caused by the negligence of the Defendants, _____ and _____ jointly and severally, acting by and through their agents, servants, workmen and/or employees, or those who appeared to be their agents, servants, workmen and/or employees, in the following particular respects:

(a) Failure to recognize and appreciate the seriousness of Plaintiff's decedent's condition following gastric bypass surgery requiring strict adherence to an NPO and/or Gastric Bypass Stage 1 diet in accordance with physicians' orders;

(b) Failure to observe and monitor Plaintiff's decedent so as to assure that physicians' diet orders were explicitly followed, monitored and managed;

(c) Failure to exercise due care by providing a contraindicated modified diet and preparing, dispensing, setting up and delivering the contradicted diet to Plaintiff's decedent increasing the risk of and causing a leak at Plaintiff's decedent's surgical site;

(d) Failure to timely recognize and treat Plaintiff's decedent's condition that occurred as a result of the dietary errors;

(e) Negligently failing to protect and prevent Plaintiff's decedent from having any frank food and/or inappropriate liquid intake contrary to physicians' orders for an NPO and/or Gastric Bypass Stage 1 - clear liquid diet post-operatively;

(f) Failure to supervise, monitor and manage the gastric bypass diet of Plaintiff's decedent;

(g) Failure to exercise due care according to appropriate standards of care by erroneously preparing, obtaining, delivering and/or requiring Plaintiff's decedent to consume the incorrect and contraindicated diet following gastric bypass surgery;

(h) Failure to timely monitor and/or discover the dietary error, thereby increasing the risks of harm to Plaintiff's decedent;

(i) Failure to protect Plaintiff's decedent by preventing her from consuming any foods or liquids contrary to physicians' orders for an NPO and/or Gastric Bypass Stage 1 diet;

(j) Failure to utilize accepted techniques to prevent dietary error;

(k) Failure to timely search for, recognize and appreciate the cause of the severity of the condition of the Plaintiff's decedent due to the dietary errors;

(l) Failure to recognize the potential for severe adverse complications from a contraindicated modified diet and/or a diet of frank food and/or inappropriate liquids;

(m) Failure to inform Plaintiff's decedent's physicians that Plaintiff's decedent was provided a modified diet, contrary to physicians' orders;

(n) Failure to properly select, place, train and supervise the agents, ostensible agents, servants, employees, students, staff and/or contractors involved in the control of Plaintiff's decedent's diet after her gastric bypass surgery;

(o) Failure to exercise due care by employing inadequate methods, techniques and/or procedures for confirming, inspecting, delivering and monitoring the ordered and appropriate diet for patients after gastric bypass surgery, including, in particular, Plaintiff's decedent;

(p) Failure to render due care by failing to timely intervene, recognize and follow the required dietary orders to prevent harm to Plaintiff's decedent;

(q) Departing from accepted and approved medical, hospital, nursing, housekeeping, dietary and other standards, techniques, practices and/or procedures regulating post-surgical Gastric Bypass Diet;

(r) Failure to provide appropriate supervision of nursing staff and/or dietary personnel in the post gastric bypass surgical care of patients, including Mrs. _____;

(s) Failure to properly inspect, deliver, monitor and maintain Plaintiff's decedent on the ordered NPO and/or Gastric Bypass Stage 1 diet;

(t) Failure to exercise due care by delivering the wrong, contraindicated and harmful modified diet, including frank food and/or improper liquids to Plaintiff's decedent, increasing the risks of harm to plaintiff's decedent;

(u) Vicarious liability for the negligence of all of their agents, ostensible agents and employees, including but limited to nurses, technicians, dieticians, house staff and/or other staff responsible for the violations of the ordered NPO and/or Gastric Bypass Stage 1 diet.

18. Defendants undertook to render care to Plaintiff's decedent which they knew or should have known was necessary for the protection of Plaintiff's decedent and the negligence and carelessness of the Defendants, as set forth above, was a cause of the harm and injury sustained by Plaintiff's decedent, which negligent conduct increased the risks of harm and was a factual cause of and/or contributed to the death of Plaintiff's decedent on _____.

19. As a result of the negligence and carelessness of the Defendants, Plaintiff's decedent, _____ developed a gastrojejunostomy leak, was caused to

undergo painful surgical reparative procedures affecting her organ systems, endured extreme physical and emotional pain and suffering, suffered peritonitis, cardiac arrest, respiratory failure, multiple codes, multi-system organ failure, and septic shock, thereby increasing the risks of harm and acting as a substantial factor in Plaintiff's decedent's death on _____, 20__.

WHEREFORE, Plaintiff demands judgment in his favor against Defendants, jointly and severally, in an amount in excess of Fifty Thousand Dollars ($50,000.00), together with interest and costs of suit.

COUNT II (CORPORATE LIABILITY)

PLAINTIFF v. DEFENDANT HOSPITALS

20. Paragraphs 1 through 19 above are incorporated herein by reference as if fully set forth at length.

21. The pain, suffering, injuries, other losses and death of Plaintiff's decedent were directly and proximately caused by the negligence of Defendants, _____ and _____, jointly and severally, and in the following particular respects:

(a) Failure to exercise due care in formulating, adopting and enforcing adequate rules, procedures and policies to be followed by its physicians, staff, personnel, nurses, orderlies, dieticians, aides, students, and/or independent contractors in connection with the diet of post-gastric bypass patients, particularly Plaintiff's decedent;

(b) Failure to exercise due care in formulating, adopting and enforcing adequate rules, procedures and policies to be followed by its physicians, staff personnel, nurses, orderlies, dieticians, aides, students, and/or independent contractors in connection with the care and treatment of patients after gastric bypass surgery, including strict

adherence to an NPO and/or Gastric Bypass Stage 1 diet post-operatively;

(c) Failure to exercise due care in representing to and giving false information to the public, including Plaintiff and Plaintiff's Decedent, that they did, in fact, possess adequate hospital facilities, physicians, staff, nurses, nursing assistants, orderlies, personnel, students and/or independent contractors for the care and treatment of gastric bypass patients;

(d) Failure to maintain a safe and adequate hospital facility for the care, protection and treatment of patients requiring appropriate dietary control and management before, during and after gastric bypass procedures to avoid dietary errors and associated risks and adverse effects;

(e) Failure to formulate, adopt, and enforce adequate rules, procedures, and policies to be followed by physicians, staff, personnel, students and/or independent contractors in connection with ordering, preparing, confirming, inspecting, delivering and monitoring the dietary requirements of patients following gastric bypass surgery in accordance with physicians' orders and the standard of care;

(f) Failure to select, place and/or retain only competent physicians, nurses, dieticians, aides, staff, personnel, students and/or independent contractors to order, inspect, prepare, deliver, monitor and manage the indicated diet for patients following gastric bypass surgery;

(g) Failure to formulate, adopt and enforce adequate rules, policies and regulations to ensure quality care for their patients, of which the hospital had actual or constructive knowledge, including the ordering, preparation, inspecting, delivery and monitoring of food and/or liquid to patients, including Plaintiff's decedent, _____, following gastric bypass surgery;

(h) Failure to formulate, adopt and enforce adequate rules, regulations, policies and procedures to ensure that Plaintiff's decedent received the indicated NPO and/or Gastric Bypass Stage 1 diet following her gastric bypass surgery;

(i) Failure to control and coordinate Plaintiff's decedent's post-surgical medical and nutritional management so as to appreciate the danger associated with the failure to properly deliver, supervise and monitor the correct diet and/or the delivery of the incorrect diet to Plaintiff's decedent, including frank food and/or inappropriate liquids;

(j) Failure to monitor all aspects of the care delivered by its physicians, nurses, dieticians, assistants, students, personnel and/or independent contractors or their respective agents, servants, associates, employees, personnel and/or contractors;

(k) Failure to oversee and review the competence of all persons practicing medicine and aiding in the delivery of medical care within the hospital as to patient care, including the process for ordering and delivering the appropriate diet to patients following gastric bypass surgery and for monitoring such patients post-surgery for adverse reaction due to dietary error;

(l) Failure to protect and safeguard the health and well-being of gastric bypass patients, particularly Plaintiff's decedent herein;

(m) Failure to monitor, manage, control and review ongoing medical, nursing, dietary, student nursing, teaching, housekeeping, and/or other medical services being provided within the medical facility to gastric bypass patients requiring a strict dietary regimen to avoid risks of harm and complications;

(n) Failure to have proper facilities, equipment and systems for the care of gastric bypass patients, including food service facilities, equipment and systems.

WHEREFORE, Plaintiff demands judgment in his favor against Defendants, jointly and severally, in an amount in excess of Fifty Thousand Dollars ($50,000.00), together with interest and costs of suit.

COUNT III (WRONGFUL DEATH ACTION)

PLAINTIFF v. DEFENDANT HOSPITALS

22. Paragraphs 1 through 21 above are incorporated herein by reference as if fully set forth at length.

23. As a direct result of the negligence, carelessness and tortious conduct of the Defendants, jointly and severally, as well as their respective agents, servants, employees and/or contractors and/or those who appeared to be their respective agents, servants,

employees and/or contractors, independently or collectively, Plaintiff's decedent underwent severe physical pain and suffering, mental and emotional anguish and distress, until her demise, for which Plaintiff claims damages.

24. Plaintiff's decedent left surviving him her husband, _____ and her son, _____, each of whom may be entitled to recover damages for her death and on whose behalf this action is being brought pursuant to the Act of 1976, July 9, P.L. 586, No. 142, § 2, 42 Pa. C.S. § 8301 and Pennsylvania Rule of Civil Procedure 2202(a).

25. Plaintiff's decedent did not bring an action during her lifetime and no other action on behalf of the decedent or for the death of the decedent has previously been instituted.

26. The death of _____ and the damages resulting therefrom were proximately caused by the acts, omissions and other tortious conduct of the Defendants named herein, jointly and severally, as above described in this Complaint.

27. As a direct and proximate result of the death of _____, her heirs have been deprived of the future aid, assistance, services, comfort and financial support she would have provided.

28. Plaintiff further claims special damages for the losses sustained as a result of the funeral bills, hospital and medical expenses and other expenses necessitated by reason of the injuries and death of Plaintiff's decedent, _____, caused by the Defendants' negligence, carelessness and tortious conduct as set forth above and incorporated herein by reference.

29. Plaintiff brings this claim on behalf of the Estate and statutory beneficiaries of _____ to recover all wrongful death damages permitted by law.

WHEREFORE, Plaintiff demands judgment in his favor against Defendants, jointly and severally, in an amount in excess of Fifty Thousand Dollars ($50,000.00), together with interest and costs of suit.

COUNT IV (SURVIVAL ACTION)

PLAINTIFF v. DEFENDANT HOSPITALS

30. Paragraphs 1 through 29 above are incorporated herein by reference as if fully set forth at length.

31. Plaintiff Administrator of the Estate of _____, brings this action on behalf of the Estate of _____, Deceased, pursuant to the Act of 1976, July 9, P. L. 586, No. 142, § 2, 42 Pa. C. S. § 8302; Act of 1972, June 30, P. L. 508, No. 164 §2 as amended, 20 Pa. C.S. §§ 3371 and 3373, including but not limited to, the damages suffered by reason of the serious personal injuries, the anxiety, fear and pain and suffering that Plaintiff's decedent, _____, underwent prior to her catastrophic demise, as well as the pecuniary value of the loss of earnings and earning capacity of the Decedent and other items of damages permitted pursuant to their statutory cause of action and Pennsylvania Law.

WHEREFORE, Plaintiff demands judgment in his favor against Defendants, jointly and severally, in an amount in excess of Fifty Thousand Dollars ($50,000.00), together with interest and costs of suit.

By: _____

APPENDIX C

Pa. Supreme Court Promulgates Fed. Rule 11 Equivalent

FOR MEMBERS OF THE PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

PaTLA NEWS

JULY 2002 VOLUME XVI, NO. 5

Pa. Supreme Ct. promulgates Fed. Rule 11 equivalent

by Robert T. Szostak, Esq.

