Franklin County Legal Journal

Volume 21, Issue 12, Pages 70-90

Gartland v. Rosenthal, et al

MICHAEL GARTLAND and SUSAN K. GARTLAND, his wife, Plaintiffs, v. DR. JOEL L. ROSENTHAL, J.C. BLAIR MEMORIAL HOSPITAL, DR. RICHARD R. DIDONATO, and DR. NITEEN N. SUKERKAR, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No. 1993–229, Jury Trial Demanded

Trial; Health; Summary Judgment; Expert Opinion; Evidence; Medical Malpractice; Civil Procedure; Agency

1. There is a basic requirement that an expert report must be produced to establish a prima facie claim for medical malpractice.

2. The plaintiffs in a medical malpractice case must offer an expert witness who will testify 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 the harm suffered.

3. An expert's testimony at trial may not go beyond the scope of his or her testimony in the report.

4. It is well settled in Pennsylvania law that the judge must determine that proximate cause is established before the question of actual cause may be put to the jury.

5. An expert falls short of the standard of certainty if he testifies that the alleged cause "possibly" or "could have" led to the result, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result.

6. The only exception to the requirement of expert testimony is where the matter under investigation is so simple, and the lack of skill or want of care so obvious, as to be within the range of ordinary experience and comprehension of even nonprofessional persons.

7. Pennsylvania law holds that a witness may only testify as an expert if he or she possesses knowledge outside the ordinary reach and offers testimony that could assist the trier of fact.

8. An expert witness must have sufficient skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.

9. There is no greater reflection upon the administration of justice than the permission of endless litigation.

10. It is axiomatic that the burden to move a case forward rests on the plaintiff.

11. The crux of Rule 1035.2 is that a motion for summary judgment includes two concepts: (1) there is no material fact disputed, and (2) there is no evidence sufficient for a jury to find a fact that is essential to the cause of action or defense.

12. A principal may be held vicariously responsible for the acts of his agent where the acts are within the scope of the agent's employment and where the principal controls the manner of performance and the result of the agent's work.

13. Physicians and surgeons, like other persons, are subject to the law of agency and a physician may be at the same time the agent both of another physician and of a hospital even though the employment is not joint.

Appearances:

Charles E. Evans, Esq., *Counsel for Plaintiffs*

James R. Hartline, Esq., *Counsel for Defendant DiDonato*

Charles W. Kenrick, Esq., *Counsel for Defendant J.C. Blair Memorial Hospital*

Conrad W. Varner, Esq., *Counsel for Defendant Rosenthal*

Michael C. Mongiello, Esq., *Counsel for Defendant Sukerkar*

OPINION

Van Horn, J., April 24, 2003

Statement of Facts

Michael Gartland (hereinafter "Husband/Plaintiff"), at age twenty (20), was involved in an automobile accident on May 26, 1987, where he was rear-ended by another driver. As a consequence of the impact, Husband/Plaintiff struck the back of his head on the rear windshield of his pickup truck but did not lose consciousness. In July of 1987, Husband/Plaintiff began to experience seizures and headaches, for which he sought treatment from his then family physician, Dr. Gary J. Wertman, who is not a party to this action. Husband/Plaintiff next saw Dr. Wertman on September 4, 1987, with a complaint of "keep passing out." Husband/Plaintiff further reported to Dr. Wertman episodes of "acting funny" or "giddy," laughing, staring up, then losing consciousness, stating that the described behaviors could happen many times a day. Dr. Wertman ordered a CT scan that was performed on Husband/Plaintiff on September 11, 1987. The CT scan was interpreted by radiologist Dr. Richard R. DiDonato at the J.C. Blair Memorial Hospital, named Defendants in this action. Defendant Dr. DiDonato's interpretation of the scan revealed an ischemia region on the left side, which Dr. DiDonato felt was possible post-traumatic in nature and may be the cause or origin of Husband/Plaintiff's unusual behavior. Dr. Wertman also ordered an electroencephalogram (EEG) which revealed no clear and precise evidence. Dr. Wertman then referred Husband/Plaintiff to Defendant Joel L. Rosenthal, M.D., a neurologist.

Dr. Rosenthal first examined Husband/Plaintiff on September 22, 1987. After examining Husband/Plaintiff and considering the September 11, 1987, CT scan as showing perinatal damage, Dr. Rosenthal diagnosed a probable seizure disorder and prescribed medication which kept his syncopal episodes and blacking-out spells to a minimum. Dr. Rosenthal also recommended a glucose tolerance test and a Holter monitor. On September 19, 1988, Dr. Rosenthal sent Husband/Plaintiff a letter suggesting that he get an MRI. The suggested MRI, however, was not obtained. At his next follow-up appointment on February 17, 1989, Dr. Rosenthal arranged for a repeat CT scan that was interpreted by Defendant Dr. Niteen Sukerkar, a radiologist. Dr. Sukerkar noted the area of low attenuation seen previously by Dr. DiDonato. Dr. Sukerkar diagnosed encephalomalacia secondary to the trauma of the May 1987 car accident. Dr. Sukerkar also noted that a diagnosis of a mass lesion or arteriovenus malformation was less likely but advised that further evaluation with an MRI study might be helpful.

After some initial adjustments in his prescribed medications, Husband/Plaintiff's seizures were under good control through June 29, 1990, the date of Dr. Rosenthal's last office note, and the date that Dr. Rosenthal released Husband/Plaintiff from his care to the care of Husband/Plaintiff's family physician, Dr. White, who is not a party to this lawsuit.

Husband/Plaintiff's condition appeared to be stable until Dr. White discovered a brain tumor in July 1992. Apparently Husband/Plaintiff discontinued his anticonvulsants in July 1990; however, in July 1992, he again experienced seizures and complained of three (3) months of worsening balance, stuttering, and slurred speech. An abnormal EEG on July 24, 1992, showed focal paroxysmal slowing and sharp activity indicating a focal structural lesion. After an episode of involuntary jerking in Husband/Plaintiff's extremities, Dr. White ordered an MRI on August 3, 1992, which was interpreted the same day by Dr. Robert Pyatt at Chambersburg Hospital. The MRI showed a large mass in the left temporal lobe consistent with a neoplasm (tumor). Husband/Plaintiff was referred to Dr. Stephen Powers, a neurosurgeon at Hershey Medical Center where Husband/Plaintiff was admitted on August 12, 1992, for a biopsy that revealed a possible

oligodendroglioma, a relatively slow-growing tumor. On September 16, 1992, Husband/Plaintiff underwent a craniotomy to resect the tumor under local anesthesia with cortical mapping. There was no gross evidence of tumor at the end of the procedure, and at follow-up on September 25, 1992, there was no weakness noted. A follow-up MRI in November of 1992 did not show any evidence of recurrence.

