

**U.S. SUPREME COURT HOLDS THAT STATE’S MEDICAID DEPARTMENT  
ENTITLED TO A LIEN ONLY ON SETTLEMENT PROCEEDS WITH  
RESPECT TO MEDICAL EXPENSES**

In Arkansas Dept. of Health and Human Services v. Ahlborn, 126 S. Ct. 1752 (2006), the Court held that a State’s Medicaid department will be limited to reimbursement from only that portion of a judgment or settlement that represents payment for medical expenses. States are now prohibited from being reimbursed for Medicaid costs from settlement proceeds that were intended to cover items other than medical expenses such as pain and suffering and wage loss. The federal anti-lien statute prevents States from attaching or encumbering the non-medical portion of the settlement or judgment. The court held that “the risk that parties to a tort suit will allocate away the State’s interest can be avoided by either obtaining the State’s advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision.” Id. at 1765.

**CERTIFICATE OF MERIT REQUIRED FOR PROFESSIONAL  
NEGLIGENCE CAUSE OF ACTION IN CASE OF INJURIES FROM  
PATIENT'S FALL**

In Budner v. Allegheny General Hospital, 74 Pa. D. & C. 4<sup>th</sup> 557 (Court of Common Pleas of Allegheny County, 3/9/05), the Court addressed whether a certificate of merit was required in the context of a patient's falling from a chair while under the care of a physical therapist.

In 2001, Plaintiff Amy W. Budner fell during a session of physical therapy treatment at a facility owned by Defendant. Under the care of a physical therapist, Mrs. Budner sat in a high swivel chair for the purpose of a whirlpool bath treatment. When Mrs. Budner attempted to get down from the chair, she fell. As a result of the fall, Mrs. Budner suffered injuries to her neck, back, ribs, coccyx, and right shoulder. To seek recovery for alleged injuries, Mrs. Budner filed a cause of action for negligence against Allegheny General Hospital and the physical therapist.

Plaintiffs, Mr. and Mrs. Budner, brought the case as a premises liability claim against Defendants. Plaintiffs attempted to demonstrate that Allegheny General Hospital was liable for knowingly placing Mrs. Budner in the swivel chair, an object that Plaintiffs called a "dangerous condition of the land." The Court rejected the premises liability claim as an insufficient cause of action, citing the three-part test in the Restatement (Second) of Torts. The Court held that the physical therapist's professional negligence, not the chair, was the alleged cause of Mrs. Budner's injury. Because Plaintiffs failed to file a timely certificate of merit, they could not file a professional negligence claim pursuant to Pa.R.C.P. 1042.2. The Court granted summary judgment in favor of the Defendants.

**COURT DENIED MOTIONS TO PRECLUDE TESTIMONY OF NURSE  
PRESENTED AS A FACT WITNESS**

In Burega v. Centre Community Hospital Inc., 73 Pa. D. & C.4<sup>th</sup> 235, (Court of Common Pleas of Pennsylvania, Centre County, 8/24/05), the Court denied motions in limine brought by Defendants Centre Community Hospital Inc. and J.R. Paine M.D. to preclude testimony of Mary Harter (Auman) R.N.

In the Amended Complaint, Plaintiff alleged that J.R. Paine M.D. was negligent in caring and treating for minor plaintiff during an emergency visit in 1997. Plaintiff asserted that Dr. Paine failed to diagnose minor plaintiff's Group B strep meningitis and sepsis.

During the process of discovery, the deposition of Mary Harter (Auman) R.N. was taken. Nurse Harter was the emergency room nurse who assessed minor plaintiff during the 1997 emergency room visit. Nurse Harter was asked to give her opinions of minor plaintiff's condition while in the emergency room. In response to the deposition of nurse Harter, both Defendants (Centre Community Hospital Inc. and Dr. Paine) filed motions in limine to preclude nurse Harter's testimony.

Defendants argued that nurse Harter should be precluded from making medical diagnoses or prescribing treatments, as indicated in Pennsylvania Nursing Law, 63 P.S. § 212(1), which reads:

**(1) The "Practice of Professional Nursing"** means diagnosing and treating human responses to actual or potential health problems through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens as prescribed by a licensed physician or dentist. *The foregoing shall not be deemed to include acts of medical diagnosis or prescription of medical therapeutic or corrective measures, except as performed by a certified registered nurse practitioner acting in accordance with rules and regulations promulgated by the Board.* (emphasis added)

Plaintiff countered Defendant's objection to nurse Harter's testimony, stating that nurse Harter would testify as a fact witness, not as a medical expert. As a factual witness, nurse Harter would confine her testimony to observations of plaintiff minor's chart, staying in line with the language of Pennsylvania Nursing Law, 63 P.S. § 212(1). The Court held that:

“Nurse Harter's testimony may be presented by plaintiff. However, such testimony must be restricted to that which she is qualified to testify, including but not limited to descriptions of what she observed, what she did, and notations she made in plaintiff minor's chart.”

Further, the Court held that Nurse Harter “may not offer opinions as to either the medical diagnosis of plaintiff minor’s condition or to the medical causes of that condition.” The Court also ordered that “to further avoid confusion, the jury will be informed at time of trial, and prior to deliberations, that testimony of a nurse is not expert medical testimony.”

## VARIOUS EVIDENTIARY ISSUES IN MALPRACTICE CLAIM

In Burton v. Chatwani, 2006 W.L. 1768388 (Court of Com. Pl. 5/30/06), the court addressed multiple evidentiary issues in the context of a medical malpractice action. Plaintiff's complaint alleged that her left ureter was injured when she was operated on for a hysterectomy, and as a result thereof, a fistula developed, resulting in the leakage of urine into her vagina.