The Pennsylvania Supreme Court, on April 22, 2002, rescinded Pa.R.C.P. 1023 and replaced it with Rule 1023.1 - 4 effective July 1, 2002. The new rule, which is the state equivalent of Federal Rule 11, regulates the "Scope. Signing of Documents. Representations to the Court. Violation". Rule 1023.1 mandates that "[by] signing, filing, submitting, or later advocating" any non-discovery "pleading, written motion and other paper directed to the Court," an attorney or *pro se* party is certifying:

(1) Such document is not being presented for any improper purpose such as harassment, delay or needless increase in the cost of litigation;

(2) Any claims, defenses and other legal contentions in such document are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law;

(3) The factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery; and

(4) Denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

see New Rule on 4

New Rule

continued from page 1

Thus, every pleading, written motion and other paper directed to the court must have a proper purpose, be nonfrivolous, bear evidentiary support and contain only good faith denials. A court may impose appropriate sanctions on any attorneys, law firms, and parties for violation of the rule after notice and a reasonable opportunity to respond. "'[A]n appropriate sanction' is designed to prevent the abuse of litigation."[1] The attorneys or unrepresented parties must assure there is a basis in fact and in law for any claim or defense set forth in any document to which the rule applies. In short, attorneys and *pro se* litigants have the affirmative, nondelegable duty to make some prefiling inquiry into both the facts and the law when pursuing factual or legal theories. Such inquiry is to be judged by an objective standard of reasonableness under the circumstances on a case-by-case basis.

Rule 1023.2 mandates that any application for sanctions under the rule be made by a separate motion filed before the entry of final judgment describing the specific improper purpose, frivolous argument, lack of evidentiary support and/or unwarranted denials. The rule also contains a "safe harbor" requirement that obligates the moving party to provide written notice and demand to the signing attorney or *pro se* party that the challenged document is believed to violate the provisions of the rule and that, therefore, an application for sanctions may be filed if the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected within twenty-eight (28) days after service of such written demand. A court, *sua sponte*, may enter an order to show cause directing the signing attorney, law firm or party to show cause why the rule has not been violated.

Sanctions pursuant to Rule 1023.4 must not exceed that which is necessary to deter repetition of violative conduct or comparable conduct by others similarly situated. Sanctions may include nonmonetary directives (i.e., striking of offensive litigation document or portion thereof), a penalty paid into court or reasonable attorneys' fees, and other expenses incurred as a direct result of violation of the rule. Conversely, attorneys' fees and costs may be awarded if the non-moving party prevails in opposing the motion. Absent exceptional circumstances, a law firm must be held jointly responsible for violations committed by any of its partners, associates, and employees. Monetary sanctions may not be awarded against a represented party for violation of the rule; nor may such sanctions be awarded on the court's initiative unless there is the appropriate order to show cause. Whenever a court imposes sanctions, it must describe the conduct determined to be in violation of the rule and explain the basis for any sanction imposed. The court, when imposing sanctions, may consider factors including scienter of the signing party or *pro se* litigant, whether there is a pattern or frequency of offensive conduct, the severity of the violation, other similar conduct in related litigation, intent to injure, the effect in time or expense on the litigation process, the extent of legal training of the responsible person and the amount of sanction needed to deter any person from repetition in the same case and to deter similar activity by other litigants.

Whenever a court reviews a motion for sanctions under the rule, the reviewing court should "avoid using the wisdom of hindsight." The court should evaluate the signor's conduct by "what was reasonable to believe at the time the pleading, motion or other paper was submitted." Elements for determining whether the signor's conduct was based on a reasonable inquiry include the time available for investigation, the degree of reliance on a client for information, the extent to which the challenged document is based on a plausible view of the law, or whether the signer depended on other counsel. Although a litigant may have a good faith basis to assert that a claim or defense is valid, the rule recognizes that discovery, formal or informal, may be necessary to gather and confirm the evidentiary support necessary for the claim or defense. In the absence thereof, the party advocating such claim or defense does so at his or her own peril. ■

1. Because the rule is intended to prevent "frivolous litigation," it is anticipated that controversial Senate Bill 406 will not be endorsed by the Legislature.

APPENDIX D

COM Form under Rule 1042.9

Rule 1042.8. Certificate of Merit. Form

The certificate required by Rule 1042.3(a) shall be substantially in the following form:

(Caption)

Certificate of Merit as to _____
(Name of Defendant)

I, _____, certify that:
(Attorney or Party)

☐ an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited by this defendant in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm;

AND/OR

☐ the claim that this defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard and an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited by the other licensed professionals in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm;

OR

☐ expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim against this defendant.

Date: _____

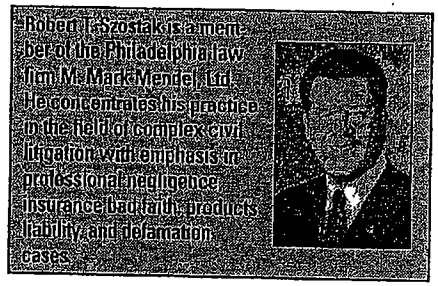
_____
(Attorney or Party)

APPENDIX E

Expert Witness Qualifications under the Certificate of Merit Rules, Section 512 of the Mcare Act and the Same Subspecialty Defense

the Barrister

Expert witness qualifications under the Certificate of Merit rules, § 512 of the Mcare Act and the same subspecialty defense



Robert T. Szostak is a member of the Philadelphia law firm Mc Mack Mendel, Ltd. He concentrates his practice in the field of complex civil litigation with emphasis in professional negligence, insurance bad faith, products liability, and defamation cases.

By Robert T. Szostak, Esq.

The Supreme Court of Pennsylvania promulgated the Certificate of Merit Rules effective Jan. 27, 2003.[1] More particularly, Pa.R.C.P. 1042.3(a) mandates that the attorney for the plaintiff (or the plaintiff if not represented) file with the Complaint or within 60 days after the filing of the Complaint, a Certificate of Merit signed by the attorney (or party) in any action based upon an allegation that a licensed professional[2] deviated from an accepted professional standard. To satisfy the requirements of this rule, an "appropriate licensed professional" must supply a written statement to the filing attorney (or plaintiff) "that there exists a reasonable probability that the care, skill, or knowledge exercised or exhibited in the treatment, practice, or work that is the subject of the Complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm."[3] The same requirement applies to claims based solely on allegations of vicarious responsibility.[4] The rule specifies that, "separate Certificates of Merit shall be filed as to each licensed professional against whom a claim is asserted."[5]

Although the "appropriate licensed professional" supplying a written standard of care/causation statement need not actually testify at trial, the "appropriate licensed professional" must "be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony, or stated another way, the expert who supplies the statement must have qualifications such that the trial court would find them sufficient to allow that expert to testify at trial."[6] In any medical professional liability action, "the expert who provides the statement in support of a Certificate of Merit *should* meet the qualifications as set forth in Section 512 of the Medical Care Availability and Reduction of Error (Mcare) Act, 40 P.S. § 1303.512."[7] Thus, any expert supplying a Certificate of Merit statement in a medical malpractice case must be trial competent as determined by a balancing of the expert's qualifications under Pennsylvania case law and Section 512 of the Mcare Act.

In order to testify in a medical professional liability action against a physician, Section 512 of the Mcare Act requires that an expert (1) possess "sufficient education, training, knowledge, and experience to provide credible, competent testimony"; and (2) fulfill the qualifications required by the act. Any expert testifying on a medical matter, including the standard of care, risks and alternatives, causation, and the nature and extent of injury, must also satisfy the following qualifications:

1. Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia; and

2. Be engaged in or retired within the previous five years from active clinical practice or teaching.

The court may waive these requirements on any matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training, or experience.[8]

Any expert testifying as to a physician's standard of care must also meet the following qualifications:

1. Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care;

2. Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue (with certain exceptions); and

3. In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board.[9]

A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that:

1. The expert is trained in the diagnosis or treatment of the condition, as applicable; and

2. The defendant physician provided care for that condition and such care was not within the physician's specialty or competence.[10]

When assessing the qualifications of an expert in a medical professional liability action, a court may also waive the same subspecialty and board certification requirements for an expert testifying on the standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in:

1. The applicable subspecialty; or

2. A related field of medicine within the previous five-year time period.[11]

The qualifications of an expert for initiating and trying a medical professional liability action are determined by the same competency threshold. For both, a careful evaluation of the adequacy of the education, training, knowledge and experience of the expert is the key to admissibility. Notwithstanding this discretionary standard, the defendant physician will seek to limit or preclude the testimony of a plaintiff's expert if the expert is not from the same specialty or certified by the same board as the defendant. This presents a wide range of very specific and complicated questions that must be asked during the qualification phase of any expert during trial or, if possible, by a separate pre-trial *in limine* hearing. A two-fold argument is commonly posed: (i) the proffered expert is substantially unfamiliar with the applicable standard of care for the specific care at issue at the time of the alleged breach; and (ii) the expert is not from the same subspecialty with the same certification, but has different interprofessional standard of care in an unrelated field of medicine. The arguments against preclusion are strong and several.

First, any motion to limit or preclude expert testimony should be challenged on the basis of timeliness to avoid prejudice. The Mcare Act was signed into law on March 20, 2002. Section 512 became effective on May 20, 2002. Accordingly, where defendants wait until the eve of trial to present a 512 Motion, any pre-trial hearings on the issue presented, including waiver, should be without prejudice to the affected plaintiff to substitute a new expert. Because preclusion would be a drastic, outcome-determinative sanction depriving a plaintiff of the substantive right to trial by jury and due process, sufficient time to substitute a "qualified" expert, if necessary, should be permitted.

Section 512 of the Mcare Act should also be challenged as unconstitutional. Pa.R.E. 702 regulates "Testimony By Experts" and provides:

> If scientific, technical or other specialized knowledge beyond that possessed by a lay person will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness called as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

This evidentiary rule was adopted by the Pennsylvania Supreme Court under the authority of Article IV, § 10(c) of the Constitution of Pennsylvania, adopted April 23, 1968. Rule 702 is mandatory and governs proceedings in all courts of the Commonwealth of Pennsylvania's unified judicial system, except as otherwise provided by law. It has been in effect since Oct. 1, 1998. Clearly, Section 512 imposes far broader restrictions on expert witness qualifications. It conflicts with Pa.R.E. 702. Section 512, therefore, unconstitutionally interferes with the rule-making authority of the Pennsylvania Supreme Court. It should, as a result, be declared null and void as a violation of the Pennsylvania Constitution.[12] Furthermore, if Section 512 is strictly applied without regard to common law, it interferes with fundamental substantive rights.

Assuming the validity of Section 512 as a constitutional regulation on expert qualifications "as otherwise provided by law," a plaintiff's expert in a professional liability action against a physician should be deemed qualified under both Pennsylvania jurisprudence and Section 512 on the issues of standard of care and causation. Trial courts have followed a long-established discretionary standard when determining the admissibility of expert testimony:

Whether a witness has been properly qualified to give expert witness testimony is vested in the discretion of the trial court. Pennsylvania's standard for qualifying a witness as an expert is rather liberal — if the witness possesses knowledge with regard to a subject matter that is beyond the knowledge, information or skill possessed by the ordinary juror, he or she may testify.[13]

To qualify as an expert, a witness need not possess all of the knowledge on a subject; rather, the witness need only possess more knowledge than is within the ordinary range of training, knowledge, intelligence or experience.[14] The cardinal test that trial courts apply when qualifying an expert is "whether the witness has any reasonable pretension to specialized knowledge of the subject under investigation."[15] The weight to be assigned to the expert's testimony is for the trier of fact to determine.

