AMANDA E. BRANT, A MINOR, BY HER PARENTS AND NATURAL GUARDIANS, ET AL, V. RUSSELL McLUCAS, M.D., ET AL, C.P. Fulton County Branch, NO. 89 of 1992-C.

ostensible agency does not apply to a hospital when the patient unreasonably asserts that it looked to the hospital rather than the physician for care, and when the hospital has not held out the alleged Action in Law-Motion to strike reply to new matter due to failure to respond within the allotted time required by Pa.R.C.P. 1026 showing an "abject indifference" to the rule and no reasonable excuse for doing so; and a motion for summary judgment alleging that the theory of agent, the physician, as its employee.

1."[E]very pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading..." Pa.R.C.P. 1026.

2. Pa.R.C.P. 1026 is flexible in that a court can accept a pleading beyond the twenty day requirement as long as the opposing party is not prejudiced.

3. This flexibility will not be honored where "abject indifference" to the rule is involved.

4. It has been held that delays of almost five years, three years nine months, one year seven months, and thirteen and one-half months have constituted "abject indifference".

5. Consequently, a delay of more than two years as in the instant case constitutes "abject indifference" and plaintiffs now have the burden of sufficiently explaining the delay.

6. Failure to receive an answer to a complaint is not a sufficient excuse.

7. If plaintiffs had sought summary judgment on the pleadings or had checked with the court every four to six months to determine the status of the action, they would have discovered that an answer and new matter had been filed.

8. If facts concerning the relationship of the parties are involved and these facts are not in dispute, the court must make a determination as to what that relationship is.

9. Two factors which are relevant in determining whether a physician is an ostensible agent of a hospital are 1) whether the patient looks to the

institution rather than the individual physician for care; and 2) whether the hospital "holds out" the physician as its employee.

10. Although a regularly scheduled ultrasound was performed at the hospital and the patient went to the hospital immediately prior to the birth of her child, a patient could not have reasonably believed that she was being treated by a hospital or one of its employees when all but one regularly scheduled check-up was conducted at the private office of her physician and when the patient always phoned her physician's private office any time she needed to contact her physician.

Sarah P. Katowitz, Esquire, Attorney for Plaintiffs
Francis E. Marshall, Jr., Esquire, Attorney for Defendant, Fulton County Medical Center

OPINION & ORDER

WALKER, P.J., September 1, 1994:

FINDINGS OF FACT

In June 1985, plaintiff Amy E. Brant sought prenatal treatment under Russell McLucas, M.D. at his private office upon a recommendation by a friend. Although Dr. McLucas was at that time Chief of Surgery, Gynecology and Obstetrics at the Fulton County Medical Center, plaintiff nonetheless sought prenatal treatment from Dr. McLucas at his private office.

In August of 1985, plaintiff again visited Dr. McLucas for a regularly scheduled appointment in which an ultrasound examination was performed. Because Dr. McLucas does not have the facilities needed to conduct such examinations in his private office, plaintiff was sent by Dr. McLucas to the Fulton County Medical Center where such facilities are located. The ultrasound was administered and interpreted by Dr. McLucas.

Plaintiff again had a regularly scheduled examination at Dr. McLucas' private office in October of 1985. Then, on November 13, 1985, Dr. McLucas received a call from plain-

tiff at his office. Upon discussing plaintiff's condition and her symptoms, Dr. McLucas advised plaintiff to proceed to the Emergency Room of the Fulton County Medical Center where he informed her he would meet her.

Upon plaintiff's arrival at the Fulton County Medical Center on November 13, 1985, Dr. McLucas examined the plaintiff, administered medication and within thirty minutes of her arrival at the Emergency Room transferred her to the Hershey Medical Center where the minor plaintiff Amanda E. Brant was born.

This matter is a medical malpractice action in which plaintiffs are seeking recovery of damages to minor plaintiff Amanda E. Brant. Plaintiffs allege that defendants Fulton County Medical Center and Russell McLucas, M.D. were negligent in failing to diagnose and treat plaintiff Amy E. Brant for an infection known as campylobacter sepsis.

Plaintiffs commenced this action by filing a complaint on or about April 11, 1992. Defendant Fulton County Medical Center's liability is premised on theories of vicarious liability.