### a. Qualification Of Expert Under MCARE

Plaintiff argued that the Trial Court erred in permitting Dr. Hersch, a urologist, to testify as a witness because he was not an obstetrician/gynecologist and was, therefore, not qualified to testify as to the standard of care involved in hysterectomy surgery. The court found no merit to this contention. The record reflected that Dr. Hersch did not testify about the standard of care of an obstetrician/gynecologist, but rather about the standard of care involved in avoiding ureteral injury during abdominal surgery and about a diagnostic test used to determine whether a ureter was damaged during surgery, subjects which were within his area of expertise. While the court noted that the MCARE Act plainly prefers, and in some cases may require, that expert testimony in professional malpractice cases come from witnesses with expertise in the defendant's particular subspecialty, the Act does not require that testimony in all cases be so restricted. 40 P.S. §1303.512(c).

### b. Reasonable Medical Certainty Not Required of Defense Expert

Plaintiff also objected to the testimony of Dr. Hersch because his opinions were not stated to a reasonable degree of medical certainty. On this issue the court held as follows:

“While experts called by Plaintiffs in medical malpractice actions surely indicate that their opinions are rendered to a degree of medical certainty, there appears to be no such requirement with respect to experts called by the defense.”

### c. Cross Examination Of Defense Expert About Malpractice Suits Filed Against Expert

Plaintiff complained that the court erred when it prohibited plaintiff's counsel from cross examining a defense expert about medical malpractice lawsuits filed against her. On this point the court held as follows:

“Had the plaintiff's counsel been more specific in her questioning and lay the foundation as set forth that, in fact, the doctor had been sued for malpractice and when and where that occurred, the defense's objection most likely would not have been sustained, especially given that evidence

showing that the doctor had been recently sued for malpractice would be admissible to prove bias.”

**d. Judge Berating Of Trial Counsel**

Plaintiff also argued a new trial should be granted because the court improperly berated counsel before the jury thereby prejudicing the jury against plaintiff and her attorney. The law provides that a litigant has the right to a fair trial before an impartial jury uninfluenced by a Trial Court’s having showed favoritism or ill will toward either party. The record reflected that the court admonished plaintiff’s counsel only after she insisted upon asking improper questions after objections to them had been sustained. In so doing, the court did not stigmatize counsel or make comments that would cause the jury to dislike the plaintiff or her attorney. The fact that the complained of comments did not prejudice the plaintiff renders the argument without merit.

**e. Right To Make A Record**

Finally, plaintiff claimed that the court erred when it refused to allow plaintiff’s counsel to make a record or offer of proof. The court did not preclude plaintiff ever from making an offer of proof or for making record. It merely did not permit her to do so at a certain point during the trial. Once the witness finished testifying, counsel should have placed whatever she wished on the record.

## **VOIR DIRE ALLOWED REGARDING PROSPECTIVE JURORS' ATTITUDE TOWARDS TORT REFORM**

In Capoferri v. Children's Hospital of Philadelphia, 893 A.2d 133 (Pa. Super. 2006), the Court held that parties in a medical malpractice action were entitled to question prospective jurors on *voir dire* regarding the attitudes toward tort reform. This medical malpractice trial resulted in a verdict for the defense. On appeal plaintiffs argued that they were precluded from questioning prospective jurors during *voir dire* about the alleged media coverage of "the alleged medical malpractice crisis in and the alleged flight of physicians from Philadelphia."

The Court noted that the sole purpose of *voir dire* is to secure a fair, competent and impartial jury. To achieve this purpose, general questions should be permitted so that it can be determined whether any of the veniremen would have a direct or even a contingent interest in the outcome of the litigation or the parties involved. The scope and extent of *voir dire* examination is within the sound discretion of the Trial Court and the Trial Court's ruling thereon will not be disturbed absent a clear abuse of that discretion.

In its ruling the Court noted that Rule 220.1(a)(16) directs that *voir dire* shall include the opportunity to obtain "[s]uch other pertinent information as may be appropriate to the particular case to achieve a competent, fair, and impartial jury." The Court concluded that with the amount of publicity occurring at the time the case was ready for trial, the parties should have been allowed to question prospective jurors about their attitudes regarding medical malpractice and tort reform in order to determine whether each individual juror could serve in a fair and impartial manner. Common sense, as noted by the Court "...dictates that the type of media coverage that accompanied the debate over tort reform created a climate from which the average person could conclude that he or she would be economically impacted and/or be deprived of accessible health care services. Because there was no question that there was pervasive media coverage on the issue of medical malpractice prior to trial in the instant case, we conclude that counsel for both sides should have been permitted to question the prospective jurors regarding the subject and attempt to glean whether there was any impact on any individual juror's ability to decide the case fairly and impartially." 893 A.2d at 142.

The Superior Court did not require that the Trial Court specifically allow the questions proposed by plaintiffs, but did hold that the questions proposed by plaintiffs were acceptable. Had any of the jurors responded positively to these initial questions, either party should have been entitled to have more specific questions put to the jurors designed to probe those jurors' attitudes regarding, and possible bias resulting from, the tort-reform information.

## **VOIR DIRE QUESTIONS SUBMITTED BY PLAINTIFF**

Have you seen or heard advertisements which criticize persons who use the judicial system as a method of recovering money for personal injuries or damages caused by another person? If so, what have you seen or heard?