Basic to the assessment of the qualifications of any expert witness is the understanding that a witness may qualify as an expert if his or her experience or education logically or fundamentally embraces the matter at issue.[16] In the area of medicine, specialties often overlap and, as a result, a clinician may be knowledgeable in more than one field.[17] Overlapping specialties are not unusual in the medical community:

In the field of medicine, specialties sometimes overlap and a practitioner may be knowledgeable in more than one field. Different doctors will have different qualifications. Some doctors will be more qualified than others to provide evidence about specific medical practices. However, it is for the jury to determine the weight to be given to expert testimony in light of the qualifications presented by the expert witness.[18]

Numerous examples from Pennsylvania case law establish that experts in one area of medicine have been ruled qualified to address other areas of specialization where the medical disciplines blend in practice, or where the specialist is experienced in another related medical field:

- *Yacoub v. Lehigh Valley Medical Associates, P.C.*, 805 A.2d 579,592 (Pa. Super. 2002) (En Banc) (in the absence of a proper foundation, board certified neurosurgeon deemed unqualified to testify on standards of care in internal medicine and special care unit nursing)
- *Rauch v. Mike-Mayer*, supra (board certified neurologist who for prior decade practiced in psychiatry and not neurology deemed an expert in neurology because of the degree of trust to be placed in his testimony would go to the weight of such evidence)
- *Grady v. Frito-Lay, Inc.*, supra (board certified otolaryngologist qualified to express an opinion as to the cause of an esophageal tear in products liability action - it was for the jury to determine the weight to be given the physician's testimony)
- *Gunn v. Grossman*, 748 A.2d 1235 (Pa. Super. 2000) (infectious disease specialist allowed to testify as to the standard of care required of a cardiologist in prescribing antibiotics)
- *McClain v. Welker*, 761 A.2d 155, 156-57 (Pa. Super. 2000) (individual with Ph.D. in neuroscience without medical degree ruled competent to testify on the causation of cognitive deficits).
- *Poleri v. Salkind*, 683 A.2d 649 (Pa. Super. 1996) (board certified orthopedic surgeon qualified to testify regarding applicable standard of care of physiatrist because wound care is an area in which the specialists overlap)
- *Montgomery v. South Philadelphia Medical Group*, 656 A.2d 1385 (Pa. Super. 1995) (board certified internist ruled qualified to opine on standard of care for physician's assistant)
- *Lira v. Albert Einstein Medical Center*, supra (licensed physician, board certified in neurology and trained in otolaryngology, possessed sufficient skill, knowledge and experience such that his opinion would aid the jury in resolving a medical malpractice action filed against a throat specialist)
- *McDaniel v. Merck, Sharp & Dohme*, supra (board certified specialist in both internal medicine and infectious disease was qualified to express an opinion regarding the cause of decedent's hemolytic anemia and death even though the physician was not also a hematologist)
- *Kearns v. Clark*, 493 A.2d 1358 (Pa. Super. 1985) (urologist qualified to evaluate surgeon's performance of hysterectomy when urologist was familiar with and had assisted in the performance of other hysterectomies)
- *Pratt v. Stein*, 444 A.2d 674 (Pa. Super. 1982) (professor of pharmacology qualified to testify to post-operative care given by orthopedic surgeon)
- *Ragan v. Steen*, 331 A.2d 724 (Pa. Super. 1974) (surgeon permitted to testify in medical malpractice action as to causation against radiologists where surgeon was knowledgeable through experience as to x-ray treatments)
- *Workers' Compensation Appeal Board v. Jones E. Laughlin Steel Corp.*, 349 A.2d 793 (Pa. Cmwlth. 1975) (orthopedist permitted to testify to causation and urological psychological effects of fractured pelvis)

The rationale behind the precepts enunciated in the above opinions is that a qualified witness need only have a reasonable pretension to specialized knowledge, for the standard is not set so high as to exclude the kind of testimony ordinarily presentable to a jury.

Gunn v. Grossman, supra, is particularly instructive for cases where medical specialists are called upon to employ education, knowledge, training, and experience within the orbit of knowledge of any physician practicing medicine or in training toward specialization. There, the plaintiff secured a significant jury verdict in a medical malpractice action arising from alleged negligent prescription of antibiotics after the plaintiff's decedent exhibited an allergic reaction that caused a toxic exfoliation leading to a horrible death. On appeal, a defendant physician challenged the trial court's ruling that one of the plaintiff's experts, a specialist in infectious disease, was qualified to render an opinion as to the standard of care of the defendant, a cardiologist. The Superior Court flatly rejected this argument, noting that, "the defendant and the expert were both board certified in internal medicine and, most importantly, that the expert's testimony concerned the prescription of [antibiotics] as well as the symptoms which give rise to an allergic reaction to antibiotic medication, *[an issue] applicable to all physicians who prescribe medication. Id.* at 1244 (emphasis added). The Superior Court concluded that the expert "clearly was permitted to render an opinion concerning another doctor's alleged breach of a duty by prescribing these antibiotics where there were symptoms of an alleged reaction." Thus, where the relevant issues are within the knowledge base of any doctor, differences in areas of specialty blend into the common fund of expertise shared by all physicians.[19]

Miller v. The Brass Rail Tavern, Inc., supra, is also enlightening. There, the trial court determined as a matter of law that a non-physician coroner was not qualified to render an expert opinion regarding time of death. The Superior Court affirmed because the coroner was not a physician. However, the Supreme Court reversed, dismantling the reason of both lower courts. Instead, the Supreme Court adhered to the well-established standards for qualification of expert witnesses discussed above. Again, so long as an expert witness has any reasonable pretension to specialized knowledge on the subject under investigation, he or she may testify and the weight to be given to such testimony is for

the trier of fact to determine. *Id.* at 528. The court observed that a witness may be qualified to render an expert opinion based on training and experience, that formal education on the subject matter of the testimony is not required, and that it is not necessary that an expert be a licensed medical practitioner to testify with respect to organic matters. *Id.* Never to be forgotten is the basic precept that the purpose for allowing testimony from a qualified expert is to assist the trier of fact with information that the ordinary person does not possess.

Section 512 struggles to accommodate the Pennsylvania Rules of Evidence and Pennsylvania jurisprudence. It encourages trial courts to engage in a "waiver" analysis. When initiating a medical professional liability action against a physician and, at the end, when preparing for the presentation of expert medical opinion testimony, the attorney for the plaintiff must track the elements of Section 512 and the applicable case law or risk sanction or preclusion. If the plaintiff's expert is substantially familiar with the applicable standard of care at issue at the time of the alleged breach, practices in the same subspecialty or in a subspecialty that has a substantially similar standard care for the specific care at issue and is board certified by the same or a similar approved board as the defendant/physician, it is not mandatory that the expert be pre-qualified based on otherwise adequate training, experience, and knowledge. At trial, however, it is extremely advisable that all of the Section 512 criteria be adduced to assure standard of care competency, as well as the following areas:

- The extent to which the case involves issues applicable to all physicians of any specialty when evaluating the medical issue presented and whether the standard of care is substantially similar for all physicians;
- The nature and extent of overlap between specialties;
- The extent to which the expert is familiar with the standard of care for the specific care at issue in the case;
- Whether the issue is so narrow within a particular subspecialty that only the same type of specialist can validly opine;
- Whether the expert's testimony is generic for any medical doctor, student, intern or resident whose training, experience, knowledge and/or specialty or related field of medicine falls within the standard of care at issue;
- Whether the expert is an active clinical practitioner or a full-time teacher of medicine within the previous five years qualified to testify on the standard of care for the specific care at issue;
- Whether the defense is blurring the issue when, in fact, the proffered expert is more qualified than the defendant physician to testify on the standard of care presented.

The Certificate of Merit Rules, the Mcare Act, and legal pragmatism dictate that every expert be carefully screened to assure their trial competency within the precepts of the court's discretion and the Section 512 components. Every potential and pending case must meet the same test or risk severe consequences in the form of sanctions,[20] or preclusion. Although the front-end certifying expert need not be the same person who will testify at trial, it is prudent trial practice to use the same expert from the beginning to the end of the case. This will assure a comfort level and facility for selecting an expert who satisfies the Rules, Section 512, and the long-standing jurisprudential standards for the qualification of an expert witness.

Notes

1 These new Rules of Civil Procedure appear as Rules 1042.1 through 1042.8.

2 Pa.R.C.P. 1042.1(b) applies to a wide spectrum of "licensed professionals", including a primary health care center, a personal care home licensed by the Department of Public Welfare, or a person including a corporation, university or other educational institution licensed or approved by the Commonwealth of Pennsylvania to provide health care or professional medical services as a physician, a certified nurse midwife, a podiatrist, hospital, nursing home, birth center, and an officer, employee or agent of any of them acting in the course and scope of employment. See also 40 P.S. § 1303.503.

3 Pa.R.C.P. 1042.3(a)(1).

4 Pa.R.C.P. 1042.3(a)(2).

5 Pa.R.C.P. 1042.3(b).

6 Note to Pa.R.C.P. 1042.3(a)(1).

7 *Id.* (emphasis added).

8 40 P.S. § 1303.512(b).

9 40 P.S. § 1303.512(c).

10 40 P.S. § 1303.515(d).

11 40 P.S. §1303.512(e).

12 See In Re: Suspension of Certain Provisions of Act No. 1975-111 added by Act No. 1996-135, PA No. 269, Civil Procedure Rules Docket No. 5, Per Curium Order entered January 17, 1997 (Supreme Court suspended various provisions of now repealed Act 135 of 1996 because only the Supreme Court has the constitutional authority to regulate court procedures).

13 *Grady v. Frito-Lay, Inc.*, 789 A.2d 735, 740 (Pa. Super. 2001), quoting, *West Philadelphia Therapy Center v. Erie Insurance Group*, 751 A.2d 1166, 1167-68 (Pa. Super. 2002) (citations omitted).

14 *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995).

15 *Grady v. Frito-Lay, Inc.*, supra at 740. See also (1) *Krisis v. Baldwin-Lima-Hamilton Corp*, 319 A.2d 914, 924 (Pa. 1974); (2) *McClain v. Welker*, 761 A.2d 155, 156-57 (Pa. Super. 2000); (3) *McDaniel v. Merck, Sharp & Dohme*, 533 A.2d 436, 442 (Pa. Super. 1997); (4) *Lira v. Albert Einstein Medical Center*, 559 A.2d 550, 553 (Pa. Super. 1989).

16 *Dombacher By Dombacher v. Malis*, 485 A.2d 408, 418 (Pa. Super. 1984) (En Banc).

17 *Rauch v. Mike-Mayer*, 783 A.2d 815, 821 (Pa. Super. 2001); *Estate of Pew*, 598 A.2d 65, 69 (Pa. Super. 1991).

18 *Grady v. Frito-Lay, Inc.*, supra at 741; *Rauch v. Mike-Mayer*, supra; *Lavish v. Archbold Company*, 39 Pa. D&C 4th 455, 467 (1999) (Bernstein, J.).

19 See also *Grady v. Frito-Lay, Inc.*, supra at 741; *Paleri v. Salkind*, supra.

20 Pa.R.C.P. 1042.7. ■

APPENDIX F

Proposed Recommendation No. 227 for Amendment of Rules 1042.1, et seq., Governing the Certificate of Merit in Professional Liability Actions

SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE

PROPOSED RECOMMENDATION NO. 227

Proposed Amendment of Rules 1042.1 et seq. Governing

the Certificate of Merit in Professional Liability Actions

The Civil Procedural Rules Committee is proposing that Rule of Civil Procedure 1042.1 governing the certificate of merit in professional liability actions be amended as set forth in the attached recommendation. The recommendation is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court of Pennsylvania.

All communications in reference to the proposed recommendation should be sent not later than **November 8, 2007** to:

Harold K. Don, Jr.,
Counsel
Civil Procedural Rules Committee
5035 Ritter Road, Suite 700
Mechanicsburg, Pennsylvania 17055

or E-Mail to
civil.rules@pacourts.us

The Explanatory Comment which appears in connection with the proposed recommendation has been inserted by the Committee for the convenience of the bench and bar. It will not constitute part of the rules of civil procedure or be officially adopted or promulgated by the Court.