Post-operatively, Husband/Plaintiff developed frequent episodes of numbness at the right side of the mouth, presumed to be sensory seizures. He also reported episodes of right face and arm jerking, staring spells with unresponsiveness, and generalized shaking with unresponsiveness. He was seen by Dr. Lawrence Rodichok, an epileptologist, who felt that the reported behaviors were seizures. Video-EEG monitoring in November 1993 while on anticonvulsants did not show any epileptiform EEG changes during two (2) episodes of facial numbness and one of unresponsiveness. Husband/Plaintiff continued to have frequent episodes, and as of April 2, 1994, he was experiencing two (2) to three (3) spells a week while on medication.

Procedural History

Plaintiffs Michael Gartland and Susan Gartland (hereinafter "Plaintiffs," "Husband/Plaintiff," or "Wife/Plaintiff"), husband and wife, initiated this medical malpractice action on September 9, 1992, by filing a Writ of Summons. Plaintiffs then filed a Complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, on December 28, 1992, against Defendants Joel L. Rosenthal, M.D., J.C. Blair Memorial Hospital, Richard R. DiDonato, M.D., Chambersburg Hospital, and Niteen N. Sukerkar, M.D. Plaintiffs alleged the Defendants were negligent in diagnosing and treating Mr. Gartland's frontoparietal oligodendroglioma (brain tumor). On April 15, 1993, Judge McGowan transferred the case to Franklin County, Pennsylvania.

In mid-1993, Defendants began what became a tortured process of discovery. Defendant Rosenthal sent Plaintiffs' counsel interrogatories and requests for production of documents on June 21, 1993, which went unanswered. On July 30, 1993, Defendant Rosenthal requested, by letter, dates from Plaintiffs as to when they would be available for deposition. This request, also, went unanswered by Plaintiffs. On July 19, 1993, Defendant Chambersburg Hospital served Plaintiffs with Interrogatories and Request for Production of Documents. When neither answers nor objections were filed to that discovery request, Defendant Chambersburg Hospital filed on June 7, 1994, a Motion to Compel Answers to Interrogatories, which was granted by Order of Court dated July 27, 1994. Similarly, Defendant DiDonato served Interrogatories on the Plaintiffs on April 8, 1993. After a year had passed without a response from Plaintiffs, Defendant DiDonato filed on June 16, 1994, a Motion to Compel Interrogatories, which was granted by Order of Court dated August 1, 1994. On August 4, 1994, Defendant Sukerkar filed a Motion to Compel Discovery as a result of Plaintiffs' non-response to Interrogatories with a companion Request for Production of Documents served upon Plaintiffs on January 11, 1994. On August 4, 1993, Defendant Rosenthal sent a second letter to Plaintiffs' counsel requesting dates on which Plaintiffs would be available for deposition. Again, this request went unanswered by Plaintiffs.

On August 20, 1993, Defendant Rosenthal sent a letter to Plaintiffs' counsel inquiring as to when he could expect to receive Plaintiffs' answers to interrogatories that Defendant Rosenthal had sent to Plaintiffs on June 21, 1993.

In Defendant Rosenthal's final informal effort to acquire the information requested, he sent Plaintiffs' counsel a letter dated December 14, 1993, requesting answers and responses and informing Plaintiffs' counsel that if this request went unanswered, a Motion to Compel would be filed with the Court. Again, Plaintiffs did not respond. As a result of the Plaintiffs' noncompliance with Defendant Rosenthal's repeated informal efforts to acquire the information requested, Dr. Rosenthal then filed with this Court on January 11, 1994, a Motion to Compel, to which Plaintiffs never filed a response. A hearing on the Motion was ordered for July 7, 1994, and was held with neither Plaintiffs nor Plaintiffs' counsel appearing. Consequently, Defendant Rosenthal's Motion to Compel was granted by Order of Court dated July 11, 1994, directing Plaintiffs to answer Defendant's interrogatories within fourteen (14) days and to make the Plaintiffs available for depositions within thirty (30) days of the date of the Order. The July 11, 1994, Order of Court further informed Plaintiffs that if they failed to comply with the Order, then the case would be dismissed. Plaintiffs, again, did not respond within the prescribed time, resulting in Defendant Rosenthal's filing on July 29, 1994 a Motion to Dismiss.

In the Opinion and Order of Court of the Honorable John R. Walker disposing of Defendant Rosenthal's Motion to Dismiss dated September 23, 1994, the Court imposed financial sanctions on Plaintiffs' attorney personally, but did not dismiss the case stating that Plaintiffs indicated an intent to comply with Court Orders and requests for discovery. In its reasoning, the Court articulated its duty to strike a balance between the need to move the case to a prompt disposition and the need to preserve the substantive rights of the parties. The Court did, however, warn Plaintiffs' counsel that if further Court Orders were disobeyed, then the result would be dismissal of the case.

The next activity in the case was not until 1996 when Defendant Niteen N. Sukerkar filed a Motion for Summary Judgment based on the affirmative defense of Plaintiffs' settlement and release of the parties involved in the 1987 automobile accident. By Opinion and Order of Court of Judge Walker dated June 4, 1996, Defendants' Motion for Summary Judgment was denied, wherein the Court reasoned that the record did not show that the alleged misdiagnosis was caused by the injuries sustained in the accident or, in the alternative, that the instant cause of action had not accrued and was not contemplated by the parties at the time of the signing of the release.

On November 14, 1996, Defendant Sukerkar filed a Motion to Compel the Production of Plaintiffs' Expert Report. By Order of Court dated November 14, 1996, Plaintiffs were directed to produce their expert report within thirty (30) days of the Order, with the warning that failure to comply could result in dismissal or other sanctions.

