The Medical Malpractice Trial, Judgment and Appeal

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The federal and state court follow rules of civil procedure that may vary somewhat. The following provides a general overview of the procedure followed in a civil action involving medical malpractice.

Pre-Trial Matters and Stipulations

The malpractice proceedings are governed by a ***pre-trial order***, which covers anticipated witnesses, exhibits, unusual legal issues, and matters which have been stipulated by the parties.

1. Request for Separate Trials as to Certain Issues

The trial court may, upon a most persuasive showing, order a separate trial of one or more claims, cross-claims, counterclaims, third-party claims, or issues, for convenience to all parties or to avoid prejudice, or when separate trials will be conducive to expedition and economy.

2. Motions in Limine

Motions in limine are generally brought to the judge just before the jury selection or before opening statements, the purpose being to prevent attempts by a party to introduce evidence not in dispute or "legally inadmissible" evidence which may, by its very utterance, prejudice the trial process by irrelevant, but sensational, evidence or comment. For example, the insured status of the defendant, activities unrelated to the trial, personal affairs, misconduct by a party or witness, and misleading documentary evidence may be the subject of motions in limine.

The trial court can best determine the prejudicial effect of evidence by contemporaneously assessing its presentation, credibility, and effect. Unfair prejudice exists when there is a danger that marginally probative evidence will be given preemptive weight by a jury. Thus, the trial court may exclude the admission of relevant

evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion or delay as to the material issues to be decided. And, the submission to the jury of issues that are not in dispute or which have been admitted may constitute reversible error. If the trial court grants the motion in limine, a sanction is usually imposed in advance for failure to follow the ruling.

3. Admission of Medical Records

The parties often agree that records will be introduced into evidence without the usual necessity of calling records custodians to establish their authenticity.

4. Jury Control Agreements ("Hi-Lows")

The parties may agree to reduce their respective risks at trial by setting low and high limits on recovery regardless of the verdict amount. Such an agreement, contractual in nature, should be described in detail on the record.

The jury need not be advised of high low arrangements when there is only one defendant. Where several defendants are involved, the jury should be advised of any high low agreements, without specific numbers, involving the parties by utilizing a disclosure method that reasonably ensures fairness to each of the litigants.

5. "Mary Carter" Agreements

In a "Mary Carter" agreement (named after a 1967 Florida decision, Booth v Mary Carter Paint Co), Plaintiff makes a secret agreement to settle with one or more defendants, sometimes for an amount that decreases based upon a higher jury award against the other defendants. Many courts have held that this type of agreement is improper by providing one defendant with a monetary incentive to assist the plaintiff against other defendants.

Voir Dire the Jury

Voir Dire (French for look and say) is the questioning of jurors to determine which will be fair triers of the facts. The Court may conduct the questioning or may allow counsel to do so. Where evidence of bias or prejudice is

revealed, the parties have unlimited "challenges for cause." In civil cases, the parties also have three "peremptory challenges" to remove jurors for no stated reason. However, it is not permissible to use peremptory challenges to exclude jurors on the basis of race.

1. Jury Selection

The number of jurors that are selected and seated in a civil trial varies from 6-12. In addition, at least one "alternate" juror is seated to avoid the risk of a mistrial that may result from a juror becoming sick or otherwise unable to complete the trial.

The process of jury selection aims at providing a fair and impartial jury, even though each party seeks to seat a jury which will favor that side. Where a party fails to timely object to the method of jury selection, the issue is waived for appeal.

2. Challenge of Juror for Cause

A juror must be able to set aside personal opinions and decide a case based solely on the facts and applicable law. The trial court has discretion whether to dismiss a juror for cause, such as an inability to be fair and impartial.

A trial court's decision whether to grant or deny a challenge for cause is generally discretionary, but where apprehension about a challenged juror is reasonable, the court should err on the side of the moving party.

Reversal by the appellate court on the basis of an improperly denied challenge for cause requires additional proof of prejudice. For a party to seek relief from the denial of a challenge for cause, he/she must show on the record that:

a. The court improperly denied a challenge for cause;
b. The aggrieved party exhausted all peremptory challenges;
c. The party demonstrated a desire to excuse a subsequently summoned juror; and
d. The juror the party wished later to excuse was objectionable. (The term "objectionable" is a lesser standard than "excusable for cause," and is defined as causing or tending to cause an objection, disapproval, or protest.)

3. Peremptory Challenges of Jurors

A party has the right to dismiss a potential juror for no reason by utilizing a peremptory challenge. The latter may not be used, however, for the sole reason to remove a juror based upon race, gender, religion, etc.

Peremptory challenges help ensure a fair trial, both in fact and in appearance. They may be exercised at any time before the swearing of the jury. The plaintiff and then the defendant exercise their peremptory challenges until all have been used, or until the parties successively waive further peremptory challenges. At that point, jury selection is complete.