On or about June 1, 1992, defendant Fulton County Medical Center answered plaintiffs' complaint and served new matter upon plaintiffs. Plaintiffs replied to defendant's new matter on or about June 24, 1994, more than two years after being served with defendant's new matter.

Defendant Fulton County Medical Center initiated discovery by serving plaintiffs with a request for production of documents and interrogatories on or about June 18, 1992. Plaintiffs responded to these requests on or about July 27, 1993, more than one year after being served with such requests. Depositions of defendant Russell McLucas, M.D. and plaintiff Amy E. Brant were taken on July 27, 1992 and October 15, 1993 respectively.

DISCUSSION

This court has before it two motions made by defendant Fulton County Medical Center concerning this action. First and foremost defendant, Fulton County Medical Center has moved to strike plaintiffs' reply to defendant's new matter due to plaintiffs' failure to respond within the allotted twenty days pursuant to Pa.R.C.P. 1026.

"[E]very pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading. . ." Pa.R.C.P. 1026. The Pennsylvania Superior Court has been flexible in its interpretation of this rule and has accepted a pleading beyond the twenty day requirement as long as the opposing party "is not prejudiced as justice requires." *Paulish v. Bakaitis*, 442 Pa 434, 441, 275 A.2d 318, 322 (1971).

Although the twenty day rule set forth in Pa.R.C.P. 1026 has been interpreted as "permissive rather than mandatory" *Francisco v. Ford Motor Co.*, 397 Pa.Super. 430, 434, 580 A.2d 374, 376 (1990), "[a] pleading that is not filed within the articulated time period may be stricken by the court." *Id.* The Pennsylvania Superior Court in *Joyce v. Safeguard Mutual Insurance Co.*, 362 Pa.Super. 522, 524 A.2d 1362 (1987), (reviewed on other grounds *sub. nom*_) has noted that although Rule 1026 has traditionally been flexibly interpreted as allowing late filing, this custom will not be honored where "abject indifference" to the rule is involved. The court further noted that when "abject indifference" as to the filing period is involved, prejudice to the opposing party need not be considered unless the one seeking to file the late pleading has shown sufficient cause for delay.

The courts have interpreted "abject indifference" in several holdings. The Superior Court in *Joyce* determined that a delay of almost five years constituted "abject indifference." The Superior Court also determined that a three year, nine month delay in filing an answer constituted "abject indifference" in *Francisco*. It should also be noted that the

Francisco Court declined to follow a holding by a Pennsylvania Commonwealth Court which vacated an order by a trial court which struck a defendant's answer and new matter filed approximately twenty-three months late. This court believes that this would indicate that the Superior Court would likely find that a delay of twenty-three months would constitute "abject indifference" to the filing requirements. In *Paulish*, plaintiff failed to reply to defendants' answers for one year, seven months and thirteen and one-half months. The Superior Court described these delays as being extraordinary in duration and granted defendants' motion to strike the replies stating that "the interests of expeditious and efficient administration of justice by reasonable adherence to the rules of court were adequate grounds for the lower court's refusal to grant an indulgence of such magnitude. . ." *Paulish* at 442, 275 A.2d at 322. Conversely, the Superior Court failed to find that a two week delay constituted "abject difference." Consequently, this court believes that a delay of more than two years in the instant case constitutes "abject indifference" and therefore plaintiffs have the burden of sufficiently explaining this delay.

Original counsel for defendants Russell McLucas, M.D. and Fulton County Medical Center, Robert J. Pfaff, certified that a true and correct copy of defendants' answer and new matter was mailed to *all* counsel of record which included plaintiffs' counsel, Jack E. Feinburg, on May 27, 1992. This same answer and new matter was received and filed by the Fulton County Prothonotary on June 1, 1992. Plaintiff neither asked for an extension in which to respond to defendants' answer and new matter nor did they file their reply to such for more than two years on June 23, 1994.