After Defendant Rosenthal filed yet another Motion to Compel Production of Plaintiffs' Expert Witness Report, the parties signed a stipulation dated January 27, 1997, whereby the parties set a deadline for Plaintiffs to produce an expert's report. The subsequent Order of Court dated January 30, 1997, directed Plaintiffs to produce an expert witness report within fifteen (15) days of the Order. The January 30, 1997, Order of Court again warned Plaintiffs that failure to comply with the Court's Order may result in dismissal of the action with prejudice or may result in the imposition of other sanctions. At the expiration of the stipulated time limit, Plaintiffs had produced one (1) expert report from Dr. Stephen S. Kamin, a neurologist and psychiatrist, offering opinions concerning the standard of care given to Husband/Plaintiff by Dr. Sukerkar and Dr. DiDonato, both of whom are radiologists, as well as Dr. Rosenthal, a neurologist.

On February 10, 1997, Plaintiffs filed a Motion to Compel Attendance of Defendant Rosenthal at Scheduled Deposition. By Order of Court dated February 11, 1997, Defendant Rosenthal was directed to appear at the stated time and place for his previously scheduled deposition, with the warning of sanctions should he not comply as directed.

After languishing for more than five (5) years, the case was resuscitated on May 14, 2002, when Defendant Sukerkar filed a praecipe to list the case for the November 2002 trial term.

Subsequently, the following Motions for Summary Judgment were filed: Defendant Sukerkar filed a Motion for Summary Judgment on July 16, 2002; Defendant J.C. Blair Hospital filed a Motion for Summary Judgment on August 15, 2002; Defendant DiDonato filed a Motion for Summary Judgment on August 23, 2002.

Plaintiffs then filed a "Preliminary Pre-Trial Statement" on August 30, 2002, and attached two (2) additional expert reports that had not heretofore been submitted to opposing counsel as part of discovery: a report from Dr. John K. Johnson, M.D., dated February 23, 1997, and a report from Seth N. Glick, M.D., dated February 12, 1997.

On September 12, 2002, the last of the defendants, Defendant Dr. Rosenthal, filed his Motion for Summary Judgment. All parties timely filed briefs in support of their respective positions. The original date set for oral argument was in December 2002 but was continued due to the Court's request with the next date available being February 26, 2003. This case is now ripe for disposition on each Defendant's Motion for Summary Judgment.

Discussion

A. What expert report(s) will be considered in each Defendant's Motion for Summary Judgment?

The instant case was initiated by Plaintiffs in 1992 based upon allegations of medical malpractice stemming from alleged misinterpretations of CT scans taken of Husband/Plaintiff in 1987 and 1989. The issues under investigation regarding the early detection of Husband/Plaintiff's brain tumor and subsequent medical condition are beyond the knowledge, experience, and education of the average layperson. As such, the case at bar falls under the general rule requiring an expert to testify "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 the harm suffered." Mitzelfelt v. Kamrin, 526 Pa.Super. 54, 62, 584 A.2d 888, 892 (1990).

For five (5) years, Plaintiffs disregarded Defendants' numerous requests and extraordinary efforts to gather discovery, including the request for an expert witness report. Plaintiffs complied with the above rule regarding the required expert witness report only after Order of Court dated January 30, 1997, directed Plaintiffs to produce an expert witness report within fifteen (15) days of the Order. Plaintiffs finally produced one (1) expert witness report ("Preliminary Report") from Dr. Stephen S. Kamin dated February 24, 1997.

Plaintiffs allowed the case to lie fallow until Defendant Sukerkar filed a praecipe to list the case for the

November 2002 trial term. Subsequently, three of the four Defendants, Dr. Sukerkar, J.C. Blair Memorial Hospital, and Dr. DiDonato, filed Motions for Summary Judgment. Plaintiffs then filed a "Preliminary Pre-Trial Statement" on August 30, 2002, and attached Dr. Kamin's expert report, as well as two (2) additional expert reports that had not previously been submitted to opposing counsel prior to Plaintiffs filing their "Preliminary Pre-Trial Statement." The two (2) additional expert reports were dated February 12, 1997, and February 24, 1997, respectively.

At oral argument on February 26, 2003, Plaintiffs' counsel argued that the Order of Court, dated January 30, 1997, directing him to "produce an expert witness report" within fifteen (15) days of the Order, did not preclude his producing more expert witness reports at a later time. Plaintiffs' counsel argued that all the Court Order directed him to do was produce "an" expert report, and he did so. In complying with the Court Order, Plaintiffs' counsel argues that he is not now precluded from producing additional expert reports.

In his Supplemental Brief in Support of Motion for Summary Judgment, Defendant Dr. Sukerkar argues that if the Court allows the two (2) additional expert reports to be considered for purposes of the Motion for Summary Judgment, then Defendant Dr. Sukerkar would be unfairly and immeasurable prejudiced. Defendant Sukerkar continues by stating that he has justifiably concluded his preparation for trial based on the theories set forth in Dr. Kamin's report that was produced in February 1997, and if the new (to Defendants) expert reports are allowed, Defendant Sukerkar will require ample time to obtain his own new expert to facilitate a response. Defendant Dr. Sukerkar also notes that the two additional reports were available when Plaintiffs produced only Dr. Kamin's expert report, but Plaintiffs chose not to produce them. For Plaintiffs to now argue that the word "an" in the January 30, 1997, Order required the Plaintiffs to produce only one of their expert reports is disingenuous. Defendant Dr. Sukerkar submits that this disingenuous argument belies the Court's intentions and Dr. Sukerkar's good faith that Plaintiffs had completed service of their expert reports in accordance with the apparent intent of the Court Order and the spirit of the Rules of Professional Conduct. Dr. Sukerkar concludes by arguing that after Plaintiffs' unwarranted and excessive five and one-half (5½) years delay, for Plaintiffs to be allowed to produce two (2) new expert reports on the eve of the trial would be manifestly unfair and prejudicial. This Court agrees.

Because the accumulated paperwork in this case of ten (10) years is voluminous, and since Defendant Dr. Sukerkar's Supplemental Brief in Support of Motion for Summary Judgment articulates and encompasses the same arguments contained in the other Defendants' briefs on this issue, Defendant Dr. Sukerkar's arguments will be representative.