A party may 'pass' when it is time to exercise a challenge, and this is a waiver of further challenge to the panel as constituted at that time. If a challenge for cause is sustained, or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. If the composition of the panel changes after a party passes, the party is free to exercise further peremptory challenges to any member of the new panel.

A claim that the jury selection process was improper is generally not preserved for appeal if the party has not used all available peremptory challenges.

Opening Statements

Opening statements are supposed to be brief summaries of what the party intends to prove through witnesses or other evidence. The jury is informed of the basic law which they will later be asked by the trial court to apply in the case. In reality, the goal of the attorney in presenting an opening statement is to try to sway the Jury from the outset by setting a perspective for the case, or “playing field”, which favors his/her party’s position. *Nothing said by the attorneys is evidence*. But if the attorneys cannot later prove what they say they intend to, they will be usually called to task for it after proofs are closed and closing arguments begin. If a party fails to state a prima facie case on opening statement, the case may be dismissed with prejudice or a default entered upon motion by opposing counsel.

Plaintiff’s Proofs

The Plaintiff always goes first with presenting proofs, and has the burden of proving all legal elements of the claim by evidence creating a “preponderance” or “more likely than not” claim of entitlement to damages. During this process, witnesses will be called by plaintiff’s counsel, with the defense attorney cross-examining the witnesses to

undermine any persuasiveness they may have on the merits by bringing out inconsistencies, biases, seeking concessions, or revealing their lack of knowledge. In a medical malpractice case, key witnesses will be expert medical witnesses who will testify as to the "standard of care" applicable to the conduct of the defendant. The only remedy available in a typical civil trial is money damages, so much testimony will relate to the losses claimed.

1. Objections

Objections are based upon the rules of evidence. All proofs must be authorized by some evidentiary rule. In many areas, however, the Court has wide discretion to admit or exclude evidence. In other areas, admitting improper evidence may require reversal and a new trial.

2. Issues Not Pled

Unpled issues that are tried without timely objection are treated as if they were in the pleadings, and the pleadings are summarily amended to conform to the evidence.

3. Expert Testimony

In the past, expert opinions could be based on facts perceived by or made known to the expert before the hearing. Presently, the bases for expert opinions are required to be in evidence, or will be admitted in evidence during the trial.

4. Prior Lawsuits Generally Not Admissible

Testimony regarding an expert witness' involvement as a party in a prior medical malpractice case may not be used to impeach the witness' credibility. Mere unproven accusations of malpractice stated in a complaint cannot be used as a basis for attacking a physician's knowledge and credibility. Such allegations of malpractice are analogous to unproven charges of criminal activity. Arrests and charges not resulting in conviction may not be used for impeachment.

5. Evidence

Admission of Pleadings

The purpose of certain pleadings, such as a complaint, is primarily to give notice and usually lack the essential character of an admission. Excluding complaints from admission is not error because the frequently inflammatory language used in the complaint is often more prejudicial than probative. Furthermore, a party should not have to forego a claim at the risk of having inconsistent allegations treated as admissions. Alternative pleadings are an exception to the general rule permitting treating pleadings as admissions.

Objections Not Made at Deposition

All objections to deposition questions are preserved unless the defect could be cured at the deposition. Defects as to notice, the manner of the deposition, objections to form and foundation must be made at the deposition. Other objections may be made to preserve the impressions of counsel during the deposition, but excessive commentary or "coaching" is improper.

Hearsay Exceptions Generally

All hearsay exceptions are based upon trustworthiness of the out of court statement or document. The business records hearsay exception is justified on grounds of trustworthiness and a belief that unintentional mistakes would likely be detected and corrected in the ordinary course of business. The trial court, in its discretion, may exclude evidence meeting the literal requirements of the business records exception where the underlying circumstances indicate a lack of trustworthiness.

Medical & Business Records

Statements made for medical treatment or for diagnosis are not hearsay. This exception is not restricted to statements to medical doctors.

Statements in medical records referring to history that is not related to treatment are inadmissible under the business records exception to the hearsay rule. Federal rules of evidence allow introduction of opinions and diagnoses contained in records without cross-examination as to reliability. Trustworthiness remains, however, an express threshold condition for admissibility under the rule.

Reliable Medical Journals or Texts

Where an expert establishes a medical journal or text as "reliable," it may be used to impeach that expert on cross examination even though it is not expressly described as "authoritative."

Reading from Pleadings

Pleadings may be read and argued without the necessity of admitting them. Pleadings may also be admitted into evidence as an exhibit.

Insurance of a Party

References to the insurance coverage of either party during either voir dire or trial are presumptively improper. Generally, the collateral source rule bars evidence of insurance to show mitigation of damages.

