IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH MARESCA, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 01-5355
ELLIOT L. MANCALL, M.D., and THOMAS JEFFERSON UNIVERSITY HOSPITAL, Defendants.	:	

MEMORANDUM

LEGROME D. DAVIS, J. JUNE ___, 2003

I. INTRODUCTION

Plaintiff Joseph Maresca ("Plaintiff"), proceeding *pro se*, initiated this medical malpractice action in state court in September of 2001 against Defendants Elliot L. Mancall, M.D. ("Dr. Mancall") and Thomas Jefferson University Hospital ("TJUH"). After the action was removed to this Court by Defendants, Plaintiff filed a Complaint on February 14, 2002, generally alleging the following: that he was examined by Dr. Mancall on or about December 5, 1996; that he was at that time suffering from particular symptoms which Dr. Mancall should have recognized as corresponding to a medical condition called ankylosing spondylitis; that Dr. Mancall failed to diagnose his condition; that he did not realize that he suffered from ankylosing spondylitis until over two years later; and that Dr. Mancall's failure to diagnose his condition resulted in his continued suffering from the condition and the further progression of the condition. The Complaint can be fairly read to set forth three claims: (1) a medical malpractice

claim against Dr. Mancall based on his alleged failure to diagnose Plaintiff's condition; (2) a claim against TJUH alleging vicarious liability for Dr. Mancall's actions based upon the theory of *respondeat superior*; and (3) a claim against TJUH based upon the doctrine of corporate negligence. The following motions are presently before the Court, and will be addressed individually: (1) a Motion for Summary Judgment filed by TJUH on January 13, 2003 ("TJUH Motion for Summary Judgment"); (2) a Motion for Summary Judgment filed by Dr. Mancall on January 13, 2003 ("Dr. Mancall's Motion for Summary Judgment"); (3) a Partial Summary Judgment Motion filed by Plaintiff on January 13, 2003 ("Plaintiff's Partial Summary Judgment Motion"); and (4) a Motion in Limine filed by Plaintiff on February 18, 2003 ("Motion in Limine").

II. SUMMARY JUDGMENT STANDARD

In order to prevail on a summary judgment motion, the moving party must show from the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the court must view the facts from the evidence submitted in the light most favorable to the non-moving party, and the court must take the non-movant's allegations as true. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). A fact is *material* only if it might affect the outcome of the lawsuit under the governing substantive law, and a dispute about a material fact is *genuine* only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Once the moving party establishes "that there is an absence of evidence to support the non-moving party's case," Celotex Corp. v.. Catrett, 477 U.S. 317, 325 (1986), the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not rely on bare assertions, conclusory allegations or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Neither may the nonmoving party rest on the allegations in the pleadings. Celotex Corp., 477 U.S. at 324. Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id.

III. TJUH MOTION FOR SUMMARY JUDGMENT

In its Motion for Summary Judgment, TJUH argues: (1) that Plaintiff's malpractice claim is barred by the applicable statute of limitations; (2) that TJUH is entitled to Summary Judgment as to Plaintiff's claim against TJUH based upon the doctrine of *respondeat superior*; and (3) that TJUH is entitled to Summary Judgment as to Plaintiff's corporate negligence claim.

A. Statute of Limitations

Where, as here, a plaintiff's medical malpractice claim is based upon the alleged failure of a doctor to diagnose or treat a pre-existing condition,

> "the injury is not the mere undetected existence of the medical problem at the time the physician failed to diagnose or treat the patient or the mere continuance of that same undiagnosed problem in substantially the same state. Rather, the injury is the *development* of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment."

Hughes v. U.S., 263 F.3d 272, 276-77 (3d Cir. 2001) (citation omitted). The applicable statute of limitations does not begin to accrue on such a claim until such time as the plaintiff discovered, or through the exercise of reasonable diligence should have discovered, that the failure of his doctor to diagnose, treat, or warn him *was a causal factor* in the plaintiff's injuries. See id. at 277. (applying the discovery rule to the specific context of an alleged failure to diagnose). Here, there clearly exists a genuine issue of material fact as to whether Plaintiff discovered, or should have discovered, that Dr. Mancall's alleged failure to diagnose his condition (ankylosing spondylitis) *was a causal factor* in Plaintiff's alleged injuries (including the worsening of his condition) more than two years before the date Plaintiff initiated this action (on or about September 7, 2001).[1] Thus, TJUH is not entitled to summary judgment on the grounds that Plaintiff's malpractice claim is barred by the applicable statute of limitations.[2]

B. Corporate Negligence

[1] In its brief, TJUH appears to ignore the particular formulation of the discovery rule within the context of an alleged failure to diagnose, citing instead the general formulation of the rule that the statute of limitations begins to accrue when a plaintiff knows or reasonably should know of his injury. On this basis, TJUH argues that the medical malpractice claim is barred because Plaintiff knew that he continued to experience the symptoms of his condition during the two years following his examination by Dr. Mancall. TJUH Motion for Summary Judgment at 12-21. This, however, is not the pertinent question in the instance context.