Rule 1042.1. Professional Liability Actions. Scope. Definition

(a) The rules of this chapter govern a civil action in which a professional liability claim is asserted against

(1) a licensed professional**, and**

(2) a partnership, unincorporated association, corporation or similar entity where the entity is responsible for a licensed professional who deviated from an acceptable professional standard.

(b) As used in this chapter, "licensed professional" means

(1) any person who is licensed pursuant to an Act of Assembly as

(i) a health care provider as defined by Section 503 of the Medical Care Availability and Reduction of Error (Mcare) Act, 40 P.S. § 1303.503;

(ii) an accountant;

NOTE: See the CPA Law, Act of May 26, 1947, No. 318, as reenacted and amended, 63 P.S. § 9.1 et seq.

(iii) an architect;

NOTE: See the Architects Licensure Law, Act of December 14, 1982, P.L. 1227, No. 281, 63 P.S. § 34.1 et seq.

(iv) a chiropractor;

NOTE: See the Chiropractic Practice Act of Dec. 16, 1986, P.L. 1646, No. 188, 63 P.S. § 625.101 et seq.

(v) a dentist;

NOTE: See the Dental Law, Act of May 1, 1933, P.L. 216, 63 P.S. §120 et seq.

(vi) an engineer or land surveyor;

NOTE: See The Engineer, Land Surveyor and Geologist Registration Law, Act of May 23, 1945, P.L. 913, as amended, 63 P.S. §148 et seq.

(vii) a nurse;

NOTE: See the Professional Nursing Law, Act of May 22, 1951, P.L. 317, as amended, 63 P.S. § 211 et seq.

(viii) an optometrist;

NOTE: See the Optometric Practice and Licensure Act of June 6, 1980, P.L. 197, No. 57, 63 P.S. § 244.1 et seq.

(ix) a pharmacist;

NOTE: See the Wholesale Prescription Drug Distributors License Act of December 14, 1992, P.L. 1116, No.145, 63 P.S. § 391.1 et seq.

(x) a physical therapist;

NOTE: See the Physical Therapy Practice Act of October 10, 1975, P.L. 383, No. 110, 63 P.S. § 1301 et seq.

(xi) a psychologist; and

NOTE: See the Professional Psychologists Practice Act of March 23, 1972, P.L. 136, No. 52, 63 P.S. § 1201 et seq.

(xii) a veterinarian.

NOTE: See the Veterinary Medicine Practice Act of December 27, 1974, P.L. 995, No. 326, 63 P.S. § 485.1 et seq.

(2) an attorney at law; and

NOTE: See Rule 76 for the definition of attorney at law.

(3) any professional described in paragraphs (1) and (2) who is licensed by another state.

(c) As used in this chapter,

"professional liability claim" when asserted against a licensed professional who is a health care provider under subdivision (b)(1)(i) of this rule includes a claim for lack of informed consent.

Rule 1042.2. Complaint

(a) A complaint shall identify each defendant against whom the plaintiff is asserting a professional liability claim.

NOTE: It is recommended that the complaint read as follows:

"Defendant _____ (name) is a licensed professional with offices in _____ County, Pennsylvania. Plaintiff is asserting a professional liability claim against this defendant."

(b) A defendant may raise by preliminary objections the failure of the complaint to comply with subdivision (a) of this rule.

NOTE: [The filing of preliminary objections raising failure of a pleading to conform to rule of court is the procedure for bringing before the court the issue whether the complaint is asserting a professional liability claim.] **The filing of preliminary objections pursuant to Rule 1042.2(b) is not a prerequisite to the filing of a praecipe for judgment of non pros for failure to file a certificate of merit.**

Rule 1042.3. Certificate of Merit

(a) In any action **against a licensed professional or an entity responsible for a licensed professional** based upon an allegation that [a] **the** licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard,

NOTE: Certificates of merit must be filed as to the other licensed professionals whether or not they are named defendants in the action.

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

NOTE: In the event that the attorney certifies under subdivision (a)(3) that an expert is unnecessary for prosecution of the claim, in the absence of exceptional circumstances the attorney is bound by the certification and, subsequently, the trial court shall preclude the plaintiff from presenting testimony by an expert on the questions of standard of care and causation.

(b) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

(c)(1) A defendant who files a counterclaim asserting a claim for professional liability shall file a certificate of merit as required by this rule.

(2) A defendant or an additional defendant who has joined a licensed professional as an additional defendant need not file a certificate of merit unless the joinder is based on acts of negligence that are unrelated to the acts of negligence that are the basis for the claim against the joining party.

(d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. A motion to extend the time for filing a certificate of merit must be filed [on or before the filing date that the plaintiff seeks to extend.] **by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6(a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater.** The filing of a

motion to extend tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.

> NOTE: There are no restrictions on the number of orders that a court may enter extending the time for filing a certificate of merit provided that each order is entered pursuant to a new motion, timely filed and based on cause shown as of the date of filing the new motion.
>
> The moving party must act with reasonable diligence to see that the motion is promptly presented to the court if required by local practice.
>
> In ruling upon a motion to extend time, the court shall give appropriate consideration to the practicalities of securing expert review. There is a basis for granting an extension of time within which to file the certificate of merit if counsel for the plaintiff was first contacted shortly before the statute of limitations was about to expire, or if, despite diligent efforts by counsel, records necessary to review the validity of the claim are not available.

New Rule

Rule 1042.6. Notice of Intent to Enter Judgment of Non Pros for Failure to File Certificate of Merit. Motion to Determine Necessity to File Certificate. Form of Notice

(a) Except as provided by subdivision (b), a defendant seeking to enter a judgment of non pros under Rule 1042.7(a) shall file a written notice of intention to file the praecipe and serve it on the party's attorney of record or on the party if unrepresented, no sooner than the thirty-first day after the filing of the complaint.

(b) A judgment of non pros may be entered as provided by Rule 1042.7(a) without notice if

(1) the court has granted a motion to extend the time to file the certificate and the plaintiff has failed to file it within the extended time, or

(2) the court has denied the motion to extend the time.

(c) Upon the filing of a notice under subdivision (a) of this rule, a plaintiff may file a motion seeking a determination by the court as to the necessity of filing of a certificate of merit. The filing of the motion tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.

> NOTE: The motion may be filed at any time prior to the entry of a judgment of non pros.
>
> Once the judgment of non pros is entered, a party cannot raise the claim that the filing of a certificate of merit was not required.

(d) The notice required by subdivision (a) of this rule shall be substantially in the following form:

(CAPTION)

NOTICE OF INTENTION TO ENTER JUDGMENT OF NON PROS ON PROFESSIONAL LIABILITY CLAIM

To: _____
(Identify Party)

Pursuant to Pennsylvania Rule of Civil Procedure 1042.7, I intend to enter a judgment of non pros against you after thirty (30) days of the date of the filing of this notice if a certificate of merit is not filed as required by Rule 1042.3.

I am serving this notice on behalf of _____.
(Name of party)

The judgment of non pros will be entered as to the following claims: _____
_____
_____.
(State if a judgment is to be entered as to all claims. Otherwise, identify claims set forth in the complaint as to which a judgment of non pros will be entered.)

_____
(Attorney)

_____
(Address)

_____
(Telephone Number)

Rule [1042.6.] 1042.7. Entry of Judgment of Non Pros for Failure to File Certification. Form of Praecipe

(a) The prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time provided that

(1) there is **no pending motion for determination that the filing of a certificate is not required or** no pending timely filed motion seeking to extend the time to file the certificate[.],

(2) no certificate of merit has been filed,

(3) except as provided by Rule 1042.6(b), the defendant has attached to the praecipe a certificate of service of the notice of intention to enter the judgment of non pros, and

(4) the praecipe is filed no less that thirty days after the date of the filing of the notice of intention to enter the judgment of non pros.

> NOTE: The prothonotary may not enter judgment if the certificate of merit has been filed prior to the filing of the praecipe.
>
> Rule 237.1 does not apply to a judgment of non pros entered under this rule.
>
> **See Rule 208.2(a)(4) for the content of the certificate of service.**

(b) The praecipe for the entry of a judgment of non pros shall be substantially in the following form:

(Caption)

Praecipe for Entry of Judgment of Non Pros
Pursuant to Rule 1042.6

To the Prothonotary:

[Enter judgment of non pros against _____ in the
Plaintiff
Professional liability claim against _____ in the above
Defendant
captioned matter.]

Enter judgment of non pros in the above captioned matter against _____

_____ as to
Identify Party

(1) all claims against _____.
Identify Party

OR

(2) only the following claims against _____:
Identify Party

_____
Identify Claims

_____

_____.

[I, the undersigned, certify that the plaintiff named above has asserted a professional liability claim against the defendant named above who is a licensed professional, that no certificate of merit has been filed within the time required by Pa.R.C.P. 1042.3 and that there is no motion to extend the time for filing the certificate pending before the court.]

Date: _____

_____

[Defendant or] Attorney for [Defendant]
_____ **(Identify Party)**

NOTE: Where applicable, a certificate of service of the notice of intention to enter judgment of non pros shall be attached to the praecipe.

Rule [1042.7.] 1042.8. Sanctions

***

Rule [1042.8.] 1042.9. Certificate of Merit. Form

***

Explanatory Comment

Rules of Civil Procedure 1042.1 et seq., governing the certificate of merit in professional liability actions were promulgated in 2003. The Civil Procedural Rules Committee has reviewed the operation of the rules over the past four years and is proposing amendments to supply certain omissions in the present rules and provide additional notice to the parties. The proposed amendments do not alter the requirements of the existing rules governing the certificate of merit or expand the time period for filing the certificate.

It is proposed that Rules 1042.6, 1042.7 and 1042.8 be renumbered as Rules 1042.7, 1042.8 and 1042.9, respectively, and that new Rule 1042.6 be promulgated to govern notice of intent to enter a judgment of non pros for failure to file a certificate of merit.

The highlights of the amendments are as follows:

1. It is proposed that present Rule 1042.1 governing the scope of the rules be amended in two respects. First, subdivision (a) is revised to make clear that present Rule 1042.1 et seq. includes professional liability actions against a partnership, an unincorporated association, a corporation or a similar entity where the entity "is responsible for a licensed professional who deviated from an acceptable professional standard." A conforming amendment to refer to these entities is to be made to Rule 1042.3(a).

Second, new subdivision (c) is added to Rule 1042.1 to make clear that a professional liability action against a health care provider may include a claim for lack of informed consent.

2. Rule 1042.2(b) provides that "[a] defendant may raise by preliminary objections the failure of the complaint to comply with subdivision (a) of this rule." However, courts have not construed the rule as requiring preliminary objections as a prerequisite to the filing of a praecipe for a judgment of *non pros* for failure to file a certificate of merit. Therefore, the Committee is proposing that the note to Rule 1042.2(b) be amended to reflect the case law.

3. New Rules 1042.6 and 1042.7 address concerns that the present rules (1) permit the entry of a judgment of *non pros* where a plaintiff may believe that the rules governing certificates of merit do not apply and (2) provide for the entry of a judgment of *non pros* where there has been no notice of intent to enter such a judgment.

Several revisions are proposed to remedy this situation. First, new Rule 1042.6(a) requires a defendant to give a thirty-day notice of intention to file a praecipe for a judgment of non pros for failure to file a certificate of merit. Subdivision (d) provides a form of notice. The new rule retains the basic sixty-day period for the filing of a certificate of merit under present practice since the notice may be filed no earlier than the thirty-first day after the filing of the complaint and the judgment may not be filed earlier than thirty days after the filing of the notice.

Subdivision (b) sets forth two exceptions to the notice requirement where the court (1) has granted an extension of time to file a certificate of merit and the plaintiff has failed to do so or (2) has denied a motion to extend the time for filing a certificate.

Second, new Rule 1042.6(c) provides that once a notice of intention to seek a judgment of *non pros* has been filed, the plaintiff may file a motion to seek "a determination by the court that the filing of a certificate of merit is not required." As in the case of a motion to extend the time for filing a certificate under Rule 1042.3(d), the "filing of the motion tolls the time period within which a certificate of merit must be filed until the court rules upon the motion."

