

MEDICAL MALPRACTICE UPDATE

August 2005

THE CASE FOR CASE EVALUATION

By Brian A. Molde, Attorney

Michigan law requires that all medical malpractice claims go through the case evaluation process.

What is the benefit to the defense? The answer is that the process of presenting a defense, as well as the rules surrounding the formal method of case evaluation, can serve as an incomparable primer for trial and can be used to exert leverage to force settlement or trial by imposing costs on opposing parties. Also, though not commonly known, the case evaluation process can also result in settlement if the parties agree with the evaluated award. It is high ground on the litigation battlefield, and should not be weakly defended.

A Primer for Trial

Case evaluation almost invariably occurs after the close of discovery. Therefore, the universe of facts that will be available at trial has been squeezed (through interrogatory, request for production, and deposition) from the rest of the world into the case file. Even in the simplest of cases, however, problematic facts arise and holes in the defense appear. Case evaluation is a spectacular opportunity to find those holes and fill them in. This is sometimes the first opportunity to digest the facts of a case as a whole, and by crafting an argument that takes into account the testimony of lay and expert witnesses, discovery, and the legal issues presented by the testimony, case evaluation can focus the defense upon its strongest redoubts and strengthen the weaker points. In sum, it serves as the first chance to present the case, as a whole, to an uninterested group.

Case evaluation also serves as a final discovery session. The opposing party will present its claim in the same way that the defense will put its best case before the panel. Reviewing plaintiff's brief and paying attention to the presentation by the plaintiff can provide valuable facts regarding what the plaintiff believes to be his strongest argument. Having this information ahead of trial is indispensable.

Exerting Leverage Through the Case Evaluation Process

All cases should be prepared from the outset of litigation as if they are bound for trial. Case evaluation can, therefore, be an irrelevant exercise if viewed only as a tool for settlement of a claim that should be tried to a jury. Treating the process as irrelevant or of lesser importance is, however, inconsistent with an aggressive approach towards trial. Used effectively, case evaluation can pin a plaintiff into an uncomfortable and untenable situation before trial, making capitulation more likely.

The "hammer" in the case evaluation process is the threat of an award of costs pursuant to the Michigan Court Rules governing case evaluation. These costs are awarded if an accepting party receives a verdict more favorable than the case evaluation award rejected by the opposing party. Thus, controlling the amount awarded at case evaluation is critical to holding leverage over the plaintiff with the threat of costs. The best method for controlling the award is by overwhelming the panel with the argument in the summary, convincing the panel that the case has insufficient facts or is subject to dismissal or is unsupported by medical knowledge. Presenting the best prepared and most comprehensive summary forces the panel to agree with facts or arguments which may not have been addressed by the other parties. Having control over the facts presented gives the defense influence over the panel's evaluation, and thereby influences the posture of the claim as it moves toward trial.

Whether the successful use of case evaluation forces a favorable settlement or simply adds momentum to the defense moving towards trial, it is an opportunity to outmaneuver an opponent and the first chance to present a case as a whole and should not be overlooked.

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CASE LAW UPDATE

Edited by: Robert W. Tubbs, Attorney

Affidavit of Merit/Entry of Default Judgment

Saffian v Simmons, D.D.S., ___ Mich App ___ (2005). Defendant failed to file an answer to plaintiff's complaint and a default judgment was entered. On appeal, Defendant claims that because the affidavit of merit filed with plaintiff's complaint was deficient (it was signed by an expert in the field of endodontics rather than general dentistry) he was not required to file responsive pleadings to plaintiff's complaint. In affirming the trial court's order reinstating the default, the Court held that a deficiency in the affidavit of merit does not relieve the defendant of his duty to file an answer to a complaint. To hold otherwise would allow a defendant to knowingly allow the statute of limitations to run by ignoring a lawsuit and then to bypass the default by attacking the affidavit of merit. The Court distinguished this case from *White v Busuito*, 230 Mich App 71 (1998), which held that suit is not commenced without the filing of an affidavit of merit. In this case an affidavit was filed with the complaint.