However, evidence of insurance is admissible to prove malingering or that insurance payments are the motivation to avoid working. For this insurance coverage exception to apply, the facts must raise serious doubts as to the extent of the injury actually suffered. For example, the evidence of insurance could be admitted if it appears to the trial judge from other evidence that there is a real possibility that plaintiff was motivated by receipt of collateral source benefits to remain inactive as long as he did.

Other Crimes, Wrongs, or Acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. Other acts are also admissible to prove a person's state of mind.

6. Witnesses

Attendance of the Parties

A party who wishes to compel the attendance of opposing parties at trial must serve subpoenas on them. One party only needs to serve the other party's attorney with a subpoena to compel the attendance of a party. An agent of a corporate party is considered party for these purposes.

Sequestration of Witnesses

Court proceedings, with certain exceptions, are public. At the request of a party, however, the court may order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may also make the order on its own motion, but can not authorize exclusion of:

B. A party who is a “natural person,”

C. An officer or employee of a corporation or organization designated as its representative by its attorney, or

D. A person whose presence is shown by a party to be essential to the presentation of the party's case.

Unlisted Witnesses

An unlisted witness may not be called, except for good cause shown. But, trial courts should not be reluctant to allow unlisted witnesses where justice requires, particularly rebuttal witnesses. Justice is best served where an unlisted witness can be permitted to testify while the interests of the opposing party are adequately protected. When a party has introduced evidence to disprove a fact, the trial court may allow rebuttal evidence to prove that fact. The decision whether to allow an unlisted witness to testify is within the trial court’s discretion and the decision should not be reversed unless there is an abuse of discretion.

Motion for Directed Verdict or Summary Judgment

A motion for a directed verdict, or summary judgment, is required at the close of plaintiff’s proofs, as a prerequisite to a motion for Judgment Notwithstanding the Verdict. A directed verdict, or summary judgment, is appropriate only when no factual question exists upon which reasonable minds may differ and all doubts are resolved against the moving party. For example, the failure to present expert medical testimony by the plaintiff, failure to offer sufficient expert testimony, or where the expert witness is not familiar with the applicable standard of care, a directed verdict is proper. Where a plaintiff fails to offer a reasonable question as to a material fact on all necessary elements of a claim, a directed verdict is generally appropriate.

Motion for Mistrial

When improper conduct occurs during trial, opposing counsel may move for a mistrial. This is generally done outside the presence of the jury. The grant or denial of a motion for mistrial is in the discretion of the judge. If no motion for mistrial has been made, objection to the improper conduct may be waived. But, if an error is incurable, the appellate court may allow review anyway.

Defendant's Proofs

After the plaintiff finishes introducing evidence, the defense is offered the opportunity to put on proofs. First, as noted above, the defense will generally test the sufficiency of the Plaintiff's proofs by asking the Court to grant a "Directed Verdict" asserting that there is some deficiency to the Plaintiff's case which precludes recovery and requires that the matter be dismissed, with judgment in favor of the defense. If this motion fails, defense proofs will proceed.

When presenting the defendant's proof, the same rules of evidence apply as in the plaintiff's proof. Most commonly, the defense will introduce evidence to rebut the Plaintiffs claim with evidence or witnesses not introduced by plaintiff. If the Defendant has raised an "affirmative defense," which may defeat an otherwise valid case, it must be then proven by the same "preponderance of the evidence" standard required of the Plaintiff. This could mean introducing proof that, regardless of the merits of the case, the time for bringing the action has passed, that the matter was previously settled, that there is some immunity from the claim granted by law, or some other assertion which would defeat the Plaintiff's otherwise valid claim.

Rebuttal Evidence

The purpose of rebuttal evidence is to undercut an opponent's case, and a party may not introduce evidence competent as part of his case in chief during rebuttal unless permitted to do so by the court. Generally, rebuttal evidence is not allowed unless an unanticipated issue or claim has been raised during trial. A decision regarding the admission of rebuttal evidence may be reviewed for an abuse of discretion.

Closing Arguments

When all proofs are in, closing arguments are given where the respective attorneys recapitulate the evidence and synthesize it into the theme, or theory of the case, previously given in the opening statement. This is where "argument" comes to the forefront, with the attorneys bringing all of the persuasiveness they can muster to convince the jury of the righteousness (not necessarily "merit") of their position. Where the facts have favored a party's position, they will be stressed. Similarly, where the law favors the party, it will be stressed.

It is proper to discuss the character of witnesses, the probability of truth of certain testimony, and when there is a reasonable basis, to characterize testimony. Reasonable inferences to be drawn from the evidence and references to well known matters of public knowledge are generally permissible, but argument as to matters outside the record may be objectionable. Other improper and/or objectionable statements by counsel include:

1. Personal knowledge, or personal beliefs, that is not in evidence;
2. Vouching for a witness' truthfulness is generally improper;
3. Comments as to the wealth of a party are generally improper;
4. Counsel asking the jury to put themselves in the place of a party;
5. Using language revealing a studied purpose to inflame or prejudice the jury based upon facts not in evidence; and
6. Overly disparaging remarks or name calling.