Third, present Rule 1042.6 is to be renumbered as Rule 1042.7 and revised. As revised, subdivision (a) of the rule has been expanded to set forth four conditions for the entry of a judgment of *non pros*. The form of praecipe to enter the judgment in subdivision (b) has been revised to conform to the new procedure.

By the Civil Procedural
Rules Committee

R. Stanton Wettick, Jr.
Chair

APPENDIX G

Pa.R.C.P. 1006, 2130, 2156 and 2179

IN THE

SUPREME COURT OF PENNSYLVANIA

IN RE: Amendment of Rules of	:	**No. 381**
Civil Procedure Governing Venue	:	**Civil Procedural Rules**
	:	**Docket No. 5**

AMENDATORY ORDER

PER CURIAM:

AND NOW, this 5th day of March, 2003, Pennsylvania Rules of Civil Procedure 1006, 2130, 2156 and 2179, amended by the Order of January 27, 2003, No. 381, Civil Procedural Rules Docket No. 5, shall apply to medical professional liability actions filed on or after January 1, 2002 and not to such actions filed prior to that date. The provisions of Rule of Civil Procedure 1032 governing waiver of defenses and objections shall not apply to a challenge to venue made within ninety days of the date of this Amendatory Order.

This Amendatory Order shall be processed in accordance with Pa.R.J.A. 103(b) and shall be effective immediately.

Justices Castille and Saylor would apply the amendments to the Pennsylvania Rules of Civil Procedure, as stated above, prospectively for all actions filed on or after the effective date of Act No. 127 of 2002.

Civil Action

Rule 1006. Venue. Change of Venue

(a) Except as otherwise provided by [S]subdivisions (a.1), (b) and (c) of this rule, an action against an individual may be brought in and only in a county in which the individual may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law.

> NOTE: For a definition of transaction or occurrence see *Craig v. W. J. Thiele & Sons, Inc.*, 395 Pa. 129, 149 A.2d 35 (1959).

(a.1) Except as otherwise provided by subdivision (c), a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in a county in which the cause of action arose.

> NOTE: See Section 5101.1(c) of the Judicial Code, 42 Pa.C.S. § 5101.1(c) for the definitions of "health care provider", "medical professional liability action" and "medical professional liability claim".

(b) Actions against the following defendants, except as otherwise provided in [S]subdivision (c), may be brought in and only in the counties designated by the following rules: political subdivisions, Rule 2103; partnerships, Rule 2130; unincorporated associations, Rule 2156; corporations and similar entities, Rule 2179.

> NOTE: Partnerships, unincorporated associations, and corporations and similar entities are subject to subdivision (a.1) governing venue in medical professional liability actions. See Rules 2130, 2156 and 2179.

(c)(1) [An] Except as otherwise provided by paragraph (2), an action to enforce a joint or joint and several liability against two or more defendants, except actions in which the Commonwealth is a party defendant, may be brought against all defendants in any county in which the venue may be laid against any one of the defendants under the general rules of [S]subdivisions (a) or (b).

(2) If the action to enforce a joint or joint and several liability against two or more defendants includes one or more medical professional liability claims, the action shall be brought in any county in which the venue may be laid against any defendant under subdivision (a.1).

(d)(1) For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought.

(2) Where, upon petition and hearing thereon, the court finds that a fair and impartial trial cannot be held in the county for reasons stated of record, the court may order that the action be transferred. The order changing venue shall be certified forthwith to the Supreme Court, which shall designate the county to which the case is to be transferred.

NOTE: For the recusal of the judge for interest or prejudice, see Canon 3C of the Code of Judicial Conduct.

(3) It shall be the duty of the prothonotary of the court in which the action is pending to forward to the prothonotary of the county to which the action is transferred certified copies of the docket entries, process, pleadings, depositions and other papers filed in the action. The costs and fees of the petition for transfer and the removal of the record shall be paid by the petitioner in the first instance to be taxable as costs in the case.

(e) Improper venue shall be raised by preliminary objection and if not so raised shall be waived. If a preliminary objection to venue is sustained and there is a county of proper venue within the State the action shall not be dismissed but shall be transferred to the appropriate court of that county. The costs and fees for transfer and removal of the record shall be paid by the plaintiff.

(f)(1) **[If]** Except as provided by paragraph (2), if the plaintiff states more than one cause of action against the same defendant in the complaint pursuant to Rule 1020(a), the action may be brought in any county in which any one of the individual causes of action might have been brought.

(2) Except as otherwise provided by subdivision (c), if one or more of the causes of action stated against the same defendant is a medical professional liability claim, the action shall be brought in a county required by subdivision (a.1).

Partnerships as Parties

Rule 2130. Venue

(a) Except as otherwise provided by Rule 1006(a.1) and by subdivision (c) of this rule, an action against a partnership may be brought in and only in a county where the partnership regularly conducts business, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of actions arose.

NOTE: Rule 1006(a.1) governs venue in actions for medical professional liability.

***

Unincorporated Associations as Parties

Rule 2156. Venue

(a) Except as otherwise provided by Rule 1006(a.1) and by subdivision (b) of this rule, an action against an association may be brought in and only in a county where the association regularly conducts business or any association activity, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of actions arose.

NOTE: Rule 1006(a.1) governs venue in actions for medical professional liability.

(b) ***

Corporations and Similar Entities as Parties

Rule 2179. Venue

(a) Except as otherwise provided by an Act of Assembly, by Rule 1006(a.1) or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in

(1) the county where its registered office or principal place of business is located;

(2) a county where it regularly conducts business;

(3) the county where the cause of action arose; or

(4) a county where a transaction or occurrence took place out of which the cause of action arose.

NOTE: Rule 1006(a.1) governs venue in actions for medical professional liability.

(b) ***

Explanatory Comment

Act No. 127 of 2002 amended the Judicial Code by adding new Section 5101.1 providing for venue in medical professional liability actions. Section 5101.1(b) provides

> **(b) General rule.** – Notwithstanding any other provision to the contrary, a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in the county in which the cause of action arose.

This provision has been incorporated into Rule of Civil Procedure 1006 governing venue as new subdivision (a.1). The new subdivision uses the terminology of the legislation. "Medical professional liability action," "health care provider" and "medical professional liability claim" are terms defined by Section 5101.1(c) of the Code.

Joint and Several Liability

Under new subdivision (c)(2) of Rule 1006, an action to enforce a joint and several liability against two or more health care providers may be brought in any county in which venue may be laid against at least one of the health care providers under subdivision (a.1). Therefore, an action to enforce a joint and several liability against Health Care Provider A that provided treatment in County 1 and against Health Care Provider B that provided treatment in County 2 may be brought in either County 1 or County 2.

However, subdivision (c)(2) does not allow an action to enforce a joint and several liability to be brought against a health care provider in a county in which venue may be laid against a defendant that is not a health care provider. Therefore, an action to enforce a joint and several liability against Health Care Provider A that provided treatment in County 1 and against a product manufacturer that does business in County 2 may be brought only in County 1.

Multiple Causes of Action

Subdivision (f) of Rule 1006 provides that where more than one cause of action is asserted against the same defendant pursuant to Rule 1020(a), venue as to one cause of action constitutes venue as to all causes of action. In an action in which there are asserted multiple causes of action but only one is a claim for medical professional liability, the application of this provision could frustrate Section 5101.1 and result in an action being brought in a county other than the county in which the cause of action for medical professional liability arose. New subdivision (f)(2) limits venue in such cases to the county required by new subdivision (a.1), e.g., the county in which the cause of action for medical professional liability arose.

The new venue provision for a medical professional liability claim is to be made applicable not only to individual defendants (Rule 1006(a.1)) but also to partnerships (Rule 2130(a)), unincorporated associations (Rule 2156(a)) and corporations and similar entities (Rule 2179(a)).

By the Civil Procedural
Rules Committee

R. Stanton Wettick, Jr.
Chair

APPENDIX H

THE MCARE ACT (ACT 13)

New med-mal law

Analysis of the Medical Care Availability and Reduction of Error (Mcare) Act—Act No. 2002-13

By Robert T. Szostak

Governor Mark Schweiker signed the Medical Care Availability and Reduction of Error (Mcare) Act on March 20, 2002, which amends the Health Services Malpractice Act of 1996, 40 P.C.S.A. Section 1301.101 *et seq.* The act contains significant changes in the regulation of medical professional liability claims. Although no formal legislative history to this act exists, there are seven prior versions of the bill that constitute persuasive authority for future interpretation of the act.[1] The following is a summary of the provisions of the act that have changed the law on medical professional liability. This summary does not address every provision of the act and it is advised that the act be read in its entirety to fully comprehend the significant impact that this legislation will have on medical practice and the way in which medical malpractice claims are initially evaluated and ultimately prosecuted in Pennsylvania.[2]

Changes include elimination of past collateral sources for wages & medical bills, periodic payments for future medical expenses, and reduction of future wage losses to present value. A Patient Safety Authority will also be formed.

I. Policy [§ 102]

The General Assembly declared the following as the enabling policy and purpose of the act:

1. To ensure that medical care is available through a comprehensive and high-quality health care system;
2. To ensure that a full spectrum of hospital services and highly trained physicians in all specialties are available;
3. To maintain the medical system by fostering availability of medical professional liability insurance at affordable and reasonable cost in every geographic region in the cmmonwealth;
4. To afford a prompt determination and fair compensation for every person who has sustained injury or death as a result of medical negligence by a health care provider;
5. To reduce and eliminate medical errors by identifying problems and implementing solutions that promote patient safety; and
6. To recognize and further all of these elements as essential to the public health, safety and welfare of all citizens of Pennsylvania.

II. Patient Safety [§§ 301-314]

The act is clearly intended to balance the need for available medical care and reduction of medical errors. As a result, the act requires the establishment of a body corporate and politic known as the Patient Safety Authority. This authority has various powers, including, *inter alia*:

1. The power to directly or indirectly collect, analyze and evaluate data regarding reports of serious events and incidents, including the identification of performance indicators and patterns in frequency or severity at certain medical facilities or in certain regions of the commonwealth[3];
2. The power to receive recommendations for changes in health care practices and procedures which may be instituted for the purpose of reducing the number and severity of serious events and incidents;
3. The power to directly or indirectly advise reporting medical facilities of immediate changes that can be instituted to reduce serious events and incidents;
4. The power to conduct reviews;
5. The power to evaluate recommendations and to report such recommendations to the Pennsylvania Department of Health; and
6. The power to issue recommendations to medical facilities on a facility-specific or statewide basis regarding changes, trends and improvements in health care practices and procedures for the purpose of reducing the number and severity of serious events and incidents after consultation and approval by the Department of Health.

Every medical facility is required to develop, implement and comply with an internal patient safety plan for the purpose of improving the health and safety of patients. Such plan must be developed in consultation with the licensees providing health care services in the medical facility.[4] A patient safety plan must include a patient safety officer and a patient safety committee and must establish a system for the health care workers of a medical facility to report

Continued on page 6

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serious events and incidents which must be accessible 24 hours a day, 7 days a week.[5] The plan must be submitted to the Department of Health for approval. Compliance with the plan is a condition of employment or credentialing at a medical facility.

The health care worker who reasonably believes that a serious event or incident has occurred must report it according to the patient safety plan of the medical facility within 24 hours after its occurrence or discovery. The medical facility must then provide written notification to the patient affected by such serious event or, with the consent of the patient, to an available family member or designee, within seven days of the occurrence or discovery of the serious event. Depending upon the circumstances, notification may be required to be given to an adult member of the immediate family of a patient, to the closest adult family member, or to the parent or guardian of the patient. Any health care worker who reports the occurrence of a serious event or incident is shielded from any retaliatory action and has the protection and remedies of the Whistleblower Law, Act of December 12, 1986 (P.L. 1559, No. 169).