As stated previously in this opinion, there is a basic requirement that an expert report must be produced to establish a prima facie claim for medical malpractice. Mitzelfelt v. Kamrin, 526 Pa.Super 62, 584 A.2d 642. After a lack of due diligence by failing to cooperate with Defendants' exhaustive efforts to gather discovery including Plaintiffs' expert report, Plaintiffs now attempt another delay tactic by surprising Defendants and this Court by introducing yet two more expert reports, mere weeks before trial was to commence, that have been in Plaintiffs' possession for more than five (5) years. Plaintiffs' counsel attempts to defend his surprise expert reports by stating that he complied in 1997 with the literal word of the January 20, 1997, Order of Court. No amount of parsing the meaning of a Court Order with indefinite articles can persuade this Court that any such tactic should be allowed to stand unchallenged.

Both Plaintiffs and Defendants, in their respective briefs, cite cases addressing the issue of expert testimony beyond the scope of the expert's report. Additionally, in Plaintiffs' Brief in Opposition to Defendant Dr. Rosenthal's Motion for Summary Judgment, Plaintiffs discuss Pa.R.C.P. 4003.5 as it relates to the requirement that an expert's testimony at trial may not go beyond the scope of his or her testimony in the report. Although Pa.R.C.P. 4003.5 is controlling in governing discovery of expert testimony, the use of interrogatories, and the scope of an expert's testimony at trial, it does not directly address the question that is presented in this case: whether expert reports should be allowed which were available more than five (5) years ago and which were never introduced until after the case had been listed for trial and after three (3) of the (4) defendants had filed motions for summary judgment. Therefore, neither the case law cited in the parties' briefs nor Pa.R.C.P. 4003.5 are particularly helpful to this Court for the issue presented in the instant case. Because Pa.R.C.P. 4003.5(b) comes closer to addressing the issue presented in this case, this Court will be guided by Rule 4003.5(b) which states:

(b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or appropriate relief.

Although Plaintiffs are not literally in default of Pa.R.C.P. 4003.5(a)(1) as that section deals with requiring a party to identify experts and the substance of the facts and opinions to which the expert is expected to testify, Plaintiffs failed to introduce the two (2) additional experts' reports within a reasonable time that would fairly allow Defendants to adequately prepare responses from their own experts. Plaintiffs have

presented no evidence of extenuating circumstances beyond their control which prevented introducing the two (2) additional expert reports prior to a mere few weeks before the scheduled trial. Defendant Dr. Sukerkar states that if the Plaintiffs' additional expert reports are allowed to be considered in the Court's disposition of Defendant's Motion for Summary Judgment, then Dr. Sukerkar would require ample time to retain his own expert to fashion responses to the two (2) additional expert reports. Supplemental Brief in Support of Motion for Summary Judgment at 2. The result would be for this Court to grant Defendants a continuance in this case and allow the case to be delayed even longer as the Defendants would again attempt to complete discovery. What is to prevent Plaintiffs from trying the same or similar tactic again once this new discovery is completed by Defendants? Defendants proceeded earlier under the good faith expectation that Plaintiffs had completed service of their expert reports in accordance with the Court Order dated January 30, 1997. Why should Defendants, at this point, expect Plaintiffs to cooperate with additional discovery requests after all Defendants endured for more than ten (10) years in trying to complete discovery?

This case has been dragging on for more than ten (10) years because Plaintiffs have not been professionally diligent, and such a great lapse of time cannot but prejudice Defendants. See Shrum v. Philadelphia Electric Co., 440 Pa. 383, 269 A.2d 502 (1970) (which holds that a lapse of time may in itself be presumptively prejudicial). In a 1992 case appealing a judgment of non pros, the Pennsylvania Supreme Court stated that "...where a plaintiff, without reasonable explanation, has delayed an inordinate time to pursue his action ... we must make note of our cognizance of how anxiety based on apprehension of being sued can affect a defendant. Fairness demands that such anxiety not be unreasonably or unnecessarily prolonged." Penn Piping, Inc. v. Insurance Co. of North America, 529 Pa. 350, 354, 603 A.2d 1006, 1008 (1992). In another appeal from a judgment of non pros, the Pennsylvania Supreme Court stated that "as a matter of common fairness, he who brings another into court should prosecute the claim against him with reasonable diligence, and one who sues in a representative capacity no less so than an individual. There is no greater reflection upon the administration of justice than the permission of endless litigation." Id. at 356, 603.A.2d at 1009 (quoting Potter Title & Trust Co. v. Frank, 298 Pa. 137, 142, 148 A. 50, 52 (1929)). It is axiomatic that the burden to move a case forward rests on the plaintiff. Streidl v. Community General Hospital, 529 Pa. 360, 603 A.2d 1011 (1992) (waiting for the report of an expert). Plaintiffs in the instant case failed to proceed with reasonable diligence, thus prejudicing Defendants in their good faith efforts to conduct discovery and fashion a meaningful response.

For the foregoing reasons, this Court holds that only Dr. Kamin's Preliminary Report dated February 24, 1997, will be considered in the disposition of each Defendant's Motion for Summary Judgment.

B. Did Plaintiffs establish a prima facie case for medical malpractice against Defendants Dr. Sukerkar, J.C. Blair Hospital, Dr. Rosenthal, and Dr. DiDonato, which would, therefore, preclude summary judgment?

Pennsylvania Rule of Civil Procedure 1035.2 governs summary judgment and provides as follows:

Rule 1035.2. Motion

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2.

