Pennsylvania, on May 4, 1971, and recorded among the Deed Records of Franklin County, Pennsylvania, in Deed Book Volume 288-A, Page 219, Part 1.

BEING THE SAME REAL ESTATE which James S. Ferguson and JoAnne E. Ferguson, his wife, by deed dated March 7, 1974, and recorded among the Deed Records of Franklin County, Pennsylvania, in Deed Book Volume 698, Page 243, conveyed to Robert E. Collette and Victoria Collette, his wife.

SUBJECT, HOWEVER, to an easement for utilities along the strip of land ten feet in width adjoining Buckingham Drive and Warwick Drive as shown on the aforementioned plan of lots; to the restrictions adopted by Carl R. Flohr and Arlene S. Flohr, his wife, and recorded in Franklin County Deed Book Volume 664, Page 425; and to the covenant or agreement contained in abovementioned deed recorded in Franklin County Deed Book Volume 677, Page 1010.

BEING sold as the property of Robert E. Collette and Victoria Collette, his wife, Writ No. AD 1990-397.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, February 18, 1991 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on February 22, 1991 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

1/18, 1/25, 2/1/91

dropped, let fall, or swung onto the table or wheelchair. These claims are based upon alleged negligent supervision of the minor child and not a defect in the real property. The plaintiff's claim arises from the alleged conduct of the staff as distinguished from the condition of the property itself.

Based upon the foregoing, we are persuaded that the facts alleged do not bring the case at bar within the narrow scope of the exception to governmental immunity as set forth in the real estate exception. We therefore sustain defendant's preliminary objection in the nature of a demurrer.

Defendant's second motion, failure of plaintffs to join necessary parties, will not be acted upon because we have concluded the defendant's demurrer must be sustained. However, for the guidance of counsel, we feel compelled to observe that the legal posture of the Chambersburg Area School District appears to be identical with the other school districts.

ORDER OF COURT

NOW, this 9th day of August, 1990, the preliminary objections of the Chambersburg Area School District in the nature of a demurrer is sustained.

The plaintiffs are granted leave to file an amended complaint within twenty (20) days of date hereof.

LAYTON, ADMRX. ESTATE OF LAYTON, DECEASED VS. SHALLCROSS, M.D., ET AL., C.P. Franklin County Branch, No. A.D. 1987-398

Compulsory Nonsuit - Videotape Depositions - Expert Opinion - Medical Malpractice

1. An expert can render an opinion based on his personal knowledge assuming the truth of the trial testimony or based on a hypothetical question.

2. In a medical malpractice case the plaintiff must present expert testimony regarding the breach of the standard of care and causation.

3. Where plaintiff has not presented any expert witnesses in a medical malpractice case, a compulsory nonsuit is proper.

SUPPLEMENTAL OPINION

John C. Carlin Jr., Esq., Attorney for Plaintiffs
G. Thomas Miller, Esq., Attorney for Defendants

KELLER, P.J., September 11, 1990:

The case of Layton vs. Shallcross and Palmer was tried before a jury on February 12 and 13, 1990. During the second day of the trial, after Marlene E. Layton, Lawrence J. Boyler, M.D., Marjorie Adams and the two defendants testified, plaintff's counsel informed the Court and defendants' counsel that he had no other witnesses to call. At that time, plaintiff's counsel offered the videotape depositions of plaintiff's experts Alvin P. Shapiro, M.D. and Jerome M. Itzkoff, M.D. Legal questions were anticipated, therefore, a noon recess was called and an on-the-record meeting was held in chambers with the Court and counsel present. At issue at that time were the motions of both defendants to exclude the videotape depositions of plaintiff's expert witnesses. At the conclusion of the conference, the Court granted the defendants' motions to exclude.