The medical facility must report the occurrence of a serious event to the Department of Health within 24 hours of confirmation of the occurrence of a serious event. The medical facility must also report the occurrence of an incident to the Patient Safety Authority. A medical facility must also report the occurrence of an "infrastructure failure" to the Department of Health within 24 hours of the occurrence or discovery of such failure.[6] If a licensee fails to report a serious event, the medical facility is required to notify the licensee's licensing board. In addition, it is considered a violation of the act not to report a serious event or infrastructure event or to develop and comply with a patient safety plan or notify a patient of a serious event. This may subject the licensee and/or medical facility to an administrative penalty of $1,000 per day by the Department of Health. There are also provisions for a Patient Safety Trust Fund and patient safety discount to reflect the initiation of a certified safety program.

As aforesaid, every medical facility is required to have a patient safety officer and a patient safety committee. The patient safety officer must serve on the patient safety committee with the primary function of investigating all reports of serious events and incidents. The patient safety officer must take action as immediately necessary to ensure patient safety as a result of any investigation and report to the patient safety committee regarding such action. The patient safety committee not only receives reports from the patient safety officer, it also evaluates investigations and actions of the patient safety officer on all reports and reviews and evaluates the quality of patient safety measures utilized by the medical facility. In addition, the patient safety committee makes recommendations to eliminate future serious events and incidents and reports to the administrative officer and governing body of the medical facility on a quarterly basis.

Any documents, materials or information solely prepared or created for the purpose of compliance with patient safety requirements are confidential and not discoverable or admissible as evidence in any civil or administrative action or proceeding. Any documents, materials or information received by the Patient Safety Authority or Department of Health from a medical facility, health care worker, patient safety committee or governing board of a medical facility solely prepared or created for the purpose of compliance with the patient safety requirements are similarly insulated. Documents otherwise available from original sources are discoverable. No current or former employee of the Authority, the Department or the Department of State is allowed to testify as to any matters gained by reason of his or her review of documents, materials, records or information submitted to the Authority by any medical facility or health care worker pursuant to the requirements of the act. No person providing information or services to a patient safety committee or governing board of a medical facility, the Patient Safety Authority or Department of Health can be held liable by reason of having provided such information or services unless such information is false and the person providing such information knew or had reason to believe that such information was false and was motivated by malice toward any person directly affected by such action.

III. Medical Professional Liability [§§ 501-516]

A. Informed Consent [§ 504]

Although the act repeals the informed consent provisions of Act 135 of 1996, 40 P.S. § 1301.811-A, the Legislature has restated verbatim these informed consent provisions and, in addition, has expressly overruled the Supreme Court opinion in *Duttry v. Patterson*, 771 A.2d 1255 (Pa. 2001).[7] Except in emergencies, a physician owes a duty to a patient to obtain the informed consent of the patient or the patient's authorized representative prior to conducting the following procedures:

1. Performing surgery, including the related administration of anesthesia;
2. Administering radiation or chemotherapy;
3. Administering a blood transfusion;
4. Inserting a surgical device or appliance; and/or
5. Administering an experimental medication, using an experimental device or using an approved medication or device in an experimental manner.

Consent is deemed informed if the patient has been given a description of an applicable procedure and the risks and alternatives that a reasonably prudent patient would require in order to make an informed decision as to that procedure. Expert testimony is required to determine whether the procedure constituted the type of procedure to which informed consent applies and to identify the risks of that procedure, the alternatives to that procedure and the risks of such alternatives. A physician is liable for failure to obtain informed consent only if the patient proves that receiving such information would have been a substantial factor in the patient's decision whether to undergo a procedure to which a duty to provide informed consent applies. A physician may now be held liable for failure to seek a patient's informed consent if the physician knowingly misrepresents to the patient his or her professional credentials, training or experience.[8]

B. Punitive Damages [§ 505]

The standard for awarding punitive damages is willful or wanton conduct or reckless indifference to the rights of others; gross negligence is insufficient. Punitive damages may not be awarded against a health care provider based on vicarious liability. The total amount of damages (except in cases involving intentional misconduct) against an individual shall not exceed 200 percent of the compensatory damage award. If punitive damages are awarded, 75 percent of the punitive damages shall be paid to the prevailing party and 25 percent shall be paid to the newly created

Medical Care Availability and Reduction of Error Fund.

C. Affidavit of Noninvolvement [§ 506] (contained in existing statute)

If a defendant health care provider in a medical professional liability action files an affidavit of noninvolvement with the court, the action against such provider may be dismissed. Each affidavit shall toll the applicable statute of limitations. Any claimant[9] or co-defendant may challenge such affidavit. False or inaccurate filings by a defendant may result in sanctions, including attorneys fees in the discretion of the court.

D. Advance Payments [§ 507] (contained in existing statute)

No advance payment by a health care provider or insurance company shall be admissible by a claimant or construed as an admission of liability for injuries or damages suffered by the claimant.

E. Collateral Sources [§ 508]

Pennsylvania jurisprudence has long recognized the collateral source rule. Simply put, the collateral source rule precludes reduction of damages otherwise recoverable from a defendant when the claimant has received payments from a collateral source such as health or disability insurance. The rationale for the collateral source rule is that it is better for the wronged claimant to receive a potential windfall than it is for the defendant causing harm to be relieved from responsibility for the harm.

Section 508 of the act regulates collateral sources. It significantly modifies the collateral source rule and provides:

(a) General rule. — Except as set forth in subsection (d), a claimant in a medical professional liability action is precluded from recovering damages for past medical expenses or past lost earnings incurred to the time of trial to the extent that the loss is covered by a private or public benefit or gratuity that the claimant has received prior to trial..

(b) Option. — The claimant has the option to introduce into evidence at trial the amount of medical expenses actually incurred, but the claimant shall not be permitted to recover for such expenses as part of any verdict except to the extent that the claimant remains legally responsible for such payment.

(c) No subrogation. — Except as set forth in subsection (d), there shall be no right of subrogation or reimbursement from claimant's tort recovery with respect to a public or private benefit covered in subsection (a).

(d) Exceptions. — The collateral source provision set forth in subsection (a) shall not apply to the following::

(1) Life insurance, pension or profit sharing plans, or other deferred compensation plans, including agreements pertaining to the sale of a business.
(2) Social Security benefits.
(3) Cash or medical assistance benefits which are subject to repayment to the Department of Public Welfare.
(4) Public benefits paid or payable under a program which, under Federal statute, provides for right of reimbursement which supersedes State law for the amount of benefits paid from a verdict or settlement.

It bears emphasis that the general rule applies only to past paid expenses. There is potential ambiguity between damages for past medical expenses or past lost earnings **incurred** to the time of trial as compared to benefits or gratuities **received** by the claimant prior to trial. The act does not define the terms private benefit, public benefit or gratuity. While there is no subrogation for the claimant's tort recovery with respect to public or private benefits covered under Subsection 508(a), because "gratuity" is not included, there appears to be a right of subrogation or reimbursement for gratuities conferred.

Although the claimant has the option to introduce evidence on the amount of medical expenses actually incurred, Subsection 508(b) is silent on the purpose for allowing the introduction of medical expenses incurred. And while a claimant can only recover medical expenses for which the claimant is "legally responsible", medical bills can be introduced to show the cost of future medical treatment. Moreover, it appears that the claimant should be able to introduce the full amount of medical expenses actually incurred as an indicator of non-economic harm, including pain and suffering.

F. Payment of Damages [§ 509]

Henceforth, in a medical professional liability action, the trier of fact is required to determine damages with separate findings for each claimant, excluding damages for past medical expenses or past loss of earnings covered by collateral sources under § 508, as follows:

1. Past damages for medical and other related expenses in a lump sum;
2. Past damages for loss of earnings in a lump sum;
3. Past damages for non-economic loss in a lump sum;
4. Future damages for medical and other related expenses by year;
5. Future damages for loss of earnings or earning capacity in a lump sum; and
6. Future damages for non-economic loss in a lump sum.

Future damages for medical and other related expenses must be paid periodically after payment of the proportionate share of counsel fees and costs based upon the present value of the future damages awarded. The trier of fact is permitted to vary the amount of periodic payments for future medical expenses from year to year for the life expectancy of the claimant to account for different annual expenditure requirements, including immediate needs of the claimant. The trier of fact is also empowered to provide for the purchase and replacement of medically necessary equipment in the years that such expenditures may be incurred. Significantly, the trier of fact may incorporate into any future medical expense award, adjustments to account for reasonably anticipated inflation and medical improvements as presented by competent evidence. Future damages for medical expenses are required to be paid in the years that the trier of fact finds they will accrue and, in the absence of a different schedule for payment, annual amounts due must be paid in equal quarterly installments due and payable on the first day of each month, rounded to the nearest dollar.

Liability to a claimant for periodic payments not yet due for medical expenses terminates upon the claimant's death. Each party liable for all or a portion of the judgment must fund the awarded periodic payments by means of an annuity contract, trust or other qualified funding plan approved by the court pursuant to a list of designated insurers published by the Commissioner of the Pennsylvania Insurance Department. If future damages for medical and other related expenses are stipulated as not exceeding $100,000, they need not be awarded in periodic payments.

The act measures counsel fees on the

present value of the future damages for medical and other related expenses awarded. This has the salutary effect of eliminating potential conflicts between attorney and client over how counsel fees are assessed. The importance of Life Care Plans and the testimony necessary to establish future medical expenses including special needs that will require medical expense award adjustments cannot be overstated. The appropriate experts will be essential to prove that such expenses are both necessary and reasonable. Economists or qualified actuaries will also be required to factor the inflation effect into any award for future medical expenses.

G. Future Loss of Earning Capacity Reduced to Present Value [§ 510]

Future loss of earnings or earning capacity must be reduced to present value based upon the return that the claimant can earn on a reasonably secure fixed income investment. Because there is no set discount rate, the appropriate discount rate is the subject of expert testimony. In addition, future wage loss damages may include competent evidence on the effect of productivity and inflation over time. The trier of fact is required to determine the applicable discount rate also based upon competent evidence.

H. Preservation and Accuracy of Medical Records [§ 511]

Entries in patient charts concerning care rendered must be made contemporaneously or as soon as practicable. It is unprofessional conduct and a violation of the applicable licensing statute to make alterations to a patient's chart except (1) when erroneously entered; or (2) where necessary to clarify entries previously made; or (3) to add information to a patient's chart previously unavailable at the time the record was first created. All corrections or additions must be clearly identified as subsequent entries by date and time.

If a claimant can demonstrate spoliation by a preponderance of the evidence that there has been an intentional alteration or destruction of medical records, the court may give an adverse inference charge to the jury. A health care provider is subject to suspension for eliminating information that would give rise to a medical professional liability action. However, any health care provider who is aware of an alteration or destruction must report any party suspected of such conduct to the appropriate licensure board.

I. Expert Qualifications [§ 512]

In order to testify in a medical professional liability action against a physician, an expert must (1) possess "sufficient education, training, knowledge and experience to provide credible, competent testimony"; and (2) fulfill the qualifications required by the act. Any expert testifying on a medical matter, including standard of care, risks and alternatives, causation and the nature and extent of injury, must satisfy the following qualifications:

1. Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia; and

2. Be engaged in, or retired within the previous five years from active clinical practice or teaching.

A court may waive the licensing and/or retirement restrictions for an expert "on a matter other than the standard of care" provided that the court determines the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.[10]

Any expert testifying as to a physician's standard of care must also meet the following qualifications:

1. Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care; and

2. Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue (which certain exceptions); and

3. In the event the defendant physician is certified by an approved board, be board certified by the same or similar approved board.

A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that: (1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and (2) the defendant physician provided care for that condition and such care was not within the physician's specialty or competence. A court may also waive the same subspecialty and/or Board Certification requirements for an expert testifying on the standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

J. Statute of Repose [§ 513]

Except in the cases of harm caused by a foreign object or injuries to minors, no cause of action asserting a medical professional liability claim can be commenced after seven (7) years from the date of the alleged tort or breach of contract. Because a statute of repose eliminates both the right and remedy, after seven years, no claimant may sue and argue exceptional circumstances as embodied in the Pennsylvania Discovery Rule to justify extending the statute of limitations as part of the right to sue. For death or survival actions, unless there is affirmative evidence of misrepresentation or fraudulent concealment of the cause of death, such claims must be commenced within two years after death.