The crux of Rule 1035.2 is that a motion for summary judgment includes two concepts:

(1) there is no material fact disputed, and (2) there is no evidence sufficient for a jury to find a fact that is essential to the cause of action or defense. Pa.R.Civ.P. 1035.2 Comment. Accordingly, Pennsylvania courts have stated that the "mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial ... We have a summary judgment rule in this Commonwealth in order to dispense with a trial of a case (or in some matters, issues in a case) where a party lacks the beginnings of evidence to establish or contest a material issue." Ertel v. Patriot-News Co., 674 A.2d 1038, 1042 (Pa. 1996) (citations omitted). In the case at bar, each Defendant, as the party moving for summary judgment, has the burden of the first concept of Rule 1035.2: that there is no genuine issue of material fact. Laich v. Bracey, 776 A.2d 1022 (Pa. Commw. Ct. 2001). Plaintiffs, as the non-moving party in the case at bar, have the burden of the second concept of Rule 1035.2:

presenting evidence sufficient for showing the existence of facts essential to their defense in this medical malpractice action which, in a jury trial, would have to be decided by the jury in their favor. Ertel v. Patriot-News Co., at 101-102.; see also Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (stating that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"). "Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. A reviewing Court's standard is to "accept as true all well pleaded facts in the plaintiff's pleadings ... giving to the plaintiff the benefit of all reasonable inferences to be drawn therefrom ... All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment." Schacter v. Albert, 212 Pa. Super. 58, 239 A.2d 841 (1968).

Each of the Defendants in the instant case bases his Motion for Summary Judgment on the assertion that Plaintiffs have failed to produce evidence sufficient to establish a prima facie cause of action for medical malpractice. See Pa.R.Civ.P. Rule 1035.2(2). For a prima facie case of causation in a malpractice action, a plaintiff must establish the following:

1. that the physician owed a duty to the patient;

2. that the physician breached that duty;

3. that the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and

4. that the damages suffered by the patient were a direct result of that harm.

Eaddy v. Hamaty, 694 A.2d 639, 641 (Pa.Super. 1997) (citations omitted).

Additionally, the Plaintiffs in a medical malpractice case must offer an expert witness who will testify "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 the harm suffered." Mitzelfelt v. Kamrin, 526 Pa.Super. 54, 62, 584 A.2d 888, 892 (1990). It is well settled in Pennsylvania law that the judge must determine that proximate cause is established before the question of actual cause may be put to the jury. Fetherolf v. Torosian, 759 A.2d 391, 393 (Super. 2000). An expert falls short of the standard of certainty if he testifies "that the alleged cause 'possibly,' or 'could have' led to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result." Eaddy v. Hamaty, 694 A.2d 639, 642, quoting Kravinsky v. Glover, 263 Pa.Super.8, 21, 396 A.2d 1349, 1356 (1979) (where the expert who opined that "the medical records need to be ascertained and reviewed before any further is said" did not express the requisite degree of medical certainty necessary to establish a prima facie case of medical malpractice). See also Hoffman v. Brandywine Hospital, 443 Pa.Super. at 255-256, 661 A.2d at 402 (where expert's opinion that the treating physician's alleged negligent conduct "in all likelihood" "may have hastened the onset" of the result did not express the requisite degree of medical certainty sufficient to establish a prima facie case of medical malpractice). The only exception to the requirement of expert testimony is "where the matter under investigation is so simple, and the lack of skill or want of care so obvious, as to be within the range of ordinary experience and comprehension of even nonprofessional persons." Brannan v. Lankenau Hospital, 490 Pa. 588, 598 417 A.2d 196, 201 (1980). The case at bar is one which falls under the general rule requiring expert testimony since the questions regarding the detection of Husband/Plaintiff's brain tumor and subsequent medical condition are beyond the knowledge, experience, and education of the average layperson.

"Whether a witness should be permitted to testify as an expert is a question for the discretion of the trial court, whose decision will not be overruled absent an abuse thereof." Montgomery v. South Philadelphia Medical Group, Inc., 441 Pa.Super. 146, 151, 656 A.2d 1385, 1388 (1995). Pennsylvania law holds that a witness may only testify as an expert if he or she "possesses knowledge outside the ordinary reach and offers testimony that could assist the trier of fact." Id. Although Pennsylvania's standard for qualifying a witness as an expert is liberal, Pennsylvania courts have established that expertise in the specific area under investigation is necessary, and an expert witness must have "sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth." Dambacher v. Mallis, 336 Pa.Super. 22, 485 A.2d 408 (1984) quoting McCormick on Evidence §33 (3d ed. 1984). The Dambacher court further stated that sometimes it "may appear that the scope of the witness's experience and education may embrace the subject in question in a general way, but the subject may be so specialized that even so, the witness will not be qualified to testify." Id. at 419. The expert testifying as to the cause of the accident in Dambacher had experience with automobile tires in general, but he was not educated on the effect of mixing radial and non-radial tires. Id. at 418. Thus, the scope of his experience did not embrace the specific area under investigation, i.e., the effect of mixing tires. Id. Therefore, the Dambacher court ruled that the lower court's admission of his testimony as qualified expert testimony was error requiring a new trial. Id.

Plaintiffs in the instant case retained as their expert witness Stephen S. Kamin, M.D., a neurologist certified by the American Board of Psychiatry and Neurology and an Associate Professor of Clinical Neurosciences at the University of Medicine and Dentistry of New Jersey – New Jersey Medical School. After reviewing Husband/Plaintiff's medical records and radiological studies provided by Plaintiffs, Dr. Kamin opined as to the Defendants' standard of care in his Preliminary Report dated February 24, 1997. Dr. Kamin's opinion as to each Defendant's standard of care will be discussed separately.

Defendant Dr. DiDonato:

Husband/Plaintiff's family physician, Dr. Wertman, ordered a CT scan after Husband/Plaintiff reported episodes of "acting funny" or "giddy," laughing, staring up, then losing consciousness, stating that the described behaviors could happen many times a day. The CT scan was performed on Husband/Plaintiff on September 11, 1987, and the CT scan was interpreted by Dr. DiDonato, a radiologist at the J.C. Blair Memorial Hospital. Dr. DiDonato's interpretation of the scan revealed an ischemia region on the left side, which Dr. DiDonato felt was possible post-traumatic in nature and may be the cause or origin of Husband/Plaintiff's unusual behavior.

In his expert report, Dr. Kamin opines that "Dr. DiDonato deviated from the standard of care by failing to include in his interpretation of the CT of September 11, 1987, the possibility of a tumor," stating that "a tumor is far more likely than silent infarction." Preliminary Report, p. 3. Dr. Kamin further opined that "Dr. DiDonato also failed to suggest an MRI as a more definitive diagnostic procedure." Id.