Jury Instructions and Statement of the Issues

The parties must file written requests to instruct the jury as directed by the court, or at or before the close of the evidence, together with a concise statement of the issues and theory of the case as supported by evidence. A copy must be served on the other counsel. The court shall act on the requests before arguments to the jury. After the jury is sworn and before evidence is taken, the court shall give preliminary instructions regarding the duties of the jury, trial procedure, and the law applicable to the case. At any time during the trial, the court may instruct the jury on a point of law if it will aid the jury to understand the proceedings.

Before or after arguments, the court shall instruct the jury on the applicable law, the issues presented and the party's theory of the case. The court, at its discretion, may comment on the evidence, the testimony, and the character of the witnesses as the interests of justice require. While the jury is deliberating, the court may further instruct the jury and may provide the jury with a full or partial set of the jury instructions. A party must object on the record to a failure to give certain instructions before the jury begins deliberation.

Where the committee on model instructions has recommended that no instruction be given on an issue, the court shall not give an instruction unless it specifically finds on the record that the instruction is necessary to accurately state the law, and the matter is not adequately covered by other instructions. The court is free to give additional instructions on applicable law not covered by the model instructions, but they must be in the style of the model instructions, concise, understandable, conversational, un-slanted, and non-argumentative. After closing arguments, the jury is instructed as to the law and how they are to conduct deliberations. The Jury then selects a foreperson and deliberates.

When they have reached a unanimous decision, or by stipulation a majority decision, they notify the Court, the verdict is read, and a judgment entered.

1. Medical Malpractice Jury Instructions

Jury instructions must be given when requested by a party if they are applicable and accurately states the law. The determination of whether an instruction is accurate and applicable is within the discretion of the trial court.

Jury instructions are to be viewed as a whole rather than separately in determining whether there was reversible error. They should include all of the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them.

Where a Plaintiff chooses to bring suit against the hospital and its unnamed agents, servants, or employees, it is incumbent upon the trial court to ensure that the jury clearly understands how they determine whether any employee committed professional negligence or malpractice by the particular standard of practice applicable to each of their specialties.

It is error to modify a standard jury instruction where it relieves a party of their burden of proof. Instructions must inform the Jury of the requirement to establish each allegation of vicarious liability by identifying the agent alleged to have been negligent, and the proper standard of care applicable to each such alleged agent.

Example of Jury Instruction on Professional Negligence and/or Malpractice

> "When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a [Name profession.] of ordinary learning, judgment or skill in [this community or a similar one / [Name particular specialty.]] would do, or the doing of something which a [Name profession.] of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case. It is for you to decide, based upon the evidence, what the ordinary [Name profession.] of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances."

Example of Jury Instruction on Informed Consent

> "Negligence may consist of the failure on the part of the [Name profession.] to reasonably inform [Name of plaintiff] of risks or hazards which may follow the [treatment / services] contemplated by the [Name profession.].

By "reasonably inform" I mean that the information must have been given timely and in accordance with the accepted standard of practice among members of the profession with similar training and experience in [this community or a similar one / [Name particular specialty.]]".

Example of Jury Instruction Burden of Proof

"The plaintiff has the burden of proof on each of the following:

1. That the defendant was professionally negligent in one or more of the ways claimed by the plaintiff as stated in these instructions;
2. That the plaintiff sustained injury and damages; and
3. That the professional negligence or malpractice of the defendant was a proximate cause of the injury and damages to the plaintiff.

Your verdict will be for the plaintiff if the defendant was negligent, and such negligence was a proximate cause of the plaintiff's injuries, and if there were damages. Your verdict will be for the defendant if the defendant was not professionally negligent or did not commit malpractice, or if the defendant was professionally negligent or did commit malpractice but such professional negligence or malpractice was not a proximate cause of the plaintiff's injuries or damages, or if the plaintiff was not injured or damaged.

Example of Jury Instruction on Medical Uncertainties

"There are risks inherent in medical treatment that is not within a doctor's control. A doctor is not liable merely because of an adverse result. However, a doctor is liable if the doctor is negligent and that negligence is a proximate cause of an adverse result."

Some courts recognize a distinction between a doctor's negligence and a treatment's failure. Where a full medical recovery does not result, or that a surgical operation is not entirely successful, is not in itself evidence of negligence.