K. Venue [§ 514]

An Interbranch Commission on Venue has been established to review and analyze the issue of venue as it relates to medical professional liability actions and to report to the General Assembly and the Supreme Court by Sept. 1, 2002.

L. Remittitur [§ 515]

In cases where any defendant health care provider challenges a verdict as excessive, in deciding a motion for remittitur, the court must consider evidence of the impact, if any, upon the availability or access to health care in the community if the defendant health care provider is required to satisfy the verdict rendered by the jury. Should the trial court deny such motion, it must specifically enumerate the facts in evidence it considered with respect to the impact of the verdict upon the availability or access to health care in the community, subject to an abuse of discretion standard. Further, to preserve the right of appeal of claimed excess verdicts, a trial court or appellate court may limit or reduce the amount of security that a defendant health care provider must post to prevent execution if the court concludes that requiring a bond in excess of the limits of available coverage would deny the right to appeal.

M. Ostensible Agency [§ 516]

The act clarifies the basic precepts of common law ostensible agency. It

applies an objective standard to vicarious liability as follows:

(A) vicarious liability. — A hospital may be held vicariously liable for the acts of another health care provider through principles of ostensible agency only if the evidence shows that:

(1) 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; or

(2) The care in question was advertised or otherwise represented to the patient as being rendered by the hospital or its agents.

Staff privileges are an insufficient nexus to establish vicarious liability.

IV. Insurance [§§ 701-748]

Effective in the year 2003, mandatory medical professional liability insurance or self-insurance is reduced to $1 million, representing a 17 percent drop in total limits. For policies issued or renewed in the calendar year 2002, there is $500,000 per occurrence or claim limit for basic insurance coverage and a $700,000 limit of excess indemnity from the new "Medical Care Availability and Reduction of Error Fund." For policies issued or renewed from 2003 through 2005, the basic insurance coverage limit shall be $500,000.00 per occurrence or claim with excess indemnity of $500,000 from the new fund. Unless the Insurance Commissioner finds that additional basic coverage capacity is not available, from 2006 through 2008, primary coverage shall be $750,000 and excess indemnity $250,000 from the new fund. Beginning in 2009, if the private marketplace permits available coverage, the basic insurance coverage limit shall be $1 million per occurrence or claim without fund participation.

The new fund shall be administered by the Pennsylvania Insurance Department, which shall contract with an entity or entities for the administration of claims against the fund. The former CAT Fund will cease to exist on Oct. 1, 2002.

The new fund shall be funded by an assessment on each participating health care provider levied by the Department on or after January 1st of each year. Claims that become final during the preceding claims period shall be paid on or before December 31st following the August 31st on which they became final. Information provided to the Insurance Department or maintained by the Department regarding claims or adjustments to an individual participating health care provider's assessment shall be confidential. Upon the consent of all parties, the department may provide for a mediator in instances where multiple carriers disagree on the disposition or settlement of a case. Mediation must be binding and confidential. Delay damages and postjudgment interest must be paid by the fund to the extent of its liability on a medical professional liability claim. A participating health care provider may maintain the right to consent to settlement in a basic insurance coverage policy upon payment of an additional premium amount. The primary carrier continues to have the duty to provide the defense to the doctor or the fund. Significantly, the claimant can settle with the primary carrier up to the limits of its policy without effect on the liability of the Fund or the duty to defend. Within two (2) years of the effective date, podiatrists are no longer participants in the fund.

V. Mandatory Reporting of Claims Paid [§ 746]

Every medical professional liability insurer and self-insured health care provider, including the fund, which makes any payment in settlement or in partial settlement of or in satisfaction of a judgment in a medical professional liability action or claim must provide to the appropriate licensure board[11] a true and correct copy of the report required to be filed with the Federal Government by Section 421 of the Health Care Quality Improvement Act of 1986 (Public Law 99-660, 42 U.S.C. § 11131). Any person or entity filing such report in good faith and without malice shall be immune from civil or criminal liability arising from the report. Information received shall not be considered public information for purposes of the Right-to-Know Law.

VI. Reporting and Investigation of Civil Complaints [§ 903]

A physician must report to the State Board of Medicine or the State Board of Osteopathic Medicine any of the following events within sixty (60) days of their occurrence:

1. Notice of complaint in a medical professional liability action against the physician;

2. Information regarding disciplinary action taken against the physician by a health care licensing authority of another state;

3. Information regarding sentencing of the physician for an offense as provided in Section 15 of the Act of Oct. 5, 1978 known as the Osteopathic Medical Practice Act or Section 41 of the Act of Dec. 20, 1985, known as the Medical Practice Act of 1985; and

4. Information regarding an arrest of a physician for any of the offenses in this Commonwealth or another state relating to criminal homicide, aggravated assault, sexual offenses or violation of the Controlled Substance, Drug, Device and Cosmetic Act.

VII. Investigation and Action By Licensure Board [§§ 904-909]

The Licensure Board must develop criteria and standards for review of complaints based on frequency and severity of complaints filed against a physician. Any investigation must be commenced within four years from the date of notice of the complaint. If the Licensure Board determines that a physician has practiced negligently, the Board may impose disciplinary sanctions or corrective measures. With the exception of letters to a licensee that disclose the final outcome of an investigation or the final adjudications or orders issued by the Licensure Board, all documents, materials or information utilized for an investigation undertaken by the State Board of Medicine or State Board of Osteopathic Medicine or concerning a complaint filed with said Boards is confidential and privileged. Disclosure of any documents, materials or information pertaining to the status of a license, permit or certificate issued or prepared by the State Board of Medicine or State Board of Osteopathic Medicine or relating to public disciplinary proceedings or hearings is not confidential.

The Licensure Board may levy a civil penalty up to $10,000.00 on any current licensee who violates any provision of this Act.

On an annual basis, the Board shall submit a report to the Legislature which shall be deemed public information.

VIII. Effective Date [§ 5108]

The substantive legal provisions apply to all causes of action which arise on or after the effective date of the act, March 20, 2002. With minor exception, the remainder of the Act takes effect sixty (60) days later or on May 20, 2002.

Section 512 on Expert Qualifications,

when viewed through the window of procedural change, takes effect on May 20, 2002 and thus applies to pending cases. Because Section 512 can be used to preclude an expert on "the standard of care" for failure to possess an unrestricted license, non-engagement or retirement from active clinical practice or teaching within the previous five (5) years and/or failure to meet the same subspecialty and/or board certification requirements, the expert qualifications for all expert witnesses in pending cases must be immediately reevaluated under the restrictions of the act. Depending upon the circumstances, determinations on the competence *vel non* of an expert witness, especially with regard to the standard of care, will likely require continuances and/or substitution of experts in many cases. Alternatively, pretrial waiver hearings without prejudice to substitute a new expert could also be pursued on a case by case basis to prequalify any expert subject to challenge under this preclusive section of the Act.

Given that Section 512 rulings will be reviewed under the abuse of discretion standard and, therefore, rarely disturbed on appeal, a 512 Hearing should be approached by both court and counsel with the alternative failsafe of a substituted expert. To proceed otherwise is to navigate in fog on an uncharted course without a safe harbor. While the burden and expense of a substitute expert is extremely unfair, the appellate remedy may be even more oppressive to the affected litigant.[12]

Notes:

1. Prior Printer's Nos. for House Bill 1802 are 2317, 2788, 3202, 3320, 3326, 3328 and 3329.

2. On Aprill 22, 2002, the Pennsylvania Supreme Court rescinded Pennsylvania Rule of Civil Procedure 1023 and promulgated Pa. R.C.P. 1023.1 This new rule will also significantly impact the way in which medical malpractice cases are processed. Effective on July 1, 2002, the new rule reads as follows:

Rule 1023.1. Scope. Signing of Documents. Representations to Court. Violation.

(a) Rules 1023.1 through 1023.4 do not apply to disclosures and discovery requests, responses, objections and discovery motions that are subject to the provisions of general rules.

(b) Every pleading, written motion, and other paper directed to the court shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. This rule shall not be construed to suspend or modify the provisions of Rule 1024 or Rule 1029(e).

(c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,

(3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery, and

(4) the denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(d) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (c) has been violated, the court may, subject to the conditions stated in Rules 1023.2 through 1023.4, impose an appropriate sanction upon any attorneys, law firms and parties that have violated subdivision (c) or are responsible for the violation.

(e) Section 8355 of the Judicial Code, 42 Pa.C.S. § 8355, is suspended absolutely, in accordance with the provisions of the Constitution of 1968, Article V, Section 10(c).

Modeled on Rule 11 of the Federal Rules of Civil Procedure, the new rule is thus designed to deter "frivolous" claims, defenses and other legal contentions with the threat of appropriate sanctions for the "abuse of litigation." Rule 1023.1 also embraces the salutary purpose of uniformity betwen federal and state rules.

3. "Medical facility" is defined as "an ambulatory surgical facility, birth center or hospital."

"Serious event" is defined as "an event, occurrence or situation involving the clinical care of a patient in a medical facility that results in death or compromises patient safety and results in unanticipated injury requiring the delivery of additional health care services to the patient. The term does not include an incident."

"Incident" is defined as "an event, occurrence or situation involving the clinical care of a patient in a medical facility which could have injured the patient but did not either cause an unanticipated injury or require the delivery of additional health care services to the patient. The term does not include a serious event." [§ 302.]

A "serious event" is one that results in death or an "unanticipated" injury whereas an "incident" is an event occurrence or situation that "could have injured" the patient but did not. Significantly, as aforesaid, the patient safety provisions apply only to a medical facility specifically limited to either an (1) ambulatory surgical facility, (2) birth center, or (3) hospital.

4. "Licensee" is defined as "an individual who is all of the following:

1. Licensed or certified by the Department [of Health] or the Department of State to provide professional services in Pennsylvania; and
2. Employed by or authorized to provide professional services in a medical facility."

5. "Health care worker" is defined as "an employee, independent contractor, licensee or other individual authorized to provide services in a medical facility."

6. "Infrastructure" is defined as "structures related to the physical plan and service delivery systems necessary for the provision of health care services in a medical facility."

7. *See* § 5104 of the act which repeals, inter alia, the Act of October 15, 1975 (P.L. 390, No. 111) known as the Health Care Services Malpractice Act.

8. Because *Duttry* has been overruled, it is now advisable and necessary to plead a separate count for misrepresentation and specific violation of this section of the act [§ 504(d)(2)]. When evaluating a potential claim, it is prudent practice and procedure for attorneys to investigate all representations by physicians as to their credentials, training or experience, including office literature and web sites, and to question clients as to representations made to them on professional qualifications by any physician before surgery.

9. "Claimant" is defined as "a patient, including a patient's immediate family,

guardian, personal representative or estate."

10. *But see* Pennsylvania Rule of Evidence 702:

> Testimony by Experts
>
> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

11. "Licensure authority" is defined as "the State Board of Medicine, the State Board of Osteopathic Medicine, the State Board of Podiatry, the Department of Public Welfare and the Department of Health."

"Licensure board" is defined as "either or both of the following depending on the licensure of the affected individual:

(1) The State Board of Medicine.

(2) The State Board of Osteopathic Medicine."