Dr. Kamin is offering his opinion as a neurologist regarding a radiologist's deviation from good and acceptable medical standards in the area of radiology. Dr. Kamin's expertise, education, and experience are in the area of neurology. The specific area under investigation is the accurate reading and interpretion of radiographic studies, specifically CT scans. In his Brief in Support of Motion for Summary Judgment, Defendant Dr. DiDonato argues that the proffered expert testimony by Dr. Kamin is based on scientific knowledge outside the kin of Dr. Kamin's field of expertise, education, and experience and as such, his testimony is not reliably valid within the field of radiology and therefore inadmissible as expert testimony. Defendant DiDonato's Brief in Support of Motion for Summary Judgment, at 3. This Court agrees.

Although the scope of Dr. Kamin's experience embraced in a general way the area of radiology, like the proffered expert in Dambacher, Dr. Kamin's experience did not embrace the specialized subject of reading and interpreting CT scans. Therefore, this Court finds that Dr. Kamin's report dated February 24, 1997, is inadmissible expert testimony as it relates to Defendant Dr. DiDonato's adherence to the good and acceptable standard of care in the field of radiology, a specialized field in which Dr. Kamin is not an expert.

Given that this Court does not accept Dr. Kamin's report as admissible expert testimony against Dr. DiDonato's deviation from the acceptable standard of care of radiologists, it logically follows that Plaintiffs have failed to produce evidence that Dr. DiDonato breached his duty to Husband/Plaintiff and/or that any breach was the proximate cause, or increased risk, of the harm that Husband/Plaintiff suffered. Thus, Plaintiffs failed to state a prima facie cause of action for malpractice against Dr. DiDonato as required by Pa.R.Civ.P. 1035.2 and Pennsylvania case law.

Defendant J.C. Blair Memorial Hospital:

Although Defendant J.C. Blair Hospital is not mentioned in Plaintiffs' expert report, Plaintiffs included the hospital on the theory that an agency relationship exists between Defendant Dr. DiDonato and J.C. Blair Memorial Hospital. See Plaintiffs' Brief in Opposition to Defendant J.C. Blair Memorial Hospital's Motion for Summary Judgment at 9.

When Husband/Plaintiff's family doctor ordered a CT scan of Husband/Plaintiff's head on September 11, 1987, the scan was performed at J.C. Blair Memorial Hospital and interpreted by Dr. DiDonato, who was on the staff of the hospital and who then reported his findings to Husband/Plaintiff's family doctor who ordered the scan. Plaintiffs admit that no independent liability exists with respect to Defendant J.C. Blair Memorial Hospital; rather, Plaintiffs assert that an agency relationship exists between Defendant J.C. Blair Memorial Hospital as principal, and Defendant Dr. DiDonato as agent.

A principal may be held vicariously responsible for the acts of his agent where the acts are within the scope of the agent's employment and where the principal controls the manner of performance and the result of the agent's work. Strain v. Ferroni, 405 Pa.Super. 349, 360, 592 A.2d 698, 704. "Physicians and surgeons, like other persons, are subject to the law of agency and a physician may be at the same time the agent both of another physician and of a hospital even though the employment is not joint." Id. at 361, 592 A.2d at 704 (quoting Yorston v. Pennell, 397 Pa. 28, 153 A.2d 255 (1959).

The claims asserted against Defendant J.C. Blair Memorial Hospital arise out of acts and omissions involving an alleged misreading of a CT of Husband/Plaintiff's brain taken on September 11, 1987, and read by

Defendant Dr. DiDonato. See Defendant J.C. Blair Memorial Hospital's Motion for Summary Judgment at ¶1. Therefore, Defendant J.C. Blair Memorial Hospital's liability is predicated upon Defendant Dr. DiDonato's liability. See Plaintiffs' Brief in Opposition to Defendant J.C. Blair Memorial Hospital's Motion for Summary Judgment at 9.

Because this Court determined that Plaintiffs failed to establish a prima facie case of medical malpractice again Defendant Dr. DiDonato, Plaintiffs' claims against Defendant J.C. Blair Memorial Hospital must also fail.

Defendant Dr. Sukerkar:

Husband/Plaintiff was referred in 1987 by his family physician to Dr. Rosenthal, a neurologist, for further treatment and diagnosis of syncopal episodes and blacking-out spells. Dr. Rosenthal diagnosed a probable seizure disorder and prescribed medication for treatment. On February 17, 1989, Dr. Rosenthal arranged for a repeat CT scan which was interpreted by Defendant Dr. Sukerkar, a radiologist. Dr. Sukerkar noted the area of low attenuation seen previously by Dr. DiDonato. Dr. Sukerkar diagnosed encephalomalacia secondary to the trauma of the May 1987 automobile accident. Dr. Sukerkar also noted that a diagnosis of a mass lesion or arteriovenus malformation was less likely, but advised that further evaluation with a MRI study might be helpful.

In his Preliminary Report dated February 24, 1997, Dr. Kamin opined that "Dr. Sukerkar deviated from the standard of care in failing to adequately emphasize the possibility of a tumor and in failing to more strongly recommend an MRI as a further study." Preliminary Report at 3.

In his Supplemental Brief in Support of Motion for Summary Judgment, Dr. Sukerkar argues that Dr. Kamin disregards the fact that Dr. Sukerkar would have been in violation of federal law had Dr. Sukerkar done more than recommend follow-up and had actually had a hand in ordering a follow-up MRI. Supplemental Brief in Support of Motion for Summary Judgment of Niteen N. Sukerkar, M.D. at 4. Purusant to 42 U.S.C.A. § 1395, physician referrals made for financial gain are banned. Id. Radiology referrals, though, made by "another physician" are excepted from the ban as follows:

. . . a request by a radiologist for diagnostic radiology services, ... if such services are furnished by such radiologist ... pursuant to a consultation requested by another physician does not constitute a "referral" by a "referring physician."