Example of Instruction to Jury Regarding Permissible Inference of Malpractice from Circumstantial Evidence (Res Ipsa Loquitur)

"If you, the jury, find that the defendant had control over the [body of the plaintiff / instrumentality] which caused the plaintiff's injury, and that the plaintiff's injury is of a kind which does not ordinarily occur without someone's negligence, then you may infer that the defendant was negligent. However, you should weigh all of the evidence in this case in determining whether the defendant was negligent and whether that negligence was a proximate cause of plaintiff's injury."

This instruction should be given only if there is expert testimony that the injury would not ordinarily occur without negligence, or if the court finds that such a determination could be reached by the jury as a matter of common knowledge.

Example of Jury Instruction on Medical Malpractice: Vicarious Tort Liability of a Hospital Based on Ostensible Agency

> “A hospital is not generally responsible for the professional negligence of a physician who has staff privileges at the hospital but is not an agent or employee of the hospital. However, a hospital may be liable for the professional negligence of a physician if the hospital through its words, conduct, or omissions caused [Plaintiff] to reasonably believe that the physician was an employee or agent of the hospital. In order to establish the liability of the hospital under this theory, the plaintiff has the burden of proof on each of the following: That [Defendant] committed professional negligence in one or more of the ways claimed by the plaintiff; That [Plaintiff] sustained injury and damages; That the professional negligence of [Defendant] was a proximate cause of the [Plaintiff's] injuries and damages; That [Plaintiff] reasonably believed that the [Defendant] was acting as an agent or employee of the hospital; That [Plaintiff] belief that the [Defendant] was an agent or employee of the hospital was created by words, conduct, or omissions of the hospital. Your verdict will be for the plaintiff if you find that all of these elements have been proved. Your verdict will be for the defendant if you find that any one of these elements has not been proved.”

Supplemental & Non-Standard Instructions

When the Standard Jury Instructions do not adequately address an area or issue, a trial court is obligated to give supplemental instructions when requested if those instructions properly inform the jury of the applicable law and are supported by the evidence.

When the standard jury instruction committee recommends that no instruction be given, the court shall not give an instruction unless it specifically finds, for reasons stated on the record, that:

1. The instruction is necessary to state the applicable law accurately, and
2. The matter is not adequately covered by other pertinent standard jury instructions.

The determination whether special instructions are applicable and accurate is within the trial court’s discretion. A supplemental instruction when given must be modeled as nearly as practicable after the style of

the Standard Jury Instructions and must be concise, understandable, conversational, un-slanted, and non-argumentative.

Jury Instruction on "Missing" Records

In general, a party's failure to produce material evidence under its control, where no reasonable excuse for its non-production is given, permits an *inference* that the evidence would have been adverse to that party. The inference is not mandatory, and the fact finder is not required to draw it.

However, the intentional destruction of relevant evidence creates a *presumption* that the evidence was adverse to that party. A presumption against one who intentionally destroys evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case, in so far as he has the burden of proof.

Loss of Opportunity to Survive Instruction

In some states, the plaintiff is required to show that the loss of the opportunity to survive or achieve a better result exceeded fifty percent. Example of the jury instruction in those states might be worded as follows:

> "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%."

Example of Jury Instruction on Internal Rules/Regulations

> "Ladies and Gentlemen of the Jury, certain internal policies and procedures of the Defendant Hospital have been mentioned during the course of trial. Such internal rules and regulations are not evidence of the applicable standard of care. A defendant's internal policies and rules do not in any way affect or alter the standard of care owed the public, and it would not be proper to penalize a defendant which sets unusually high internal standards, or reward a defendant whose internal policies are lower than the standard of care owed the public. Therefore, I instruct you that you are not to consider the contents of any internal policies and procedures when determining whether the standard of care applicable to this case was violated."

Jury Instruction Regarding Substantial Factor

> "When a number of factors contribute to produce an injury, a defendant's conduct will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury."

2. Forms of Verdict

Itemization of Damages

Verdicts or judgments shall include specific findings as to:

a) Past economic and non-economic damages,

b) Future damages, and how long they will continue, determined annually, for:

1) Medical and health care costs,

2) Lost wages or earnings or lost earning capacity, and

3) Non-economic loss.

Future Damages

Future damages are awarded for each year they are incurred. For death cases or permanent injuries, the calculation is for each year of life expectancy. This calculation can be important in large damages cases, but in other cases, a waiver in return for mutual waiver of the right to interest may be appropriate.

Post-Trial Matters

After the trial is complete, there will still be matters for the Court to consider such as whether the verdict was supported by sufficient evidence, and whether the prevailing party is entitled to any costs and/or attorney's fees.

Motions for a judgment notwithstanding the verdict or a new trial may be brought to the court. The losing party has the right to have the case reviewed by the Appellate Court within a specified period.