Thereafter, the defendants moved for a compulsory nonsuit on the grounds that, in a medical malpractice case the plaintiff must present expert testimony regarding the breach of the standard of care and causation as a condition for allowing the jury to decide the case. This general rule is subject to the res ipsa loquitur exception, which is not presently applicable. The plaintiff had no other expert testimony regarding the breach of the standard of care by either or both of the defendants; likewise, plaintiff had no expert testimony regarding causation. Plaintiff's counsel conceded, "I don't quarrel with the position of the two counsel for the defense, you know, based on the Court's ruling I understand that. "(N.T. 103). Thereupon, the motions for compulsory nonsuit were granted. Later that afternoon trial reconvened and the jury was dismissed after being advised that the matter was resolved as a matter of law, and the case would not be submitted to the jury. We filed an Opinion and Order dated June 7, 1990, which denied the plaintiff's motion for postrial relief.

The plaintiff filed a notice of appeal on July 5, 1990, and pursuant to Pa. R.C.P. 1925 (b) was ordered on July 9, 1990 to file a statement of matters complained of on appeal. The plaintiff filed an amended notice of appeal on July 17, 1990. The statement of matters complained of on appeal was filed on July 30, 1990. This Supplemental Opinion is filed in support of our June 7, 1990 Opinion and Order.

The plaintiff contends this Court erred by excluding the expert opinion videotape deposition of Alvin P. Shapiro, M.D. for the following reasons:

(a) Dr. Shapiro did *not* base his opinion in part upon facts which were contradicted by undisputed evidence.

(b) An adequate factual basis was established upon which Dr. Shapiro rendered an opinion.

(c) Dr. Shapiro did identify the facts upon which he predicated his opinion that Dr. Palmer was negligent by failing to hospitalize Mr. Layton and that this contributed to Mr. Layton's death.

The plaintiff also contends that this Court erred by excluding the expert opinion videotape deposition testimony of Jerome M. Itzkoff, M.D.:

(a) The questions asked of Dr. Itzkoff concerning his expert opinion pertain solely to the medical records of Marcus Layton.

(b) Appellant submits that Dr. Itzkoff's opinion was not based upon the totality of the evidence and believes that this matter was addressed in the prior section entitled "a".

(c) Appellant contends that Dr. Itzkoff merely mentioned that he reviewed the experts' reports of the defendants.

(d) Appellant contends Pa. R.C.P. 4020 (a)(4) was not violated.

Each of the above complaints of the plaintiff are discussed in the order in which they appear.

Preliminarily, it must be noted that the general provision in a professional negligence action in Pennsylvania requires the plaintiff to prove, with competent medical testimony, that the defendant was negligent and the plaintiff's injuries were a result of this negligence.

Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978), *Brannan vs. Lankenau Hospital,* 490 Pa. 588, 417 A.2d 196 (1980) The exception to this rule applies when the subject matter is so simple and the lack of skill or care is so obvious that it is within the comprehension of non-professional persons. *Jones vs. Harrisburg Polyclinic Hospital,* 496 Pa. 456, 437 A.2d 1134 (1981).

Pa. R.C.P. 230.1 provides: a compulsory nonsuit is proper if the plaintiff has failed to establish a right to relief. Throughout this trial, the plaintiff presented no expert witness testimony; something she was required to do under Pennsylvania law. Therefore, a compulsory nonsuit was a proper ending for this case.

The plaintiff's first contention is that Dr. Shapiro did not base his opinion in part upon facts which were contradicted by undisputed evidence. Plaintiff believes that Dr. Shapiro's videotape deposition should have been admitted into evidence and shown during the trial. With this we do not agree.

An expert can render an opinion in any of three methods. Initially, an expert may render an opinion where it is based on his or her personal knowledge; such as that known by a treating physician. An expert can also be asked to assume the truth of the trial testimony or other evidence of record. *See Tobash vs. Jones,* 419 Pa. 205, 213 A.2d 588 (1965); *Kelly vs. Martino,* 375 Pa. 244, 99 A.2d 901 (1953). Lastly, an expert can be asked to utilize a hypothetical question, in which case the expert is asked to assume the accuracy of specified facts. *See, Houston vs. Canon Bowl, Inc.,* 443 Pa. 383, 278 A.2d 908 (1971) and *Hussey vs. May Dept. Stores, Inc.,* 238 Pa. Super. 431, 357 A.2d 635 (1976).