Does anything concern you about personal injury lawsuits generally or medical malpractice cases in particular in which an injured person seeks money damages? If so, what is your concern? Please explain.

Do any of you have any prejudice against a person who files a lawsuit seeking money damages for personal injuries based upon anything you or anyone in your family or household has seen or heard, or based upon any personal feelings or thoughts you may have?

Do any of you have any preconceived prejudice against individuals who file a lawsuit claiming injuries as a result of the medical malpractice of hospitals and/or physicians, because of recent publicity, advertising or newspaper stories that you have read or heard regarding the “so-called” medical malpractice crisis in the Philadelphia community? If so, please explain.

**GUARANTY ASSOCIATION IS LIABLE FOR THE LESSER OF THE  
INSOLVENT INSURER'S POLICY LIMIT OR THE STATUTORY MAXIMUM  
OF \$300,000**

In Chajkowsky v. Pennsylvania Property and Casualty Insurance Guaranty Association, 895 A.2d 528 (Pa. 2006), the Supreme Court, by per curiam order, affirmed the decision of the Commonwealth Court which held that the Guaranty Association's liability was limited to the lesser of the amount set forth in the insolvent insurer's policy or the statutory maximum of \$300,000, and that the Guaranty Association had no responsibility for delay damages and post-judgment interest. Thus, the Commonwealth Court held that the Guaranty Association's liability in this case was \$200,000, the amount of the insolvent insurer's policy limit.

The underlying medical malpractice claim resulted in a verdict for the plaintiff of approximately \$3.5 million. The Association paid plaintiff \$200,000 which represented the defendant doctor's policy limits with PIC, but was \$100,000 less than the Guaranty Association's \$300,000 cap. In a concurring statement, Justice Baer noted that in Hall v. Brown, 526 A.2d 413 (Pa. Super. 1987) the Court held that an insurance carrier that has paid the limits of the policy will not be liable for delay damages except when acting in bad faith. The Justice noted that the propriety of Hall in the context of claims against the Guaranty Association has not been addressed and further noted that there was no claim in the instant case that the Guaranty Association acted in bad faith. The Justice affirmed because the parties did not ask the court to review the matter pursuant to Hall which, in his opinion, was necessary before a determination could be made on the Guaranty Association's liability for delay damages.

**UNDER MCARE AND THE PENNSYLVANIA RULES OF CIVIL  
PROCEDURE, A MEDICAL PROFESSIONAL LIABILITY CLAIM MAY BE  
BROUGHT AGAINST A HEALTH CARE PROVIDER ONLY IN THE COUNTY  
IN WHICH THE CAUSE OF ACTION AROSE**

In Clark, et. al. v. Lankenau Hospital, et. al., No. 03839, 2006 WL 1768062 (Pa.Com.Pl. June 8, 2006), the Plaintiff brought a medical malpractice claim in Philadelphia county against number of health care providers who had treated him. Following a verdict for the Defendants, Clark appealed. The Superior court affirmed the judgment as to the Philadelphia Defendants, but remanded the case for trial as to the Montgomery County Defendants. On remand, the remaining Defendants moved for a change of venue from Philadelphia to Montgomery County. The court granted the motion to transfer and Plaintiff appealed.

The Superior Court affirmed on the ground that none of the remaining malpractice Defendants had Philadelphia jurisdictional ties. Except as provided in subsection (c) (relating to actions to enforce joint and several liability against two or more defendants), Pa.R.C.P. 1006(a)(1) provides that a medical professional liability action may only be brought against a health care provider in a county in which the cause of action arose. This rule was adopted in accordance with section 514(a) of the MCARE Act, 42 Pa. C.S. §5101.1(a). Because the remaining Defendants had no jurisdictional ties to Philadelphia, but all provided care in Montgomery County, the case was properly transferred to that county.

**AVAILABILITY IN A CIVIL CASE OF DISCOVERY OF  
FINANCIAL RECORDS OF A NON-PARTY EXPERT MEDICAL  
WITNESS TO FACILITATE AN INQUIRY INTO POTENTIAL  
BIAS**

In Cooper v. Schoffstall, 905 A.2d 482 (Pa. 2006), the court addressed the scope of discovery with respect to a “professional expert”. The underlying claim concerned a car accident. The defendant engaged a Dr. Eagle to perform an IME. Dr. Eagle was known as having extensive participation in defense medical exams. Plaintiff sought discovery relating to these activities to show potential favoritism toward the defense, or, more generally, the insurance agency. The Trial Court ordered the production of copies of Federal Form 1099 tax records associated with Dr. Eagle’s performance of services as an independent contractor for calendar years 1999, 2000 and 2001 in undertaking “defense-related reports, examinations and depositions”. Defendant appealed the Order, and while the appeal was interlocutory, the case proceeded as a right through the Appellate Courts under the Collateral Order Doctrine.

Plaintiff sought the information claiming that it was essential to a defense tactic of cultivating and employing “professional witnesses”, as well as the evasiveness of such witnesses in responding to legitimate inquiries concerning the extent of their financial entanglements with defense firm and/or the insurance industry. Plaintiff had presented evidence to the Trial Judge that Dr. Eagle was involved for at least thirteen years in conducting examinations for defense attorneys, rehabilitation firms, and insurance companies. Plaintiff also presented evidence that Dr. Eagle acknowledged in the past that payment for defense medical examinations represented a “big ticket item” in terms of his income, and that the doctor had been vague and inconsistent in his responses to questions concerning the raw number of his litigation-related ventures in any given year.