Arrand v Snider, D.O., et. al., Mich. Ct. App., July 14, 2005 (unpublished). The trial court granted defendants' motion for summary disposition for the reason that plaintiff failed to file an affidavit of merit with her complaint. Plaintiff's attorney claimed that the executed affidavit, together with the summons and complaint, was hand delivered to the court for filing, but that the court personnel misplaced the affidavit. Because the plaintiff could present no evidence that either the initial affidavit existed or that the trial court misplaced the affidavit, summary disposition was properly granted. The plaintiff made no copy of the initial affidavit, did not obtain a time-stamped copy of the pleadings when they were filed, and did not check to see that the affidavit was among the papers filed with the court before they were sent to the defendants.

Affidavit of Merit/Tolling

Kirkaldy v Rim, M.D., et. al., ___ Mich App ___ (2005). Defendants were board certified neurologists. Plaintiff's affidavit of merit was signed by a board certified neurosurgeon. The trial court entered an order of dismissal without prejudice and the Court of Appeals affirmed. On remand from the Supreme Court, with instruction to consider defendants' argument that the statute of limitations was not tolled by the filing of the defective affidavit, the Court reluctantly followed *Scarsella v Pollak*, 461 Mich 547 (2000), and its progeny, and held that the statute of limitations was not tolled by the filing of the defective affidavit and plaintiff's complaint was dismissed with prejudice. The

opinion further requests, however, that the Supreme Court revisit its opinion in *Scarsella*. This panel would hold that *Scarsella* was incorrectly decided because the tolling statute does not require the filing of an affidavit of merit and that cases since *Scarsella* have incorrectly expanded the *Scarsella* opinion to dismiss those cases in which an affidavit of merit is filed, albeit non-conforming to the requirements of the statute. In these situations, this panel would hold that the statute of limitations should be tolled until the trial court renders a ruling on whether the affidavit of merit is defecting or nonconforming.

Emergency Medical Services Act

Regional Emergency Medical Services, Inc. v Gudenau, Mich. Ct. App. June 21, 2005 (unpublished). In this legal malpractice action, the underlying issue was whether the Emergency Medical Services Act, MCL 333.20965, conferred immunity from ordinary negligence in a non-medical emergency situation. The Court concluded that where emergency services are not being provided (in this case the ambulance was providing transport to the hospital on a non-emergent basis) the statute does not confer immunity and only ordinary negligence need be proven. The defendant, therefore, did not commit legal malpractice when he stipulated to dismiss the immunity defense.

Expert Testimony

Clerc v Chippewa County War Memorial Hospital, et. al., ___ Mich App ___ (2005). In this malpractice action it was alleged that plaintiff's decedent's chest x-ray was mistakenly read as normal, resulting in a delayed diagnosis of lung cancer. The issue before the Court was the admissibility of expert testimony regarding the staging of the patient's lung cancer at the time of the x-ray and her chances of surviving if the cancer had been diagnosed at that time. The trial court found that the plaintiff's experts did not have a scientific basis for asserting that the cancer was either at Stage I or Stage II at the time of the x-ray and that it was mere speculation and conjecture to state that if the cancer had been diagnosed at the time of the x-ray the decedent would have had a greater than fifty percent chance of survival. On appeal, the Court held that prior to striking the plaintiff's expert's testimony, the trial court should have conducted a more thorough inquiry under MRE 702 to determine 1) if the testimony was relevant to assist the trier of fact to understand the evidence or determine a fact in issue and 2) that the testimony is derived from recognized scientific, technical, or other specialized knowledge. If, on the other hand, the trial

court concludes that the testimony regarding “backwards cancer staging” is a novel scientific principle, then the trial court should conduct a *Davis-Frye* evidentiary hearing to determine if the expert’s testimony regarding “backward staging” had achieved general scientific acceptance for reliability. The case was remanded to the trial court.

Raab v Joyce, D.O., Mich. Ct. App., June 28, 2005 (unpublished). The trial court entered an order precluding plaintiff’s expert witness from offering testimony as to the applicable standard of care for the reasons that 1) plaintiff’s expert was an M.D. board certified in general surgery whereas defendant was a D.O. board certified in general surgery and 2) the expert in his deposition testified that he neither performs one of the surgical procedures as a matter of course nor has he ever performed the other surgical procedure that was at issue in the case. In reversing the trial court’s order granting summary disposition in favor of defendant, the Court held that MCL 600.2169(1)(a) only requires that the expert and the defendant physician share a specialty, or board certification in a specialty, but not that they have equal educational credentials. Furthermore, MCL 600.2169(1)(b)(i) does not require that the expert perform the same procedures in his practice as does the defendant, but rather that the expert is engaged in the same clinical practice, in this case general surgery. Whether there is a weakness in the expert’s expertise is a matter for cross-examination and goes to the weight of the testimony and not its admissibility.