Instead of following these customary procedures for expert opinions, plaintiff's counsel merely asked Dr. Shapiro what information he had been given and what information he had reviewed. The expert testified he reviewed the December 17, 1985 outpatient emergency room record, which included a few brief notes about Mr. Layton's condition, some nursing notes, laboratory records and a cardiogram. Additionally, Dr. Shapiro reviewed the December 23, 1985, admission record, which included a brief clinical description of Mr. Layton's complaints, an echocardiographic report, the EKG tapes and the decisions made by Dr. Palmer; the January 7, 1986, records of admission, a history of the decendent and its findings, the

emergency room note describing the sequence of events, the therapeutic efforts that were made and the electrocardiograms performed that day, plus nurses' notes and laboratory notes. Lastly, Dr. Shapiro reviewed the office notes of Dr. Shallcross and the deposition transcripts of Drs. Palmer, Donohoe, Boyler, and Mrs. Layton. Deposition Transcript of Alvin P. Shapiro, M.D. at p. 23-25.

Throughout the videotape deposition of Dr. Shapiro, references were made to various sections of the above referred to depositions. However, Dr. Shapiro was not asked, nor did he testify as to the precise facts upon which he based his opinion. Instead, Dr. Shapiro gave his opinion based upon the totality of the evidence, some of which was not offered or admitted at trial.

This Court also perceives that Dr. Shapiro did not testify by utilizing any of the proper expert witness techniques. Dr. Shapiro did, however, base his opinion at least in part, on facts which were contradicted by undisputed evidence. Specifically, he testified to the following:

> It was on this occasion, with definite EKG changes, with continued symptoms on and off during the previous week, that the man should have been hospitalized, and that's the gist of the case, as far as I'm concerned.

Deposition Transcript of Alvin P. Shapiro, M.D. at p. 52.

A review of the exhibits admitted in evidence, and the transcripts of testimony presented at trial, establish beyond any doubt that Mr. Layton did not experience "continued symptoms on and off during the previous week." Indeed, the evidence relates that he had actually shown improvement. Therefore, no question can arise that the opinion of Dr. Shapiro was based on a substantial error of fact.

Plaintiff's second contention is directly related to the first: an adequate factual basis was established upon which Dr. Shapiro rendered an opinion. This argument has been thoroughly discussed above, thus, it will not be addressed here. The final basis for an appeal concerning the inadmissibility of the videotape deposition of Dr. Shapiro is that he did identify the facts upon which he predicated his opinion that Dr. Palmer was negligent by failing to hospitalize Mr. Layton and that this contributed to his death.

YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.
LEGAL SERVICE OF FRANKLIN—FULTON COUNTIES
COURT HOUSE
CHAMBERSBURG, PENNSYLVANIA
17201

Telephone No.: Chambersburg
1-717-264-4125, Ext. 213
Thomas M. Painter, Esquire
Ullman, Painter and Misner
10 East Main Street
Waynesboro, PA 17268
Attorney for Plaintiffs

2/15, 2/22, 3/1/91

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on January 22, 1991, an application for a certificate for the conducting of a business under the assumed or fictitious name of AVENUES TO EDUCATION, with its principal place of business at 68 South Third Street, Chamberburg PA 17201. The names and addresses or the persons owning or interested in said business are William P. Poe, 68 South Third Street, Chambersburg, PA 17201 and Carol A. Wolfgang, 2325 High Avenue, Chambersburg, PA 17201.

2/15/91

Notice is hereby given that TANNING UNLIMITED SALONS, LTD. has filed in the Department of State of the Commonwealth of Pennsylvania its articles of incorporation to be organized under the Business Corporation Law of 1988.