As a threshold matter, the Court agreed with the Trial Court that Rule 4003.5 should be read to restrict the scope of all discovery from non-party witnesses retained as experts in trial preparation. The Court held that the better practice is to channel inquiries into collateral information through the Rule’s “cause shown” criterion. Pa. R.C.P. 4003.5(a)(2).

The Court agreed with the general proposition that a pattern of compensation in past cases raises the inference of the possibility that the witness has slanted his testimony in these cases so he could be hired to testify in future cases. The Supreme Court therefore held as follows:

Therefore, we believe that the appropriate, threshold showing to establish cause for supplemental discovery related to potential favoritism of a non-party expert witness retained for trial preparation is of reasonable grounds to believe that the witness may have entered the professional witness category. In other words, the proponent of the discovery should demonstrate a significant pattern of compensation that would support a

reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentives.

Thus, the Court held that the boundaries of discovery, weighing the respective interests of the parties, was as follows:

In keeping with the idea that the discovery along these lines should be of the least burdensome and intrusive kind possible, we believe that the appropriate entry point, upon the showing of cause, is a deposition by written interrogatories under Rule of Civil Procedure 4004. Through this vehicle, and subject to the trial court's exercise of its sound discretion, the proponent of the discovery may be permitted to inquire as to the following: the approximate amount of compensation received and expected in the pending case; the character of the witnesses' litigation-related activities, and, in particular, the approximate percentage devoted to specific types of litigation and/or work on behalf of a particular litigant, class of litigant, attorney, and/or attorney organization; the number of examinations, investigations, or inquiries performed in a given year, for up to the past three years; the number of instances in which the witness has provided testimony within the same period; the approximate portion of the witness's overall professional work devoted to litigation-related services; and the approximate amount of income each year, for up to the past three years, garnered from the performance of such services. While we recognize that some jurisdictions have limited this form of discovery to exclude the income category, *see, e.g., Syken*, 644 So.2d at 546, we believe that this limited aspect of income information is within the fair scope of relevance on the question of potential favoritism. *Accord Wrobeski*, 727 A.2d at 938 (“If there is a reasonable basis for a conclusion that the witness may be a ‘professional witness,’ the party may inquire...into the amount of income earned in the recent past from services as an expert witness[.]”).

The Court noted that the witness will certainly incur expenses connected with the deposition and the Trial Court has discretion to allocate costs appropriately. Pa. R.C.P. 4003.5(a)(2).

The Court further held that after an assessment of the interrogatory responses, the Trial Court, upon appropriate motion, may determine that there is cause to support further supplemental discovery, including production of tax records.

Finally, the Court held that there are procedures supporting adequate trial preparation on the issue of potential bias of non-party witnesses less burdensome than the production of financial records, and thus, the orders of the Superior Court and the Common Pleas Court were vacated without prejudice.

## **FACTS RELATING TO R.N.'S INVESTIGATION INTO THE CAUSES OF PATIENT'S INFECTION ARE DISCOVERABLE**

In Forrest v. St. Luke's Hospital, 73 Pa. D. & C. 4<sup>th</sup> 353 (Court of Common Pleas of Lehigh County, 6/13/05), the Court reviewed protection from discovery issues pertaining to the Peer Review Protection Act and the Medical Care Availability and Reduction of Error Act (MCARE Act).

Plaintiffs Kevin Forrest and Michael Trigiani developed sternal wound infections following heart surgery performed at Defendant St. Luke's Hospital, Bethlehem Campus on October 28, 2003 and October 27, 2003, respectively. The unusual circumstance of the infections was that the infection diagnosed in both Forrest and Trigiani arose out of the "same virulent strain of bacteria."

Since the two infections occurred unusually close together, Steven Schweon R.N., St. Luke's Hospital's Coordinator of Infection Control and Prevention, initiated an investigation into the possible causes of the infection. Schweon was particularly concerned that the operating room could be the source of bacteria that caused the infections in Forrest and Trigiani. During his deposition, Schweon was asked about his investigation of the infection. Defendant's counsel objected to the questions and told Schweon not to respond, citing the confidentiality protection provided by the Pennsylvania Peer Review Protection Act, 63 P.S. § 425.1-425.4 and the MCARE Act, 40 P.S. § 1303.311 (specifically relevant to provisions about investigations performed by the hospital's Patient Safety Committee).

Defendant cited section 311 of the MCARE Act as grounds for objection to the interrogation of Schweon. Section 311 of the MCARE Act protects from discovery only "documents, materials, or information prepared or created pursuant to the responsibilities of the Patient Safety Committee or governing board of a medical facility..." 40 P.S. § 1303.311(c). Schweon did not testify that he initiated his investigation per instructions by a Patient Safety Committee. Further, there was no mention of a Patient Safety Committee in Defendant's policies and procedures. Because Schweon's investigation was not conducted on behalf of a Patient Safety Committee, the Court concluded that section 311 of the MCARE Act did not apply, and Defendant's objections based on section 311 were overruled.

In addition, Defendant cited the Peer Review Protection Act as grounds for objecting to the disclosure of information related to Schweon's investigation and findings. 63 P.S. §425.4

In order for information about an investigation to be protected from discovery, discussions about the information must be conducted at a peer review meeting. Information about Schweon's investigation was not brought before a committee. Further, Schweon's conclusions were generated by his personal investigation, not by the work of a peer review committee. Because Schweon, not the committee as a whole, was the original source of the investigative report, confidentiality protection could not be afforded

to Schweon's findings under the Peer Review Protection Act. See Tirado v. Lehigh Valley Hospital, 49 Pa. D. & C.4<sup>th</sup> 110 (Lehigh County, 2000).