42 U.S.C.A. § 1395(h)(5)(c).

Defendant Dr. Sukerkar interprets the statute to mean that radiology self-referrals are not exempted and thus prohibited. Supplemental Brief in Support of Motion for Summary Judgment of Niteen N. Sukerkar, M.D. at 4. Dr. Sukerkar further argues that the language of the statute requires that an order for follow-up radiology testing must come from the referring physician, not the radiologist who will perform the study. Id. Contrary to Dr. Kamin's opinion in his report, Dr. Sukerkar avers that the duty to effect follow-up radiology testing rests solely with the clinician, not the consultant radiologist. Id. at 5. This Court agrees with Dr. Sukerkar in his reading of 42 U.S.C.A. § 1395(h)(5)(c).

In light of the fact that this Court determines that Dr. Sukerkar would have been in violation of the applicable federal law had he adopted a more intrusive role in effecting an MRI for Plaintiff/Husband from which Dr. Sukerkar, himself, would have had financial gain, Dr. Kamin reveals his lack of expertise in the area under investigation pertaining to Dr. Sukerkar, which is reading and interpreting CT scans and making recommendations to the physician who requested the scan. In fact, it appears that had Dr. Sukerkar done other than to make a reasoned recommendation as he did, he would then have deviated from the standard of care of his profession.

In Plaintiffs' Response to Motion for Summary Judgment Filed on Behalf of Defendant, Niteen N. Sukerkar, M.D., Plaintiffs state that "Dr. Kamin, himself, reviewed the actual film and rendered the opinion that the abnormality on the CT Scan in question 'certainly represents' the tumor that was not diagnosed until some years later." Plaintiffs' Response to Motion for Summary Judgment Filed on Behalf of Defendant, Niteen N. Sukerkar, M.D. at ¶5. Again, this Court notes that Dr. Kamin, a neurologist, is opining as to what Dr. Sukerkar, a radiologist, should have done to be within the good and acceptable standard of care in the medical field of radiology. Dr. Kamin has experience, education, and knowledge in the area of psychiatry and neurology, as the cover sheet of his Preliminary Report states, not radiology. As such, Dr. Kamin's experience and education may embrace the subject of radiology in a general way, but the subject of reading and interpreting CT scans is outside Dr. Kamin's area of expertise.

As stated above, given that this Court does not accept Dr. Kamin's report as admissible expert testimony against Dr. Sukerkar's deviation from the acceptable standard of care of radiologists, it again logically follows that Plaintiffs have failed to produce evidence that Dr. Sukerkar breached his duty to

Husband/Plaintiff and/or that any breach was the proximate cause of, or increased risk of, the harm that Husband/Plaintiff's suffered. Thus, Plaintiffs failed to state a prima facie cause of action for medical malpractice against Dr. Sukerkar as required by Pa.R.Civ.P. 1035.2 and Pennsylvania case law.

Defendant Dr. Rosenthal:

Husband/Plaintiff was referred by his family physician to Dr. Rosenthal, a neurologist, who first examined Husband/Plaintiff on September 22, 1987. After examining Husband/Plaintiff and considering the findings of Dr. DiDonato's interpretation of a CT scan performed on Husband/Plaintiff on September 11, 1987, Dr. Rosenthal diagnosed a probable seizure disorder and prescribed medication which kept Husband/Plaintiff's syncopal episodes and blacking-out spells to a minimum. On September 19, 1988, Dr. Rosenthal sent Husband/Plaintiff a letter suggesting that he get an MRI. At his next follow-up appointment on February 17, 1989, Dr. Rosenthal arranged for a repeat CT scan that was interpreted by Defendant Dr. Sukerkar, a radiologist. Dr. Sukerkar noted the area of low attenuation seen previously by Dr. DiDonato and diagnosed encephalomalacia secondary to the trauma of Husband/Plaintiff's car accident of May 1987. Dr. Sukerkar also advised that further evaluation with an MRI study might be helpful. Dr. Rosenthal felt the area of low attenuation was a long-standing chronic lesion. Given that Husband/Plaintiff had shown no signs of any new difficulties in the time period between the two CT scans, Dr. Rosenthal declined to order an MRI to follow up the CT scan interpreted by Dr. Sukerkar. Brief in Support of Motion for Summary Judgment of Defendant Joel L. Rosenthal, M.D. at 2.

After some initial adjustments in his prescribed medications, Husband/Plaintiff's seizures were under good control through June 29, 1990, the date of Dr. Rosenthal's last office note. At that time, Dr. Rosenthal released Husband/Plaintiff from his care to the care of Husband/Plaintiff's family physician, Dr. White.

In his Preliminary Report dated February 24, 1997, Dr. Kamin states that "Dr. Rosenthal deviated from the standard of care in failing to consider the possibility of a tumor in this case. . . . An MRI of the brain should have been ordered at the time of initial evaluation in 1987. Dr. Rosenthal should have more aggressively pursued obtaining the MRI thereafter. It should have been obtained in February 1989 in preference to a repeat CT." Preliminary Report at 3. Dr. Kamin further opines in his report that Dr. Rosenthal's "deviations from the standard of care increased the risk of harm to Mr. Gartland." Preliminary Report at 4.

An expert need not testify to absolute certainty or rule out all causes of the condition at issue other than the alleged deviation from the standard of medical care. Eaddy v. Hamaty, 694 A.2d at 642. Nor is the expert required to testify in exactly the same language used in articulating the legal standard. Id. Rather, the Court considers the entire expert testimony to determine whether it expresses the requisite degree of medical certainty to establish a prima facie case of medical malpractice. Id. "An expert fails this standard of certainty if he testifies 'that the alleged cause "possibly," or "could have" led to the result, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result.'" Id. (citing Krivinsky v. Glover, 263 Pa.Super. 8, 21, 396 A.2d 1349, 1356 (1979)).

In his Brief in Support of Summary Judgment, Defendant Rosenthal argues that Plaintiffs' expert, Dr. Kamin, used equivocating language in his Preliminary Report, much like the language cited in the Eaddy case, that fails to meet the requisite standard of certainty. Brief in Support of Summary Judgment of Defendant Joel L. Rosenthal, M.D. at 5. This Court agrees.