Saggers v Detroit Receiving Hospital, et. al., Mich. Ct. App., July 26, 2005 (unpublished). Plaintiff brought this medical malpractice action alleging that her ward suffered debilitating neurological injuries arising out of the negligent treatment of varicella (chicken pox) upon his presentation to the emergency department on three separate occasions. The trial court granted defendants motion for summary disposition following a hearing to determine the admissibility of plaintiff’s expert’s testimony as it pertained to the administration of acyclovir more than 24 hours after the exposure to the virus. Defendant argued that acyclovir was approved for use and effective only if given within that time period and the ward presented to the hospital 60 hours after he noticed the first lesion. The Court held, however, that the trial court should not have granted summary disposition as to all of plaintiff’s claims. Plaintiff also claimed that her ward should have been hospitalized, given a chest x-ray, and that acyclovir should still have been administered to reduce the complications of the illness and thereby prevent the neurological injury. These claims were separate from the claim that acyclovir should have been given to prevent the development of the patient’s varicella pneumonia.

Grewe Liability

Sevelis v Sellers, D.O., et. al., Mich. Ct. App., May 17, 2005 (unpublished). During surgery, plaintiff’s personal physician called in another physician to assist. Under these circumstances, a hospital cannot be held vicariously liable for the professional negligence of the second physician, even if the treatment took place within the hospital. The hospital did not, by act or neglect, generate any belief that the physician was an agent of the hospital. Summary disposition for the hospital was affirmed.

Intoxication Defense

Harbour v Correctional Medical Services, Inc., ___ Mich App ___ (2005). Plaintiff brought this medical malpractice claim alleging that defendant was professionally negligent in the care and treatment of plaintiff’s decedent following his arrest and incarceration for driving under the influence of intoxicating liquor. After her assessment, Defendant’s nurse placed the decedent on “sick call” in a holding cell to be seen by a physician the following morning. Two hours later, the decedent collapsed and died as a result of irregular heart rhythms caused by acute alcohol withdrawal. In affirming the trial court’s directed verdict in favor of defendant, the Court held that because the decedent’s ability to function was impaired due to the influence of intoxicating liquor and because his alcohol withdrawal was an “event”, MCL 600.2955a barred plaintiff’s recovery of damages in this case. The statute states that , “It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50 percent or more the cause of the accident or event that resulted in the death or injury. “...reasonable minds could not differ that, as a result of the impairment, the decedent was 50 percent or more the cause of the “event” - acute alcohol withdrawal - that resulted in his death.”

Medical Malpractice v Ordinary Negligence

Davis v Botsford General Hospital, Mich. Ct. App., May 24, 2005 (unpublished). Plaintiff’s allegation that defendant failed to “provide proper hygiene for plaintiff’s decedent in that defendant failed to bathe plaintiff’s decedent on a regular basis and failed to properly clean and change her after she soiled herself” sounded in ordinary negligence. The Court found that the claim did not require expert testimony; medical judgment being unnecessary to determine if there was a breach of duty. On the other hand, allegations that defendant “failed to adequately and competently keep decedent’s surroundings clean and sterile as necessary

for a patient in plaintiff's decedent's medical condition" and "failed to adequately and competently change and clean plaintiff's decedent's bed linens and clothes as is necessary for a patient in plaintiff's decedent's medical condition" sounded in medical malpractice. The Court held that these allegations required "assessment of the risks and benefits of the level of sterility and cleanliness needed for a patient 'in decedent's medical condition.'" As such, expert testimony would be needed to establish the applicable standard of care for a patient "in decedent's medical condition."

McDonnell v American National Red Cross, et. al., Mich. Ct. App., June 7, 2005 (unpublished). On remand for reconsideration from the Michigan Supreme Court, the Court held that plaintiff's cause of action with respect to defendant's overall conduct in carrying out a blood drive was one of ordinary negligence. First, the "fact finder relying only on common knowledge and experience, e.g., fainting may occur in the course of blood donations, can readily determine whether defendants' conduct in organizing and staffing the blood drive was sufficient." Second, although the final analysis is left to the trial court, it does not appear that the professional relationship test (is the licensed health care professional or licensed health care facility subject to a contractual duty requiring the health care professional or health care facility to render professional health services to the plaintiff?) has been met because the defendants are not state licensed health care professionals or licensed health care facilities. The case was remanded to the trial court for further proceedings.