GRAHAM AND GRAHAM
3 North Second Street
Chambersburg, PA 17201

2/15/91

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 7th day of January, 1991 for the purpose of obtaining a Certificate of Incorporation. The name of the proposed corporation organized under the provisions of the Business Corporation Law of 1988 is PLEASANT VIEW FARM DAIRY LTD (A statutory close corporation), with its principal place of business at 4785 Lincoln Way West, St. Thomas, Pennsylvania 17252. The purpoe for which the corporation has been organized is for dairy farm business and to have the unlimited power to engage in and do any other lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

Richard K. Hoskinson of
MOWER and HOSKINSON, Solicitor
232 Lincoln Way East
Chambersburg, Pennsylvania 17201

2/15/91

NOTICE

Notice is hereby given, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing with the Department of State of the Commonwealth of Pennsylvania on January 31, 1991, of an application for a certificate for the conducting of a business under the assumed or fictitious name of MAJESTIC RIDGE ASSOCIATES, with its principal place of business at 263 Lincoln Way East, Chambersburg, Pennsylvania, 17201. The names and address of all persons interested in or owning said business are:

Lawrence J. Lahr and Barbara J. Lahr
261 Lincoln Way East
Chambersburg, Pennsylvania 17201

GRAHAM AND GRAHAM
3 North Second Street
Chambersburg, PA 17201

2/15/91

NOTICE OF FILING OF
ARTICLES OF INCORPORATION

Notice is hereby given that Articles of Incorporation were filed with the Pennsylvania Department of State at Harrisburg, Pennsylvania. The name of the proposed corporation organized under the provisions of Commonwealth of Pennsylvania Business Corporation Law of 1988 is BRICKER'S CHOICE FERTILIZER INCORPORATED.

LAW OFFICES OF WELTON J. FISCHER
550 Cleveland Avenue
Chambersburg, Pennsylvania 17201

2/15/91

Essentially, the plaintiff is presenting a causation argument. The plaintiff argues Dr. Shapiro testified that the breach of Dr. Palmer caused or contributed to Mr. Layton 's demise. This Court did not permit the videotape deposition of Dr. Shapiro into evidence. Dr. Shapiro may have addressed certain questions asked of him pertaining to Dr. Palmer; however, the expert witness offered no causation opinion testimony regarding Dr. Shallcross. It was suggested by the plaintiff that we admit Dr. Shapiro's videotape deposition, and then, submit a cautionary charge to the jury that it should only be considered to apply to Dr. Palmer.

In our opinion that proposal contains a high and unreasonable prejudice potential for both defendant doctors. The expert witness testimony is mostly intermingled, and attempting to segregate the testimony that referred to Dr. Shallcross from that which referred to Dr. Palmer would be very difficult for the Court and extremely confusing if not impossible for the jury. Considering the complications involved in admitting the videotape deposition of Dr. Shapiro, in our view, it was properly excluded. We respectfully submit that no error was committed by this Court's decision to exclude the videotape deposition of Alvin P. Shapiro, M.D. from the evidence at trial.

The plaintiff also urges error was committed by this Court regarding the admissibility of the videotape deposition of Dr. Itzkoff. Mrs. Layton maintains it was improperly excluded from the trial evidence for three reasons. Initially, plaintiff believes the questions asked of Dr. Itzkoff concerning his expert opinion pertain solely to the medical records of Marcus Layton.