Dismissals & Judgments

1. Dismissal without Prejudice

A dismissal *without prejudice* means that the allegations in the Complaint are not resolved or extinguished. The case is merely removed from the Court's jurisdiction and again subject to the applicable statute of limitations. The Court may, however, require the plaintiff to pay defendant's costs and attorney fees as a condition of dismissal without prejudice where an appearance and answer has been filed.

2. Dismissals with Prejudice

Generally, a dismissal *with prejudice* is an adjudication on the merits and bars all future claims against the defendant arising out of the same transaction or occurrence. If a party demands joinder of all claims, a judgment will resolve all potential claims to the date of judgment. If a joinder is not demanded, other claims may be brought later if not time barred.

3. Judgments

Following a verdict, judgment is to be entered in a particular order and amounts, for example:

a. All past economic damages, less collateral source payments;
b. All past non-economic damages;
c. All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible and reduced to gross present cash value. Gross present cash value means the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue;
d. All future medical and other health care costs reduced to gross present cash value;
e. All future non-economic damages reduced to gross present cash value;
f. All taxable and allowable costs, including interest, as permitted;
g. The total judgment shall be reduced by the amount of the settlement between plaintiff and any other joint tort-feasor(s); and
h. If the plaintiff was assigned a percentage of fault, the total judgment shall be reduced by that percentage. The amounts to be deducted shall be allocated proportionally between past and future damages.

4. Default Judgments

Failure to produce a representative from liability insurer at a settlement conference is not a basis for a default judgment.

A default judgment may be set aside if the defendant can show a good cause for a delay in answering the Complaint, an affidavit shows that a meritorious defense to the allegations exists, and manifest injustice would occur if the default was allowed to stand.

The defendant must demonstrate both good cause and a meritorious defense in order to set aside a default judgment. Good cause and a meritorious defense are separate and distinct requirements, and a moving party must establish both to prevail. An affidavit of meritorious defense should state more than "a general conclusory denial of liability."

Manifest injustice is not a form of good cause excusing a failure to comply with the court rules where there is a meritorious defense. It is the result that would occur if a default were not set aside where a party has satisfied the "good cause" and "meritorious defense" requirements of the court rule.

A ruling setting aside a default or a default judgment is in the discretion of the trial court, and will not be set aside absent an abuse of discretion. Although the law favors determining claims on the merits, the law is generally against setting aside properly entered default judgments.

A default settles the question of liability and precludes litigating that issue. A default is not an admission regarding damages, and a defendant has a right to participate where further proceedings are necessary to determine the amount of damages.

5. Contribution to Judgment

The trier of fact shall, unless otherwise agreed, include in the verdict the percentage of the total fault of all parties, excluding settled parties, as to the Plaintiff's claim. The right to contribution may be determined in the existing action or in a separate action. The statute of limitations for bringing a contribution claim is one year from the date of judgment.

If plaintiff is comparatively at fault, all parties bear a pro rata share of the judgment allocated to an uncollectible defendant. Where all defendants are collectable and plaintiff is also at fault, no defendant must pay more than the allotted percentage of fault.

If plaintiff is not at fault, all joint and several tortfeasors are liable to plaintiff to satisfy a judgment regardless of their respective allocated percentage of fault. A defendant's remedy for having to pay an amount in excess of the pro rata share is through seeking contribution.

The total judgment is set off or reduced by the amount of any settlements between plaintiff and other joint tort-feasors.

If the plaintiff was allocated a percentage of fault, the judgment is reduced by that amount. The amount deducted is allocated proportionally between past and future damages.

Proceedings Following Judgment

1. Post Trial Motions

Motion for Judgment Notwithstanding the Verdict

In ruling on a motion for a judgment notwithstanding the verdict ("JNOV"), the court must state the reasons for the ruling in a signed order or opinion, or on the record. A "JNOV" should only be granted when the evidence, viewed in a light most favorable to the non-moving party, is insufficient to support the claim or defense.

Motions for Remittitur and Additur

The amount of damages to be awarded is generally within the sound discretion of the trier of fact. If, however, the award is so high or low as to be outside the realm of reason, the court may order a new trial unless, within 14 days, the non-moving party consents to entry of a judgment found by the court to be the lowest or highest amount supported by the evidence. Granting additur is discretionary, but the court has no authority to simply add to the verdict. In deciding a motion, there should be evidence that the jury was swayed by improper factors such as passion, prejudice, partiality, sympathy or mistake.

Motion for New Trial

A decision to grant a new trial is reviewed for an abuse of discretion. If the reasons for granting a new trial are legally recognized and supported by a reasonable view of the record, the trial court may grant a new trial. A a motion for a new trial should be filed within a statutorily specified date of the final judgment.