This court finds it incredible that plaintiffs' counsel would not find it unusual that it never received an answer to its complaint and investigate further. If plaintiffs' counsel never received an answer to its complaint, why did it not seek a summary judgment on the pleadings which would have

consisted of only the complaint had defendants never answered the complaint. Had counsel done that they would have discovered that an answer and new matter had in deed been filed. At the very least, plaintiffs' counsel should have periodically checked with the court every four to six months to determine the status of the action and to inquire as to whether anything had been filed with the court in the interim.

Consequently, this court fails to see how plaintiffs' counsel has shown cause for failure to file the pleading sufficiently to justify exercising a delay of more than two years. Because plaintiffs' counsel has failed to meet the burden of showing cause for the delay, this court need not proceed in a further determination as to whether defendants have been prejudiced by the delay. Therefore, this court is granting defendants' motion to strike plaintiffs' reply to defendants' new matter.

This court also has before it a motion by defendant Fulton County Medical Center requesting a summary judgment. This motion rests primarily as plaintiffs' assertion that Russell McLucas, M.D., the treating physician in this case, was the ostensible agent of the Fulton County Medical Center.

If facts concerning the relationship of the parties are involved and they are in dispute as to that relationship, it is the jury's duty to determine what that relationship is. However, if these facts are not in dispute, the court must make that decision *Cox v. Caeti*, 444 Pa. 143, 279 A.2d 756 (1971), *Simmons v. St. Clair Memorial Hospital*, 332 Pa.Super 444, 481 A.2d 870 (1984). Upon review and consideration of the pleadings and the briefs submitted to this court, this court finds no basis for a dispute as to the said relationship between Russell McLucas, M.D. and the Fulton County Medical Center, and therefore will proceed in making such determination.

There are two factors which are relevant in determining whether a physician is an ostensible agent of a hospital:

1) whether the patient looks to the institution rather than the individual physician for care; and

2) whether the hospital 'holds out' the physician as its employee. *Id.* at 452, 481 A.2d at 874.

This court fails to see how plaintiff Amy E. Brant could have reasonably believed that she was being treated by the Fulton County Medical Center or one of its employees. Plaintiff initially contacted Dr. McLucas' private office on a referral by a friend and had utilized his services during a prior pregnancy. During this and the prior pregnancy, her regularly scheduled check-ups were carried out in Dr. McLucas' private office. Whenever plaintiff had questions or concerns she always contacted his private office. Plaintiff had only one regularly scheduled check-up that was at a place other than Dr. McLucas' private office. An ultrasound was scheduled to be performed during this check-up, so the doctor informed plaintiff to meet him at the Fulton County Medical Center where he subsequently administered and interpreted the procedure. It was necessary for Dr. McLucas to send plaintiff to the Fulton county Medical Center for this procedure due to the lack of such necessary equipment in his private office. The only other time plaintiff went to the Fulton County Medical Center for prenatal treatment in this case was on November 13, 1985 when plaintiff began experiencing complications with her pregnancy. Plaintiff was able to contact Dr. McLucas and upon discussing her condition and symptoms he instructed her to proceed to the Fulton County Medical Center where he would meet her. After examining the plaintiff, Dr. McLucas administered medication and ordered that she be transferred to the Hershey Medical Center.

This court fails to see how Dr. Russell McLucas could be viewed as an ostensible agent of the Fulton County medical Center. Simply because a doctor has staff privileges at a hospital does not necessarily make him an employee or an agent of that hospital. Although Dr. McLucas was the Chief

of Surgery, Obstetrics and Gynecology at the Fulton County Medical Center at that time, plaintiff Amy E. Brant had only one regularly scheduled check-up at the Fulton County Medical Center and then only because Dr. McLucas did not have the needed equipment in his private office. All other regularly scheduled check-ups were performed at the doctor's private office as were all calls made to the doctor by plaintiff. Plaintiff proceeded to the Fulton County Medical Center on both occasions only upon direction by Dr. McLucas.

It is evident to this court from plaintiff's activities that she looked to Dr. McLucas and not to the Fulton County Medical Center for treatment. Therefore, the court is granting defendant Fulton County Medical Center's motion for summary judgment.

ORDER OF COURT

September 1, 1994, the court enters summary judgment on behalf of defendant, Fulton County Medical Center. The court also strikes the plaintiff's reply to defendants' new matter.