12. One could posit the argument that preclusion of an expert witness for failure to qualify under Section 512 would lead to summary judgment or non-suit against the claimant or unrebutted expert testimony against the health care provider. Such preclusion would be outcome-determinative so as to deprive a litigant of the substantive rights to trial by jury and due process. As such, it would appear to follow that Section 512 should apply to causes of action which arise on or after the effective date of the act. Unfortunately, Section 5105(B) explicitly excludes expert qualifications as a provision applicable to causes of action which arise on or after the effective date of the act. Otherwise stated, the only provisions applicable to causes of action arising on or after the effective date of the act are:

1. Section 504(D)(2) - Legislative reversal of *Duttry*;
2. Section 505(E) - Allocation of Punitive Damages on a 75 percent/25 percent basis;
3. Section 508 - Collateral Sources;
4. Section 509 - Payment of Damages;
5. Section 510 - Reduction to Present Value of Future Loss of Earning Capacity;
6. Section 513 - Statute of Repose; and
7. Section 516 - Ostensible Agency.

A better argument may be that Section 512 interferes with the rule-making authority of the Pennsylvania Supreme Court and, is, as a result, in violation of the Pennsylvania Constitution. *See In Re: Suspension of Certain Provisions of Act No. 1975-111 added by Act No. 1996-135*, PA No. 269, Civil Procedure Rules Docket No. 5, Per Curiam Order entered January 17, 1997 (Supreme Court suspended various provisions of now repealed Act 135 of 1996 because only the Supreme Court has the constitutional authority to regulate Court procedures). ■

SCHEDULE OF EFFECTIVENESS

The following provisions of the MCARE Act are only applicable to cases alleging medical negligence that occurred on March 20, 2002 or after:

- Informed Consent	Section 504
- Punitive Damages	Section 505
- Collateral Sources	Section 508
- Payment of Damages/Reduction to Present Value	Section 509-510
- Statute of Repose	Section 513
- Ostensible Agency	Section 516

The following section of the law is effective immediately and applies to cases that are currently in suit:

-Remittitur	Section 515

The new provision dealing with expert qualifications takes effect on May 19, 2002 and applies to cases already in suit.

All hospitals have to have their patient safety plan to the Department of Health by July 16, 2002.

Venue (Senate Bill 138)
Effective date 12/16/02

Fair Share Act (Act 57) (Joint and Several Liability Elimination)
Applies to causes of action arising on or after 8/19/02.

APPENDIX I

Adoption of Rule of Procedure 1042.6 and Admendment of Rules 1042.1et seq. Governing Professional Liability Actions

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE: Adoption of Rule of Civil Procedure 1042.6 and Amendment of Rules 1042.1 et seq. Governing Professional Liability Actions	:	**No. 493**
	:	**Civil Procedural Rules**
	:	**Docket No. 5**

ORDER

PER CURIAM:

AND NOW, this 16th day of June, 2008, the Pennsylvania Rules of Civil Procedure are amended as follows:

(1) Rule 1042.1, Rule 1042.2, and Rule 1042.3 are amended to read as attached hereto.

(2) Rule 1042.6 is renumbered as Rule 1042.7 and amended to read as attached hereto. Rule 1042.7 is renumbered as Rule 1042.8; Rule 1042.8 is renumbered as 1042.9.

(3) New Rule 1042.6 is promulgated to read as attached hereto.

This Order shall be processed in accordance with Pa.R.J.A. 103(b) and shall be effective immediately. The new and amended rules shall apply to all pending actions in which a judgment of non pros for failure to file a certificate of merit has not been entered by the effective date.

NOTE: Bracketed material is deleted.
New material is underscored
New rules are not underscored.

Rule 1042.1. Professional Liability Actions. Scope. Definition

(a) The rules of this chapter govern a civil action in which a professional liability claim is asserted by or on behalf of a patient or client of the licensed professional against

(1) a licensed professional, and/or

(2) a partnership, unincorporated association, corporation or similar entity where the entity is responsible for a licensed professional who deviated from an acceptable professional standard, and

(b) A professional liability claim asserted against a licensed professional includes a claim for lack of informed consent.

[(b)] (c) * * *

Rule 1042.2. Complaint

(a) * * *

(b) A defendant may raise by preliminary objections the failure of the complaint to comply with subdivision (a) of this rule.

> Note: [The filing of preliminary objections raising failure of a pleading to conform to rule of court is the procedure for bringing before the court the issue whether the complaint is asserting a professional liability claim.] The filing of preliminary objections pursuant to Rule 1042.2(b) is not a prerequisite to the filing of a notice of intent to enter a judgment of non pros on a professional liability claim pursuant to Rule 1042.6.

Rule 1042.3. Certificate of Merit

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

Note: The requirements of subdivision (a) apply to a claim for lack of informed consent.

(1) * * *

(2) * * *

(3) * * *

(b) * * *

(c)(1) A defendant who files a counterclaim asserting a claim for professional responsibility shall file a certificate of merit as required by this rule.

(2) A defendant or an additional defendant who has joined a licensed professional as an additional defendant or asserted a cross-claim against a licensed professional need not file a certificate of merit unless the joinder or cross-claim is based on acts of negligence that are unrelated to the acts of negligence that are the basis for the claim against the joining or cross-claiming party.

(d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. A motion to extend the time for filing a certificate of merit must be filed [on or before the filing date that the plaintiff seeks to extend.] by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6(a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater. The filing of a motion to extend tolls the

time period within which a certificate of merit must be filed until the court rules upon the motion.

Note: * * *

Rule 1042.6. Notice of Intent to Enter Judgment of Non Pros for Failure to File Certificate of Merit. Motion to Determine Necessity to File Certificate. Form of Notice (NEW)

(a) Except as provided by subdivision (b), a defendant seeking to enter a judgment of non pros under Rule 1042.7(a) shall file a written notice of intention to file the praecipe and serve it on the party's attorney of record or on the party if unrepresented, no sooner than the thirty-first day after the filing of the complaint.

(b) A judgment of non pros may be entered as provided by Rule 1042.7(a) without notice if

(1) the court has granted a motion to extend the time to file the certificate and the plaintiff has failed to file it within the extended time, or

(2) the court has denied the motion to extend the time.

(c) Upon the filing of a notice under subdivision (a) of this rule, a plaintiff may file a motion seeking a determination by the court as to the necessity of filing a certificate of merit. The filing of the motion tolls the time period within which a certificate of merit must be filed until the court rules upon the motion. If it is determined that a certificate of merit is required, the plaintiff must file the certificate within twenty days of entry of the court order on the docket or the original time period, whichever is later.

Note: The motion may be filed at any time prior to the entry of a judgment of non pros.

Once the judgment of non pros is entered, a party cannot raise the claim that the filing of a certificate of merit was not required.

(d) The notice required by subdivision (a) of this rule shall be substantially in the following form:

(CAPTION)

NOTICE OF INTENTION TO ENTER

JUDGMENT OF NON PROS

ON PROFESSIONAL LIABILITY CLAIM

To: _____
(Identify Party)

Pursuant to Pennsylvania Rule of Civil Procedure 1042.7, I intend to enter a judgment of non pros against you after thirty (30) days of the date of the filing of this notice if a certificate of merit is not filed as required by Rule 1042.3.

I am serving this notice on behalf of _____.
(Name of party)

The judgment of non pros will be entered as to the following claims: _____
_____
_____.
(State if a judgment is to be entered as to all claims. Otherwise, identify claims set forth in the complaint as to which a judgment of non pros will be entered.)

_____
(Attorney)

_____
(Address)

_____
(Telephone Number)

Rule [1042.6.] 1042.7. Entry of Judgment of Non Pros for Failure to File Certification. Form of Praecipe

(a) The prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time provided that

(1) there is no pending motion for determination that the filing of a certificate is not required or no pending timely filed motion seeking to extend the time to file the certificate[.],

(2) no certificate of merit has been filed,

(3) except as provided by Rule 1042.6(b), the defendant has attached to the praecipe a certificate of service of the notice of intention to enter the judgment of non pros, and

(4) except as provided by Rule 1042.6(b), the praecipe is filed no less than thirty days after the date of the filing of the notice of intention to enter the judgment of non pros.

Note: The prothonotary may not enter judgment if the certificate of merit has been filed prior to the filing of the praecipe.

Rule 237.1 does not apply to a judgment of non pros entered under this rule.

See Rule 208.2(a)(4) for the content of the certificate of service.

(b) The praecipe for the entry of a judgment of non pros shall be substantially in the following form:

(Caption)

Praecipe for Entry of Judgment of Non Pros

Pursuant to Rule [1042.6] 1042.7

To the Prothonotary:

[Enter judgment of non pros against _____ in the
Plaintiff
Professional liability claim against _____ in the above
Defendant
captioned matter.]

Enter judgment of non pros in the above-captioned matter against _____

_____ as to
Identify Party

(1) all claims against _____.
Identify Party

OR

(2) only the following claims against _____:
Identify Party

_____
Identify Claims

_____

_____.

[I, the undersigned, certify that the plaintiff named above has asserted a professional liability claim against the defendant named above who is a licensed professional, that no certificate of merit has been filed within the time required by Pa.R.C.P. 1042.3 and that there is no motion to extend the time for filing the certificate pending before the court.]

Date: _____

_____

[Defendant or] Attorney for [Defendant]
_____ (Identify Party)

Note: Where applicable, a certificate of service of the notice of intention to enter judgment of non pros shall be attached to the praecipe.

Rule [1042.7.] 1042.8. **Sanctions**

* * *

Rule [1042.8.] 1042.9. **Certificate of Merit. Form**

* * *

Explanatory Comment

Current Rules 1042.6, 1042.7 and 1042.8 have been renumbered as Rules 1042.7, 1042.8 and 1042.9, respectively, and new Rule 1042.6 has been promulgated to govern notice of intent to enter a judgment of *non pros* for failure to file a certificate of merit.

The highlights of the amendments are as follows:

1. Present Rule 1042.1 governing the scope of the rules has been amended in two respects. First, subdivision (a) was revised to make clear that Rule 1042.1 et seq. (1) applies to claims by or on behalf of patients or clients against licensed professionals and (2) includes professional liability actions against a partnership, an unincorporated association, a corporation or a similar entity where the entity "is responsible for a licensed professional who deviated from an acceptable professional standard."

Second, new subdivision (b) was added to Rule 1042.1 to make clear that a professional liability action against a health care provider includes a claim for lack of informed consent.

2. Present Rule 1042.2(b) provides that "[a] defendant may raise by preliminary objections the failure of the complaint to comply with subdivision (a) of this rule." The note to present Rule 1042.2(b) has been amended because new Rule 1042.6(c) permits a plaintiff to file a motion seeking a determination by the court as to the necessity of filing a certificate of merit.

3. New Rules 1042.6 and 1042.7 address concerns that the present rules (1) permit the entry of a judgment of *non pros* where a plaintiff may believe that the rules governing certificates of merit do not apply and (2) provide for the entry of a judgment of *non pros* where there has been no notice of intent to enter such a judgment.

Several revisions to these rules remedy this situation. First, new Rule 1042.6(a) requires a defendant to give a thirty-day notice of intention to file a praecipe for a judgment of *non pros* for failure to file a certificate of merit. Subdivision (d) provides a form of notice. The new rule retains the basic sixty-day period for the filing of a certificate of merit under present practice since the notice may be filed no earlier than the thirty-first day after the filing of the complaint and the judgment may not be filed earlier than thirty days after the filing of the notice. Subdivision (b) sets forth exceptions to the notice requirement where the court (1) has granted an extension of time to file a certificate of merit and the plaintiff has failed to do so or (2) has denied a motion to extend the time for filing a certificate.

Second, new Rule 1042.6(c) provides that once a notice of intention to seek a judgment of *non pros* has been filed, the plaintiff may file a motion to seek "a determination by the court that the filing of a certificate of merit is not required." As in the case of a motion to extend the time for filing a certificate under Rule 1042.3(d), the "filing of the motion tolls the time period within which a certificate of merit must be filed until the court rules upon the motion."

Third, present Rule 1042.6 was renumbered as Rule 1042.7 and revised. As revised, subdivision (a) of the rule has been expanded to set forth four conditions for the entry of a judgment of *non pros*. The form of praecipe to enter the judgment in subdivision (b) has been revised to conform to the new procedure.

By the Civil Procedural
Rules Committee:

R. Stanton Wettick, Jr.
Chair