Repeated attorney misconduct during trial, or grievously prejudicial comments may be incurable and require a new trial be granted. Although a lawyer is expected to advocate vigorously, the parties are entitled to a fair trial on the merits, uninfluenced by appeals to passion or prejudice. Witnesses should not be subjected to personal attacks and unsubstantiated insinuations.

A new trial may be granted on the basis of an excessive verdict if the verdict was obtained by improper methods, was the result of sympathy or prejudice, or if it was clearly or grossly inadequate or excessive.

Repeated references to a corporate defendant as rich, greedy, and unfeeling warrants a new trial. References to million dollar awards in other cases may require a new trial.

Accusations, allegations, and insinuations with no reasonable basis in evidence used to divert the jury from the merits, and inflame the passions of the jury, are completely improper
And, if egregious enough, require a new trial.

A deliberate strategy to incite the jurors to punish defendant for claimed bigotry, rather than to carefully consider the facts, may be grounds for a mistrial and is improper. Regularly accusing witnesses of fabricating testimony or "making up" testimony is improper. Counsel may not belittle witnesses or make unsubstantiated accusations that a witness is lying. Repeated claims that opposing counsel is "lying" or "misrepresenting" something or "making things up" are completely improper.

The issue of organ donation, and a poem read about same, is improper and not relevant to any damages allowed in a Wrongful Death case. It improperly invoked sympathy from the jury, requiring a new trial.

2. Taxing Costs and Fees

A bill of taxable costs and fees which is not sought under the Case Evaluation rule must be filed within a "reasonable" time after the prevailing party is determined. The person bringing the action is liable for taxation of tosts. If a minor does not have a conservator, the court shall appoint a competent and responsible person as next friend, and the next friend is responsible for the costs of the action. In general, the following expenses are allowed to a prevailing party:

a. Expert fees, including preparation time;
b. Attorney fees when authorized by statute or court rule;

c. Proceedings before trial and for trial;
d. Reasonable and actual fees for depositions read;
e. Fees of officers, witnesses, or other persons, unless a contrary intention is stated; and
f. Reasonable expert witnesses expenses determined by the Court.

There are special considerations in situations involving recovery of costs from a co-defendant filing a notice of nonparty fault or from intervening lien holder plaintiff. In a medical malpractice action, if a lien holder formally intervenes, whether by right or by leave, the lien holder becomes a party, and is bound by any judgment including liability for any taxable costs.

Attorney fees are generally not recoverable in a civil action. Recovery of attorney fees is only available where a statute or court rule expressly authorizes recovery. Generally only those actual costs and fees which make the party "whole" are available and punitive sanctions are not allowed. A party may not make a profit, or obtain more than one recovery of costs and fees, except in certain special circumstances.

Determination of Reasonable Attorney Fee

The trial court's determination of "a reasonable attorney fee" to be awarded is reviewed for an abuse of discretion. A trial court abuses its discretion if its decision is grossly contrary to fact and logic or evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.

Frivolous Suits

If the Court finds that an action or a defense was frivolous, it shall order payment of reasonable, actual costs against the losing party and attorney. "Frivolous" means:

1. The primary purpose of the action or defense was to harass, embarrass or injure the prevailing party;
2. The party had no reasonable basis to believe that the facts underlying its position were true; and/or
3. The party's legal position was devoid of arguable merit.

Sanctions may be also be awarded if there was no basis for naming a specific party. A defendant must request sanctions prior to dismissal. If the court finds that an action or defense was frivolous, sanctions are mandatory.

Affidavit of Merit

An affidavit of merit precludes sanctions for a frivolous action.

3. Satisfaction of Judgments

Pre-Judgment Interest

Pre-judgment interest is a discretionary element of damages for the Jury to determine. Pre-judgment Interest is calculated at 6-month intervals from the date the Complaint is filed at a rate of 1% over the average interest at auction of 5-year Treasury Notes during the six (6) months preceding July 1 and January 1. Interest is compounded annually. Interest is not allowed on future damages until after judgment.

Insurer not Liable for Pre-Judgment Interest

An insurer is not responsible for pre-judgment interest on a settlement absent an agreement to do so.

Post-Judgment Interest

Post-judgment interest is statutory and mandatory. Interest is calculated on the entire amount of the judgment, including attorney fees and other costs. The amount of interest from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

Periodic Payments

If the amount of future damages exceeds $250,000, a defendant may satisfy, after costs and fees, future damages for a plaintiff under age 60, by purchasing an annuity if:

1. The annuity price is equal to 100% of future damages, less an amount determined by multiplying the amount of those damages by a percentage equal to the rate of prejudgment interest on the date trial commenced, and
2. The contract is purchased from a life insurer authorized to issue annuities.

Structured Settlements

If plaintiff and defendant agree to a structure for future damages within 35 days of the entry of judgment, the Court shall implement it. If the parties do not agree, the Court shall order a structured payment based upon a plan of either party.