De Zacks v Tendercare, Inc., et. al., Mich. Ct. App., July 28, 2005 (unpublished). In her complaint against defendant nursing home Plaintiff claimed that her husband's death resulted from the defendants' inadequate care; more specifically medication and diet errors, untreated injuries and the fact that nurse in charge should not have been working in a supervisory capacity as a result of numerous felony convictions. Plaintiff did not comply with the statutory requirements for medical malpractice actions and defendants moved for, and were granted summary disposition. On appeal, the plaintiff claimed that her cause of action was based on ordinary negligence and not medical malpractice. The trial court was affirmed. First, suit was brought against a party capable of malpractice. Second, the claim sounded in malpractice. There was a professional relationship between the defendant nursing home and plaintiff's decedent and the claim raised questions of medical judgment requiring expert testimony. There was a dissenting opinion that would have denied summary disposition as to that portion of plaintiff's claim based upon the negligent hiring and supervision of the supervisory nurse.

Notice of Intent

White v Cohen Podiatry, P.C., Mich. Ct. App., June 23, 2005 (unpublished). Plaintiff's claim of malpractice arose out of surgery to remove a heel spur from her foot. In her notice of intent, plaintiff noted the applicable standard of care to be, "What a podiatrist of ordinary learning, judgment or skill would or would not do under the same or similar circumstances." As to how the standard of care was breached, the NOI stated, "The podiatrist improperly performed removal of the heel spur and did not properly excise the spur removal of the left foot." The trial court held that the NOI was deficient and granted defendant's motion for summary disposition. In affirming the trial court, the majority held that the NOI must "provide details that are responsive to the information sought by the statute and that are as particularized as is consistent with the early notice stage of the proceedings." Furthermore, "a statement that a procedure was improperly performed does not identify the manner in which it is claimed that the standard of care was breached."

Other

Lasher v Wright, DPM, Mich. Ct. App., May 17, 2005 (unpublished). Plaintiff claimed medical malpractice after the partial amputation of the decedent's toe by the defendant podiatrist. Following a jury verdict in favor of defendant, the trial court granted plaintiff's motion for new trial based upon the court's finding that defendant's expert testified that at the time of surgery the toe should have been completely amputated to prevent the possibility of infection and that, therefore, the jury's verdict was against the great weight of the evidence. At the time of the hearing, the trial judge acknowledged that he could not recall the specific wording of the expert's testimony. Following the trial judge's retirement, the new judge, on defendant's motion for reconsideration, issued an order reversing the prior order on the basis that, after review of the transcript of the expert's testimony and the record of the hearing on plaintiff's motion for judgment notwithstanding the verdict, the order granting the new trial was based upon the trial judge's erroneous recollection of the testimony. In reversing this order on appeal, the Court's majority held that the subsequent judge abused his discretion by basing his decision upon a review of only the expert's testimony and the transcript of the hearing, and not the entire record from the trial. In his dissenting opinion, Judge Saad stated that, "... it was not necessary for Judge Myles to review the entire trial transcript."

Res Ipsa Loquitur

Woodard v Custer, M.D., et. al., ___ Mich ___ (2005). In this medical malpractice action, plaintiffs allege that their 15-day old son sustained fractures to both legs as a result of negligent medical procedures; specifically the

improper placement of an arterial line in the femoral vein of his right leg and the improper placement of a venous catheter in his left leg. The trial court granted defendant's motion to strike plaintiffs' expert witness on the basis that he was not qualified to testify against the defendant physician. (Leave to appeal on this decision has been granted and will be decided separately from this opinion.) The trial court then dismissed plaintiffs' action on the basis that plaintiffs could not reach a jury absent expert testimony. Plaintiffs claim, however, that expert testimony is unnecessary because of the doctrine of *res ipsa loquitur*, a Latin term meaning "the thing speaks for itself." The doctrine applies if, among other conditions, "the event [is] ... of a kind which ordinarily does not occur in the absence of someone's negligence." This condition must be supported either by expert testimony or be within the common understanding of the jury. "In this case, whether a leg may be fractured in the absence of negligence when placing an arterial line or a venous catheter in a newborn's leg is not within the common understanding of the jury, and, thus, expert testimony is required."