The Court ordered allowed Plaintiff to re-depose Schweon for the purpose of resuming questioning related to the investigation of possible causes of the infections at issue in this suit.

**THE VENUE RULES ON MEDICAL MALPRACTICE DO NOT APPLY WHERE  
A DOCTOR IS JOINED AS AN ADDITIONAL DEFENDANT AND PLAINTIFF'S  
UNDERLYING CLAIM IS NOT BASED ON MEDICAL MALPRACTICE**

In Forrester v. Salkind, 901 A.2d 548 (Pa. Super. 2006), the court addressed whether the Trial Court abused its discretion when it transferred the case from Philadelphia to Montgomery County pursuant to Pa. R.C.P. 1006(a.1). Plaintiff, Kenneth Foster, was involved in a car accident in Philadelphia with Defendant, Michael Hanson. Suit was brought in Philadelphia County. Subsequently, the defendant Hanson joined as an additional defendant Dr. Salkind, plaintiff's treating physician due to his alleged negligent treatment of plaintiff. Dr. Salkind moved to have the venue transferred to Montgomery County. The Trial Court sustained Dr. Salkind's objection to venue. Plaintiff appealed.

On the issue of appealability, the court noted that an order transferring venue in a civil action is interlocutory in nature, although, by statute, such an order is appealable as a right.

The court then addressed whether the general rules of venue apply or the venue rules set forth in MCARE. The threshold issue was whether the case involved a medical malpractice claim. Pursuant to 42 Pa. C.S.A. §5101.1(c) a "medical professional liability claim" is defined as follows:

Any claim seeking the recovery of damages or loss from a health care provider arising out of any tort or breach of contract causing injury or death resulting from the furnishing of health care services which were or should have been provided.

Because the joinder complaint against Dr. Salkind did not assert a claim seeking recovery of damages or loss from the doctor, the joinder complaint was not a "medical professional liability claim", as defined by statute. Accordingly, the venue rules applicable to malpractice actions did not apply, and thus it was an abuse of discretion for the Trial Court to transfer the case to Montgomery County.

**AN EXPERT WHO SUBMITS VARIOUS REPORTS TO A PARTY AND THEN REFUSES TO TESTIFY FOR THAT PARTY RESULTING IN THE CLAIM BEING DISMISSED, MAY BE LIABLE, BASED ON BREACH OF CONTRACT, TO THE PARTY ON WHOSE BEHALF THE REPORT WAS SUBMITTED**

In Rambo v. Greene, 2006 W.L. 2423433 (Pa. Super. 2006), the Common Pleas Court dismissed a complaint against an expert who had provided several reports to the plaintiff in a medical malpractice case. The plaintiff filed a medical malpractice lawsuit and secured two expert reports from a Dr. Greene. Dr. Greene refused to testify at the medical malpractice trial. He was served with a subpoena, yet he remained absent. As a result, Rambo's case against the defendant doctor did not proceed and a non-suit was entered. Subsequently, Rambo brought a breach of contract action against Dr. Greene. The Trial Court dismissed the complaint following preliminary objections based on lack of specificity.

The Superior Court reversed. The Superior Court noted that there was no written agreement between the parties where Greene affirmatively stated that he would testify as an expert at Rambo's trial. However, the Court held that under contract law, the objective manifestations of the parties is the governing factor regardless of subjective beliefs and reservations. Even if the expert truly believed a contract did not exist, if his manifested intent reasonably suggested the contrary, a jury could find that there was a contract.

The defendant argued, based on Panitz v. Behrend, 632 A.2d 562 (Pa. Super. 1993), that a party may not contract with an expert witness in order to compel the witness to give only favorable testimony on the threat of civil liability. The court held that it was premature to address this issue as there was no allegation that Greene contracted with the plaintiff to only give favorable testimony or to testify to anything other than the truth.

**AN EXCEPTION TO THE *RES IPSA LOQUITUR* EXCEPTION: EXPERT  
TESTIMONY REQUIRED IN MEDICAL MALPRACTICE ACTION WHERE  
ISSUES ARE BEYOND ‘ORDINARY’ KNOWLEDGE**

In Solis v. St. Luke’s Hospital, 75 Pa. D. & C. 4<sup>th</sup> 198 (Court of Common Pleas of Lehigh County, 5/27/05), the Court held that the *res ipsa loquitur* exception to the requirement that expert testimony must accompany a medical malpractice action was inapplicable in light of the technical nature of the surgery undergone by Plaintiff’s decedent.

Plaintiff brought suit against Defendant on behalf of decedent who suffered two enterotomic tears (tears resulting from an enterotomy, a procedure in which a surgical incision is made into the intestine) following laparoscopic surgery (surgery using a laparoscope, a thin fibre-optic scope) on his abdomen. Plaintiff asserted that Defendant was negligent in performing the surgery and providing post-operative care. Defendant’s negligence allegedly caused the onset of peritonitis, system sepsis, and respiratory failure, causing decedent’s death.

Plaintiff had no expert report and asserted that an expert report was unnecessary because the *res ipsa loquitur* exception to the expert testimony requirement was applicable.