In his Preliminary Report, Dr. Kamin's statements regarding Dr. Rosenthal's care and treatment of Husband/Plaintiff fail to establish that Dr. Rosenthal's medical actions and decisions were the cause of Husband/Plaintiff's brain tumor and his attendant medical condition. Dr. Rosenthal reasonably relied upon, and agreed with, radiologists' reports that revealed no indications from CT scans of a brain tumor in Husband/Plaintiff. Dr. Kamin's repeated use of the phrases "it is likely that ..." and "there would have been..." when connecting Dr. Rosenthal's treatment and diagnosis of Husband/Plaintiff to his later various conditions and medical treatments/surgeries fails to establish the requisite standard of certainty for a case of medical malpractice. For the foregoing reasons, Dr. Kamin's report does not establish a causal connection between Defendant Rosenthal's alleged deviation from the standard of care and Husband/Plaintiff's condition. Therefore, Plaintiffs fail to establish a prima facie case of medical malpractice against Defendant Dr. Rosenthal due to insufficient expert testimony for the issue of causation.

C. Does the Medical Care Availability and Reduction of Error Act (M-Care Act) 40 P.S. §1403.101, et. seq. applicable to the instant case?

At the time of oral argument, counsel for Defendants first raised the possibility of the application of the M-Care Act to the instant case. This Court allowed Defendants to submit supplemental letter-memoranda on the topic by March 7, 2003. Plaintiffs then had until March 14, 2003, to respond.

This Court received letter-memoranda from counsel for Defendants Dr. DiDonato, J.C. Blair Memorial

Hospital, and Dr. Sukerkar on March 7, 2003. On March 13, 2003, this Court received a letter from Plaintiffs' counsel which was largely supplemental argument on the strengths of his case and propriety of the use of two (2) additional expert reports, rather than the applicability of the M-Care Act.

Because this Court has decided to accept only the first expert report, Dr. Kamin's Preliminary Report dated February 24, 1997, there is no need to reach the issue of applicability of the M-Care Act. Therefore, the Motion to Strike Argument and Letter-Memoranda of Defendants filed on behalf of Plaintiffs is denied.

D. Should Defendant Dr. Sukerkar's Motion for Leave of Court to Amend New Matter to join Defendant J.C. Blair Memorial Hospital be granted?

Because Plaintiffs failed to establish a prima facie case of causation in their claim for medical malpractice against Defendant Dr. Sukerkar, the issue forming the basis of Defendant Dr. Sukerkar's Motion is now moot. Accordingly, Defendant Dr. Sukerkar's Motion for Leave of Court to Amend New Matter is denied.

ORDER OF COURT

And now this 24th day of April, 2003, upon consideration and review of the record and oral argument on February 26, 2003, it is hereby ordered as follows:

As to Defendant Joel L. Rosenthal, M.D.:

Given that Plaintiffs failed to establish a prima facie case of medical malpractice as required by Pa.R.Civ.P. 1035.2, Defendant Rosenthal's Motion for Summary Judgment is granted.

As to Defendant Richard R. DiDonato, M.D.:

Given that Plaintiffs failed to establish a prima facie case of medical malpractice as required by Pa.R.Civ.P. 1035.2, Defendant DiDonato's Motion for Summary Judgment is granted.

As to Defendant J.C. Blair Memorial Hospital:

Within the theory of agency, given that Plaintiffs failed to establish a prima facie case of medical malpractice as required by Pa.R.Civ.P. 1035.2 against agent, Defendant DiDonato, it follows that principal, Defendant J.C. Blair Memorial Hospital's Motion for Summary Judgment is granted.

As to Defendant Niteen N. Sukerkar, M.D.:

Given that Plaintiffs failed to establish a prima facie case of medical malpractice as required by Pa.R.Civ.P. 1035.2, Defendant Sukerkar's Motion for Summary Judgment is granted.

Given that Plaintiffs failed to establish a prima facie case of causation in their claim for medical malpractice against Defendant Sukerkar, the issue forming the basis of Defendant Sukerkar's Motion for Leave of Court to Amend New Matter to join Defendant J.C. Blair Memorial Hospital is moot. Accordingly, Defendant Sukerkar's Motion for Leave of Court to Amend New Matter is denied.

As to Plaintiffs:

Given that Dr. Kamin's Preliminary Report dated February 24, 1997, is the only report accepted by this Court, there is no need to reach the issue of applicability of the Medical Care Availability and Reduction of Error Act (M-Care Act). Therefore, Plaintiffs' Motion to Strike Argument and Letter-Memoranda of Defendants filed on behalf of Plaintiffs is denied.

The financial sanctions imposed personally on the Plaintiffs' counsel totaled $2,223 which reimbursed Defendant Rosenthal for reasonable attorney fees and other costs associated with the following:

1. The August 4, 1993, request for dates when Plaintiffs would be available for deposition which went unanswered;

2. The August 20, 1993, inquiry as to when Defendant could expect to receive Plaintiffs' answers to interrogatories which went unanswered;

3. The December 14, 1993, request for answers and responses which went unanswered;

4. The filing of the Motion to Compel which resulted in the Court Order of July 11, 1994, directing Plaintiffs to answer Defendant's interrogatories and to make the Plaintiffs available for depositions;

5. The hearing of July 7, 1994;

6. The Motion to Dismiss filed July 29, 1994;

7. Defense counsel's appearance at the September 1, 1994, hearing and argument concerning the Motion to Dismiss.

Defendant J. C. Blair Hospital, agent of Defendant Dr. DiDonato, is not named in Plaintiffs' expert report.

The Court notes that Plaintiffs' response to each Defendant's Motion for Summary Judgment was timely filed with the exception of Plaintiffs' response to Defendant Sukerkar, which was not filed within thirty (30) days after service as provided by Pa.R.C.P. 1035.3(a). Nevertheless, this Court will include Defendant Dr. Sukerkar in its discussion.

See Burton-Lister v. Siegel, Sivitz and Lebed Assoc., 798 A. 2d 231 (Pa. Super 2002); *Jones v. Constantio*, 429 Pa.Super. 73, 631 A.2d 1289 (1993); *Havasy v. Resnick*, 415 Pa.Super. 480, 609 A.2d 1326 (1992).

This Court notes that no motion for *non pros* was ever filed in this case, and had it been, this Court might very well have entered a judgment against Plaintiffs. Nevertheless, this Court does not decide this case on the ground of delay alone.

Dr. Kamin's Preliminary Report is based on no records beyond April 2, 1994.