Uniform Qualified Assignments

Defendant, or defendant's liability insurer, remains the ultimate obligee under any annuity unless a "qualified assignment" is made pursuant to Section 130(c) of the Internal Revenue Code. Such qualified assignment relieves a defendant of further liability.

Collection Proceedings

For judgment creditors, after a judgment, the judge may compel discovery of assets of the debtor. The court can prevent transfer of assets, order satisfaction of the judgment and appoint a receiver for property. The judge may also compel discovery of any assets.

4. Execution of Judgments

Automatic Stay of Execution on a Judgment

Execution may not issue on a judgment, and proceedings may not be taken for its enforcement until the expiration of 21 days after its entry. If a motion for new trial, a motion to alter or amend the judgment, a motion for judgment notwithstanding the verdict, or a motion to amend or for additional findings of the court is filed and served within 21 days after entry of the judgment, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order on the motion, unless otherwise ordered by the court on motion for good cause. Nothing in this rule prohibits the court from enjoining the transfer or disposition of property during the 21-day period.

Appeals

1. Procedure

Time for Bringing an Appeal

A final order or judgment may be appealed as of right within 21 days of entry. A final order resolves the entire action, not just certain claims or defendants.

Issues which may be Appealed

Appeals are generally limited to issues raised in the trial court. Facts outside the record are not considered, so discovery material must be placed in the record when judgment is entered. Unpreserved issues are only reviewed where there is plain error affecting substantial rights.

Abuse of Discretion in Admitting Evidence

A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. An abuse of discretion involves more than a difference in judicial opinion. Abuse occurs only when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

2. Appeals as of Right

Harmless Error On Appeal

Even if error exists, a decision will not be reversed if the error was harmless, or did not substantially affect material rights. Also, if no prejudice is evident, and the same result could have been reached otherwise, the result will be affirmed absent some unusual circumstance.

Curative Instruction Is Unnecessary

If an error occurs at trial, but no instruction is requested to cure the error, the matter may still be preserved for appeal, in the Court of Appeals discretion.

Reviewing the Grant of a Directed Verdict

The court of appeals reviews a trial court's grant of a directed verdict by reviewing all evidence in the light most favorable to the non-moving party.

3. Applications for Leave to Appeal

Discretionary Appeal

Appeals of non-final orders are discretionary

The time for filing an application for leave to appeal is 21 days, the same as for an appeal as of right. A party opposing the appeal may file an answer to the application at any time before the hearing.

4. Bonds and Stays of Proceedings

An appeal does not stop the enforcement of judgments or orders. A stay or appeal bond is generally set by the trial court in an amount adequate to protect the prevailing party. The Court of Appeals may modify the bond. The trial court may also order a stay of any further proceedings with, or without, a bond as justice requires.

5. Appellate Briefs & Oral Argument

Appellant must file a brief with the court of appeals within 56 days after the claim or transcript is filed, whichever is later. If oral argument is desired, it must be requested on the title page. Appellee must file a responsive brief within 35 days of the brief filed by appellant.

6. Decisions and Precedential Effect

There is no specific time required for the appellate courts to render a decision. Once issued, the decision may, or may not, be designated for publication as a binding precedent in future cases. Publication will depend upon a number of factors relating to the value of the opinion for future cases.

Unpublished decisions do not set precedent, but may be cited. A motion for rehearing on the Appellate court's decision may be requested within 21 days.

Retroactive Effect of Decisions

In general, judicial decisions are given retroactive effect. Prospective or limited retroactive application may be ordered if well-established law has been changed. In determining the issue, the court is to weigh:

1) The purpose of the new rule;
2) The extent of reliance on the old rule; and
3) The effect of retroactivity on the administration of justice.

Appeals to the State Supreme Court

An application for leave to file an appeal to the State Supreme Court may be made within 21 days. The application must show either a substantial question under statutory law, an issue of major significance to the law of the state, or a clear error in the lower court's decision for the application to be granted.

7. Finality

Res Judicata

Under Res Judicata, a Plaintiff is barred from re-litigating in another action claims already litigated, and every other claim arising from the same facts, occurrence or transaction that the parties could have raised in the prior action. All such claims merged into the final order or judgment in the original action. Res judicata requires that both actions involve the same parties or their privies. Res judicata does not apply within an action, only in a subsequent action.

Later Cross Claims Not Barred

Res Judicata does not bar a cross claim not filed in the original action unless a demand for joinder had been made.

Collateral Estoppel

The doctrine of collateral estoppel bars re-litigating of an issue unsuccessfully litigated in a prior action which ended in a final judgment. For collateral estoppel to apply, the issue sought to be relitigated must be identical to the issue in the first action, actually and necessarily litigated, and essential to the judgment. There is no requirement that the same parties be involved for the doctrine to apply.