The Court held that the *res ipsa loquitur* exception, which applies only where “the matter under investigation is so simple, and the lack or want of care so obvious as to be within the range of ordinary experience of even non-professional persons,” did not apply to the Plaintiff’s suit. Toogood, 573 Pa. at 255, 824 A.2d at 1145. The Court explained that laparoscopic surgery and treatment of enterotomic tears involve specialized knowledge, “matters beyond the knowledge of ordinary laypersons.” The Court required Plaintiff to submit an expert report. Because Plaintiff failed to produce an expert report before the deadline had expired, the Court granted Defendant’s motion for summary judgment.

**SANCTIONS DENIED BASED ON DEFENSE COUNSEL’S OPENING  
REMARKS CAUSING A MISTRIAL IN MALPRACTICE CASE**

In Stahl v. Redcay, 897 A.2d 478 (Pa. Super. 2006), the parents brought a medical malpractice action against a doctor arising out of the birth of a baby. The Court of Common Pleas of Union County granted a mistrial after the doctor’s counsel, during his opening statement, stated that defense had a host of experts to support the proposition that smoking caused microcephaly when, in fact, the only witness that doctor’s counsel could cite for this proposition was a nurse whose testimony had been ruled inadmissible. After granting a mistrial, the parents’ attorney moved for sanctions in the form of a contempt petition seeking costs and attorney fees from doctor’s counsel for causing the mistrial. The Trial Court imposed sanctions and ordered defense counsel to pay \$52,088.02 to plaintiffs’ counsel.

The Superior Court held that the Trial Court’s contempt/sanctions order was civil in nature and, thus, immediately appealable. Further, the court held that absent a definite, clear, and specific prior order of record prohibiting the use at trial of evidence of mother’s smoking during pregnancy as a cause of baby’s microcephaly, the doctor’s counsel should not have been found in civil contempt. The court noted, however, that a finding of criminal contempt or civil contempt is immediately appealable. In this case, the court held that the sanction order was for civil contempt. If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt. But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of some private party, proceedings to enforce compliance with the decree of the court are civil in nature. The court noted, however, that under prevailing Pennsylvania law, a civil contempt ruling with sanctions involving discovery orders remains interlocutory and not immediately appealable.

The court found that defense counsel strategy in misstating the evidence should not be condoned. The Court was “constrained to reverse”.

**BATHING AN ELDERLY INCAPACITATED PATIENT AT A NURSING HOME  
MAY GIVE RISE TO A PROFESSIONAL LIABILITY CLAIM AND  
THEREFORE COVERAGE IS PROVIDED PURSUANT TO THE CAT FUND**

In Strine v. Commonwealth of Pennsylvania, Medical Care Availability and Reduction of Error Fund, 894 A.2d 733 (Pa. 2006), a nursing home brought an action against the CAT Fund alleging that the Fund breached its statutory duty in refusing to indemnify it for a payment the nursing home made to settle a wrongful death suit against it. This malpractice claim arose out of the death of a 75 year old patient at the Chester Care Center. A certified nursing assistant administered a bath to the patient as therapy to relieve her bed sores, which resulted in the patient suffering severe burns because the bath water was too hot, which burns caused the patient's death. A wrongful death action was brought and the parties settled before trial for \$1.5 million, of which PPCIGA paid \$200,000 and Chester Care paid the \$1.3 million balance. Thereafter, Chester Care sought partial indemnification from the Fund, pursuant to its statutory excess coverage in the amount of \$1 million. The Fund claimed that it was not liable because the bath given to the plaintiff did not constitute a medical service supporting a claim for "professional liability" under the Health Care Services Malpractice Act. The Fund maintained that the bath was merely part of the patient's "routine care" and would not have been covered by medical malpractice liability insurance, which in turn relieved the Fund of any statutory duty to furnish indemnification.

By statute, the Fund's liability arises for losses occasioned by claims of "professional liability". The court held that the patient was physically and mentally incapacitated such that bathing required a certain degree of specialized training. 40 P.S. §1301.102, 103, 701(d). The statute regulating the Fund makes it evident that "professional liability" applies to liability "resulting from the furnishing of medical services which were or should have been provided.". 40 P.S. §1301.103 (superseded).

In holding the Fund liable, the court noted that a nurse's aid is required by law to complete certain training and that the nurse in question underwent six weeks of formal classroom training, including instruction on bathing and patient care. Further, the regulations under 28 Pa. Code §201.3 define "skilled or intermediate nursing care" as including daily inpatient services provided pursuant to a physician's direction.

The court rejected the Fund's suggestion that coverage is precluded on the basis that an equipment failure was to blame for the occurrence. Even accepting that the water's excessive heat was occasioned by a faulty valve, the court held that it was evident that the inattentiveness of the nurse's aid in administering the bath was also a substantial contributing factor in causing the death.

**COURT AFFIRMED CIVIL PENALTY ISSUED AGAINST PLAINTIFF DOCTOR FOR FAILURE TO COMPLY WITH REPORTING REQUIREMENTS OF MCARE**

In Taterka v. Bureau of Professional and Occupational Affairs, State Board of Medicine, 882 A.2d 1040, (Pa. Commonwealth 2005), the Court affirmed an order of the State Board of Medicine. The Board's order upheld the conclusions of a Hearing Examiner to assess a penalty of \$1,000.00 against Plaintiff Dr. James A. Taterka, M.D. for violating Section 903 of the Medical Care Availability and Reduction of Error Act (MCARE), 40 P.S. § 1303.903.