After reviewing the videotape deposition of Dr. Itzkoff, it is eminently clear that plaintiff's contention cannot prevail. Counsel for the plaintiff examined Dr. Itzkoff in the same manner in which he examined Dr. Shapiro - he was not asked to assume the truth of the trial testimony or other evidence of record, nor was he posed a hypothetical question by counsel for the plaintiff. *See Tobash vs. Jones, supra; Kelly vs. Martino, supra; Houston vs. Canon Bowl, Inc., supra* and *Hussey vs. May Dept. Stores, Inc., supra.*

Instead Dr. Itzkoff was asked which files he had reviewed. In response the doctor replied that he had reviewed the hospital records for December 17 and December 23 of 1985, and those of

January 7, 1986. He also reviewed:

> A number of depositions that I have referred to here in a letter that I've previously written to you. And to reiterate, those were the depositions of Marlene E. Layton, of Michael Howard Palmer, M.D., of Lawerence J. Boyler, M.D., of Louise Shallcross, M.D., of Michael Terrance Donohoe, M.D. I also reviewed the expert opinions that you had given to me of Louise B. Andrew, M.D., of David A. Lehman, M.D., and Alvin P. Shapiro, M.D.

Deposition Transcript of Jerome M. Itzkoff, M.D. p. 12 to p. 13.

Later in his deposition, Dr. Itzkoff repeatedly referred to specific deposition transcript sections which he had reviewed but which had not been made part of the record. See the Deposition Transcript of Dr. Itzkoff at p. 14, 1. 2-10; p. 24, 1. 18-20; p. 28, 1. 1-20; and p. 44, 1. 1-23. A fair and reasonable reading of his deposition transcript clearly shows the opposite of what the plaintiff would have us believe. Because Dr. Itzkoff made multiple references to isolated parts of the deposition transcript which had not been admitted into evidence and because he never identified any factual basis upon which he was relying, this Court respectfully submits that Dr. Itzkoff's videotape deposition was properly excluded from the evidence presented at trial.

The plaintiff's second contention of alleged error on the part of this Court was previously addressed during the discussion of the admissibility of the videotape deposition of Dr. Palmer that Dr. Itzkoff's opinion was not based upon the totality of the evidence. As previously concluded, we find his opinion was impermissibly based upon all of the evidence, including that which was never admitted into evidence at the trial. Precisely as had occurred with Dr. Shapiro, Dr. Itzkoff also failed to specify which facts he had relied upon when forming his opinion. Although he did explain the reasons, he failed to supply the facts. Thus, his videotape deposition was properly excluded.

The plaintiff's third complaint of an alleged error concerns the fact that Dr. Itzkoff merely mentioned he reviewed the defendants' experts' reports and, nothing more should be read into that comment. As previously discussed, Dr. Itzkoff enumerated no less than five times the fact that he had read material which never became part of the trial record, because it was never offered or

admitted into evidence. The fact that Dr. Itzkoff "merely mentioned that he reviewed the experts' reports of the defendants" does create the impression that he was forming his opinion from a totality of the evidence; this would encroach upon the domain of the jury and, as such, it is strictly prohibited. *See, Kozak vs. Struth,* 515 Pa. 554, 531 A.2d 420 (1987). This is especially true since the doctor never specified the facts upon which he relied. Thus, no other reading of his comment is possible.

Finally, the plaintiff contends Pa. R.C.P. 4020 (a)(4) was not violated with respect to the videotape desposition of Dr. Itzkoff. That rule provides:

> (a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions:
>
> . . .
>
> (4) If only part of a deposition is offered in evidence by a party, any other party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

The rule clearly prohibits isolated portions of depositions from being read into evidence at trial.

After undertaking a thorough reading of the deposition of Dr. Itzkoff, it is clear that the doctor repeatedly referred to specific deposition portions which were not of record. (See Deposition Transcript of Jerome M. Itzkoff, M.D. at p. 14, 1. 2-10; p. 24, 1. 18-20; p. 28, 1. 1-20 and p. 44, 1. 1-23.) Thus, the videotape deposition of Dr. Itzkoff was propertly excluded from the trial because it violated Pa. R.C.P. 4020 (a)(4). We respectfully submit that no error was committed in this Court's decision to exclude the videotape deposition of Jerome M. Itzkoff, M.D. from being presented at the trial.

Consequently, we conclude the motions for compulsory nonsuit were properly granted.