Statute of Limitations

Inloes v Alton, D.O., et. al., Mich. Ct. App., May 19, 2005 (unpublished). Plaintiffs filed their complaint alleging medical malpractice on the last day of the statute of limitations period. Rather than filing an affidavit of merit, plaintiffs filed a petition to extend the time for filing the affidavit an additional 28 days. Although the trial court granted the petition, it did not sign the order until five days after the limitations period expired. In affirming the trial court's entry of order granting summary disposition in favor of defendant, the Court held that the period of limitations was not tolled upon the filing of the petition to extend the time for filing an affidavit of merit. Rather, it is the granting of the motion which tolls the statute of limitations. This did not occur, however, until after the limitations period had expired. Plaintiffs also claimed that the statute of limitations was tolled pursuant to MCL 600.5851(1) because plaintiff was insane. This was not applicable here, however, because the insanity must exist at the time the claim accrues and not arise after the claim has accrued.

Farley v Advanced Cardiovascular Health Specialists, P.C., et. al., ___ Mich App ___, (2005). In reliance upon the Michigan Supreme Court opinion in *Waltz v Wyse*, 469 Mich 642 (2004), and the Court of Appeals opinion in *Ousley v McLaren*, 264 Mich App 486 (2004), the Court reversed the trial court's denial of defendants' motions for summary disposition. The alleged malpractice occurred on March 14, 1999. Plaintiff was appointed personal representative on June 22, 2000 and filed a notice of intent to sue on April 9, 2002. Pursuant to the wrongful death saving statute,

MCL 600.5852, plaintiff had until June 22, 2002, two years after her appointment as personal representative, in which to bring her claim alleging wrongful death arising out of a claim for medical malpractice. The notice period, however, did not expire until October 9, 2002. Because the notice period does not toll the wrongful death saving statute, the statute of limitations expired on June 22, 2002. Plaintiff's complaint, therefore, was untimely filed.

Vega v Lakeland Hospitals, et. al., ___ Mich App ___ (2005). In this case the Court held that the disability grace period for filing a cause of action, MCL 600.5851(1), does not apply to a claim for medical malpractice. MCL 600.5851(1) states that, "Except as otherwise provided in subsections (7) and (8)," if the claimant is under 18 years of age or insane at the time the claim accrues they have one year after the disability is removed to bring an action although the limitations period has expired. Subsection (7) states that in a claim alleging medical malpractice, if the claim accrues after the person's eighth birthday, he or she is subject to the limitations period set forth in MCL 600.5838a. Applying principles of statutory construction the Court held that the specific exception set forth in subsection (7) is clear and unambiguous and, therefore, limits the grace period to non-medical malpractice claimants. Because the minor had reached his 11th birthday at the time of the alleged malpractice, the limitations period was two years from the time the claim accrued. It was immaterial that the minor was alleged to have been insane at the time the claim accrued. Entry of an order granting defendants' motion for summary disposition was affirmed.

Jackson v Lieberman, M.D., et. al., Mich. Ct. App., July 12, 2005 (unpublished). Plaintiff's notice of intent was mailed to the defendant hospital more than 182 days before the limitations period expires. As a result, MCL 600.5856(d) did not toll the statute of limitations. Plaintiff subsequently mailed a second notice of intent to the hospital as well as to the individual defendants within that last 182 days before the limitations period was set to expire. Because MCL 600.2912b(6) mandates that the tacking or addition of successive 182-day periods is not allowed and provides that only one notice is required, summary disposition was appropriate as to all defendants.

Wrongful Death

King v Briggs, D.O., et. al., Mich Ct. App., July 12, 2005 (unpublished). MCL 600.5852 is a "savings" provision which gives a personal representative two years from the issuance of the letters of authority to file a malpractice action. It is not tolled, however, by the 182-day notice period required by MCL 600.2912b(1)

for medical malpractice actions. As a result, the trial court incorrectly denied defendant's motion for summary disposition where plaintiff's complaint was filed more than two years after the letters of authority were issued. Furthermore, the action could not be saved by the appointment of a successor personal representative. Pursuant to MCL 700.3613 a successor

personal representative "must be substituted in all actions and proceedings in which the former personal representative was a party." Therefore, the successor personal representative does not have an additional two years in which to commence the action.