Dr. Taterka had been previously named as a defendant in a civil medical professional liability action brought before the Court of Common Pleas of Philadelphia County. Upon notice that Dr. Taterka had been named as a defendant, the Board notified Dr. Taterka by letter that he had not fulfilled the reporting requirements of Section 903 of MCARE, which reads:

“A physician shall report to the State Board of Medicine ... within 60 days of the occurrence of any of the following:

(1) Notice of complaint in a medical professional liability action that is filed against the physician. The physician shall provide the docket number of the case, where the case is filed and a description of the allegations in the complaint.”

40 P.S. § 1303.903.

Even after notification by the Board, Dr. Taterka still did not comply with the reporting requirements of Section 903. As the basis for its initiation of disciplinary action against Dr. Taterka, the Board cited Section 908 of MCARE, which reads:

“Licensure board-imposed civil penalty. In addition to any other civil remedy or criminal penalty provided for in this act ... the State Board of Medicine ... by a vote of the majority of the maximum number of the authorized membership of each board as provided by law or by a vote of the majority of the duly qualified and confirmed membership or a minimum of five members, whichever is greater, may levy a civil penalty of up to \$10,000 on any current licensee who violates any provision of this act ...” 40 P.S. § 1303.908.

Although Dr. Taterka's attorney speculated that the Board may have misplaced the forwarded complaint, the attorney assumed responsibility for Dr. Taterka's failure to file the complaint in accordance with Section 903's reporting requirements.

Plaintiff argued that the civil penalty issued against him was inappropriate since the Board had received a copy of the complaint from another party at the time that the Board penalized Plaintiff for violating Section 903. Plaintiff asserted that the policy of Section 903 was enacted to maintain records of complaints filed against physician. Since

a copy of the complaint had already been received by the Board, Plaintiff argued that the Board's sanctioning of him was improper. The Court rejected Plaintiff's interpretation of Section 903. The Court noted that Section 903 "expressly mandates that a licensed physician *shall* report any complaint in a medical liability action taken against the physician." The word 'shall,' the Court concluded, clearly indicated that the intent of the statute was to require a licensed physician to report any complaint brought against him.

In holding that Plaintiff could not relinquish the reporting requirements of Section 903 of MCARE to his attorney, the Court noted that delegating the reporting duty to a second party, an attorney in this case, did not immunize Plaintiff from professional responsibility.

## **COURT REVIEWED DISCOVERY ISSUES UNDER PEER REVIEW PROTECTION ACT AND MCARE ACT**

In Treible v. Lehigh Valley Hospital Inc., 75 Pa. D. & C.4<sup>th</sup> 22 (Court of Common Pleas of Lehigh County, 8/12/05), Defendant Lehigh Valley Hospital (LVH) objected to Plaintiff Rhonda Treible’s request for the production of documents. Defendant asserted that the documents were protected from disclosure under the Peer Review Protection Act, 63 P.S. § 425.1-425.4, and the Medical Care Availability and Reduction of Error Act, 40 P.S. § 1303.101-1303.910.

The disputed matter before the Court concerned Defendant’s refusal to produce selected pages from four separate reports asserting that they were protected from discovery. The second page of each of the four reports was entitled “Quality Assurance Review Form” (QAR form). The QAR form included a description of the incident, the follow-up steps taken after the incident, and a report by the appropriate departmental director indicating the conclusions drawn as a result of the incident and follow-up.

### **a. Peer Review Act**

The Court held that the Defendant must carry the burden to demonstrate that the QAR forms were generated and utilized by a peer review committee. There was no such evidence presented.

### **b. MCARE Act**

The MCARE Act extends a confidentiality privilege to “documents, materials or information. . .which arise out of matters reviewed by the patient safety committee pursuant to section 310(b) or the governing board of a medical facility. . .” 40 P.S. § 1303.311(a). The Court reasoned that since no evidence had been presented to demonstrate that the QAR forms were reviewed by a patient safety committee or by the hospital’s governing board, the Defendant could not claim protection from discovery under the MCARE Act.

### **c. Significance Of Witness Reviewing Confidential Reports In Preparation For Deposition**

The Court had an additional circumstance to consider in deciding the present case. Nurse Renee E. Gombert, a witness produced by Defendant LVH, consulted the QAR forms prior to testifying at her deposition. The Court held that it was “patently unfair” to shield the QAR forms from discovery by the Plaintiff since Gombert had been permitted to use the forms in preparation for her deposition. The Court concluded that, “in the interest of justice,” the Plaintiff must have the same opportunity as Gombert to review the QAR forms.

## **PPCIGA IS LIABLE ON A PER POLICY NOT PER CLAIM BASIS**

In Valley Medical Facilities, Inc. v. Pennsylvania Property and Casualty Insurance Guaranty Association, 902 A.2d 547 (Pa. Super. 2006), the court addressed whether the PPCIGA (“Association”) statutory limit of \$300,000 per claimant should be applied per insured and per policy. The underlying malpractice claim concerned the care surrounding the birth of a minor plaintiff. It was alleged that The Medical Center (“TMC”) and Dr. Crozier (“Crozier”) were negligent and brought about harm to the minor plaintiff. There was a verdict of approximately \$4,800,000 with 90% of the casual negligence to TMC and 10% to Dr. Crozier.

PHICO provided TMC with a \$300,000 primary coverage policy limit and an excess coverage policy limit of \$5,000,000, and provided Dr. Crozier with a \$200,000 primary coverage limit. The Association argued that its limit per the language of the statute was per claim and since there was only one claim that its limit was \$300,000.