WHO IS ROB TUBBS?



Robert W. Tubbs is a shareholder in the Traverse City office of Smith Haughey and has been engaged in defending hospitals and physicians in medical malpractice cases for more than 15 years.

Rob was motivated to enter the field of law by his grandfather, Robert S. Tubbs, who practiced law for many years in Grand Rapids. "My grandfather looked at the law as an honorable profession through which one can use their intellectual skills to successfully help others. I have tried to follow his example." For continued inspiration, a portrait of Rob's grandfather hangs in his office.

Following law school Rob began his legal career in Traverse City as a general liability defense attorney. Rob tried a number of cases to successful jury verdicts. When one of his partners decided to stop handling medical malpractice litigation, Rob volunteered to fill that role. Fifteen years later, his medical malpractice cases continue to provide him with a sense of fulfillment. "One of the most gratifying aspects of my practice is working with colleagues to share ideas, thoughts, and strategies that ultimately allow us to provide the best defense for our clients."

"I also have an innate curiosity about science, human anatomy, and physiology and my work on medical malpractice cases allows me to obtain an intensive education in particular areas of medicine, while at the same time practicing law. I have the privilege of speaking with experts renowned in their respective fields." With their help, Rob has successfully obtained defense jury verdicts in cases arising out of the fields of psychiatry, general surgery, obstetrics, ophthalmology, emergency medicine, orthopedic surgery and x-ray technology.

In return, Rob helps to educate health care providers about the law. He has presented numerous seminars to physicians, nurses and other health care providers around the state and regularly gives presentations to the residents in the Family Practice Residency Program at Munson Medical Center in Traverse City.

Rob is a member of the State Bar of Michigan and the Antrim-Grand Traverse-Leelanau Bar Association. Rob and his wife Laura have two daughters, Natalie and Olivia. In his spare time Rob enjoys running, which he took up in his mid-forties, and has successfully completed marathons in each of the past two years. One previously unknown fact about Rob: his great uncle wrote the screenplays for the films East of Eden, South Pacific, and Sayonara, among others.

NEWS AND SUCCESS

Paul Oleniczak, Bill Henn, and Brian Molde recently received a favorable ruling from the Michigan Court of Appeals affirming an order granting summary disposition of a case originally filed in the Berrien County Circuit Court (see *Vega v Lakeland Hospital* above). Paul and Brian convinced the trial court that the statute of limitations had expired before the Complaint was filed. Bill Henn defended the ruling of the lower court in the Court of Appeals, and the appellate court agreed, ruling in a published opinion that the disability of insanity was not available to medical malpractice plaintiffs. The case is expected to be appealed to the Supreme Court.

Brian Kilbane obtained a no cause for action verdict on behalf of hospital and physician clients in a wrongful death action tried in Berrien County Circuit Court, arising from claims for failure to timely and accurately diagnose colon cancer. This case was successfully positioned for a defense verdict as the result of diligent team effort including trial preparation and pretrial motion work-up by **Brian Molde** and **Stephanie Neal**, as well as paralegal support from **Rachel Krings** and **Kathleen DeWildt**.

Jason Sebolt recently secured dismissal of a claim against a physician who refused to turn over a child's medical records to a parent who had neither legal nor physical custody of that child. Jason successfully argued that the statute the parent relied upon to support his claim of access to the child's records was inapplicable under the scenario presented. Although the statute stated that a non-custodial parent could not be denied access to his/her child's records, after hearing Jason's argument, the judge presiding over the matter asserted that a "non-custodial" parent was one who had legal custody but not physical custody over the child. Because plaintiff had neither legal nor physical custody over the child, the physician properly denied the parent access to the medical records and plaintiff's claim was dismissed.

Brian Kilbane and **Cara Nieboer** obtained summary disposition on various grounds including lack of physician-patient relationship giving rise to a duty, lack of ostensible agency due to a physician-physician referral, a defective notice of intent and a defective affidavit of merit. Due to the complex medical issues and various relationships involved in the case, as well as the unfamiliarity of the judge with medical malpractice law, the legal arguments required extensive briefing by Cara Nieboer. Brian Kilbane argued the motions at the hearing and after careful explanation and argument at a hearing that lasted over five hours, the judge ruled in the hospital's favor on all four motions.



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