Further, the Association argued that Crozier and TMC were “insurers” rather than “claimants” within the meaning of the statute. It was not disputed that the plaintiff in the medical malpractice action had a covered claim. TMC and Dr. Crozier made payments for the amounts they believe the Association should have paid and took an assignment on any rights against the Association. While there is some law to suggest that only a plaintiff in a medical malpractice is a claimant, the court found that this was not persuasive and inconsistent with the liberal intention of the statute. Accordingly, the court held that TMC and Dr. Crozier were claimants, and further that the statutory limit is applied per policy and not per claimant.

## **REJECTION OF REMITTITUR, APPEALABILITY, AND BREACH OF CONTRACT**

In Vogelsberger v. Magee-Womens Hospital of UPMC, et al., 903 A.2d 540 (Pa. Super. 2006), the Superior Court addressed several issues under the MCARE Act relating to remittitur, and also addressed the circumstances under which a breach of contract action lies against a doctor in a medical malpractice context.

Plaintiff, Michelle Vogelsberger, appealed from the Trial Court's Order granting remittitur in the amount the jury awarded in non-economic damages against the Defendants. Thus, the Trial Court ordered reduction in non-economic damages from \$600,000 to \$200,000, with the proviso that if the reduction were rejected a new trial would be granted. In addition, Plaintiff contended that the Trial Court erred by dismissing the breach of contract claim against Dr. Gentile on summary judgment. PaTLA and the Pennsylvania Medical Society filed briefs on the remittitur issue.

### **a. Appealability Of Remittitur Order Where Plaintiff Rejects The Remittitur**

Following the verdict, Defendants filed a motion for a new trial on the issues of damages. Plaintiff rejected the remittitur, and, thereafter, filed a timely Notice of Appeal. Defendants move to quash the appeal pursuant to Pa. R.C.P. 1042.72, arguing that Plaintiff must first proceed to a new trial on non-economic damages before the case is ripe for appeal. Plaintiff, on the other hand, argued that nothing in Pa. R.C.P. 1042.72 prevented her from taking an interlocutory appeal as of right pursuant to Pa. R.C.P. 311(6) from the grant of a new trial. Because the Plaintiff rejected the remittitur, the effect of which was to grant a new trial, the Superior Court held that the appeal was proper and denied the motion to quash.

### **b. Remittitur Standard**

One of the significant issues in the case was the standard to be applied by a court in determining whether remittitur is appropriate.

Prior to the passage of the MCARE Act and promulgation by the Supreme Court of Rule 1042.72, the following standard applied to remittitur in medical malpractice cases:

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 verdict. 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. Goldberg ex rel. Goldberg v. Isdaner, 780 A.2d 654, 662, (Pa. Super. 2001) (citation omitted).

903 A.2d at 552.

However, pursuant to Rule 1042.72, remittitur is appropriate as follows:

(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.

Note: A damage award for noneconomic loss does not include amounts awarded for medical and other related expenses, loss of earnings or earning capacity, or punitive damages.

(b) 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.

Note: The defendant has the burden of convincing the court that the award deviates substantially from what could be reasonable compensation.

The factors that the trier of fact should take into account are those set forth in the jury instructions described in Rule 223.3.

In determining whether or not the MCARE Act modified the Rule in Goldberg, the court held as follows:

The “deviates substantially from what could be reasonable compensation” standard differs from the traditional remittitur standard enunciated in Goldberg whereby “[t]he verdict must be clearly and immoderately excessive” and “[t]he 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” in order to warrant a remittitur. Goldberg, 780 A.2d at 662. The “deviates substantially” standard appears to provide more flexibility in the court’s discretion to grant remittitur for noneconomic damages in medical malpractice cases than does the traditional “grossly exorbitant” or “shocks the conscience of the court” standard. However, the “deviates substantially from what could be reasonable compensation” standard appears to remain 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.”. [citation omitted]

903 A.2d at 554.

### **c. Breach Of Contract Claim**

Plaintiff claimed that she was advised by the doctor that he was going to perform a TAH/BSO, a total abdominal hysterectomy (removal of the uterus), and bilateral salpingo-oophorectomy (removal of both ovaries and fallopian tubes). The doctor performed the TAH, but did not perform the BSO. Plaintiff signed an informed consent for a TAH/BSO and the preoperative note reflects that this was the surgery to be performed. The doctor testified that he was going to perform a TAH, and a BSO only if the circumstances warranted. Plaintiff, several years later, elected to have her ovaries removed and the surgeon who performed this procedure noted that the ovaries and tubes were adhered to the anterior pelvis by adhesions and covered by two different loops of bowel, which caused pain, and which may have been avoided had the defendant performed the BSO. *Id* at 547.

The Court held that where the parties have agreed upon the performance expected by the Plaintiff and promised by the Defendant in terms that commit the Defendant to that performance without reference to and irrespective of any general standard of care, the Defendant may be liable on the contract whether or not he or she was negligent. The Defendant doctor argued that Section 1303.105 of the MCARE Act precluded liability based on breach of contract. This section provides that, “In the absence of a special contract in writing, a health care provider is neither a warrantor nor guarantor of a cure.” The court rejected this argument. Plaintiff was not seeking a cure for a disease. Rather Plaintiff sought a specific prophylactic procedure in the absence of any disease to provide her assurance that she would not develop the disease in the first place. There was enough evidence as to whether or not there existed an enforceable contract to perform a prophylactic BSO and it was an abuse of discretion for the Trial Court to dismiss this claim.