[2] The additional argument by TJUH that Plaintiff has waived the issue of whether the "discovery rule" applies to this cause of action is rejected. It is well established that application of the rule is not waived where a plaintiff raises the rule in response to a defendant's assertion of the defense. Previsch v. Northwest Medical Center Oil City Campus, 692 A.2d 192, 197 (Pa. Super. 1997). Plaintiff here has expressly raised and argued the rule in his response.

As noted above, Plaintiff purports to assert a claim against TJUH based upon the doctrine of corporate negligence.[3] The Court rejects the argument by TJUH that the Complaint (filed by Plaintiff who, the Court notes, is proceeding *pro se*) is insufficient in asserting a claim for corporate negligence against TJUH.[4]

The Court also rejects the argument by TJUH that the expert report offered by Plaintiff in support of the corporate negligence claim is insufficient.[5] Here, a fair reading of the expert report of Mitchell S. Felder, M.D., indicates that Dr. Felder takes the position: that TJUH should have arranged (or at least ensured that Dr. Mancall arranged) for follow-up visits of Plaintiff by

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[3] Under the doctrine of corporate negligence, a hospital "is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well-being while at the hospital." Thompson v. Nason Hosp., 591 A.2d 703, 707 (Pa. 1991). A hospital's duties under this doctrine "have been classified into four general areas," one of which is "a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients." Id. In addition to showing (1) that a hospital has deviated from the proper standard of care, a plaintiff seeking to establish corporate negligence must also show (2) "that the hospital had actual or constructive knowledge of the defect or procedures which created the harm," and (3) that "the hospital's negligence [was] a substantial factor in bringing about the harm to the injured party." Id. at 708. Furthermore, where a hospital's negligence is not obvious, a plaintiff must present expert testimony to establish to a reasonable degree of medical certainty the first (breach of duty) and third (proximate cause) of these elements. Welsh v. Bulger, 698 A.2d 58duty).

[4] The Complaint alleges that "[t]he hospital may be held liable under the doctrine of corporate negligence," and cites to the leading Pennsylvania case regarding this doctrine, Thompson v. Nason Hosp., 591 A.2d 703 (Pa. 1991). Complaint at 6.

[5] TJUH contends that one of the reasons Dr. Felder's expert report is insufficient is because "Dr. Felder fails to state, as required by Pennsylvania law, that [TJUH] had actual or constructive notice of the defects or procedures which created the harm." TJUH Motion for Summary Judgment at 10. In fact, Pennsylvania law does *not* require that a plaintiff present *expert testimony* regarding this factor. See, e.g., Whittington v. Episcopal Hosp., 768 A.2d 1144, 1149-50 (Pa. Super. 2001). Moreover, the Court specifically does not address whether Plaintiff's evidence, *other than the expert testimony*, is sufficient to satisfy the "actual or constructive knowledge" element of the corporate negligence doctrine, as this issue has not been raised by TJUH.

Dr. Mancall; that the failure to do so constituted a breach of the duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients; and that the failure to do so likely contributed to Plaintiff's injuries, namely the progression of his condition. See TJUH Motion for Summary Judgment, Ex. C.[6] This is sufficient for purposes of surviving the Motion for Summary Judgment. See Rauch v. Mike-Mayer, 783 A.2d 815, 827-28 (Pa. Super. 2001) (expert report sufficient where fair reading of report indicated expert believed failure of anesthesiologists and surgeon to obtain medical clearance prior to administering general anesthesia to the plaintiff revealed a breach of hospital's duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients, and that such failure exposed the plaintiff to increased risk of harm).

The Court further rejects the argument that Dr. Felder is not qualified to provide expert testimony to support the corporate negligence claim. TJUH appears to contend that, although Dr. Felder may have a significant degree of knowledge and expertise in the medical field of neurology, he has no "particular expertise in the area of a hospital's duties owed to patients, hospital administration, or hospital policies and procedures," and is "therefore, not qualified to render any opinions on the issue of corporate negligence." TJUH Motion for Summary Judgment at 11-12.

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[6] Plaintiff has produced two expert reports by Dr. Felder dated November 6, 2002, and November 22, 2002, respectively. The second report includes much of the same text as the first, but also includes significant points (from a legal standpoint) not included in the first report. It should also be noted that the second report is not printed on Dr. Felder's letterhead (as the first report is), is not signed by Dr. Felder (as the first report is), and appears to be printed in a different font than the first report. However, Defendants have not challenged the authenticity of the second report.

> [T]he standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

Miller v. Brass Rail Tavern, Inc., 664 A.2d 525, 528 (Pa. 1995). Here, Dr. Felder's medical expertise and experience are sufficient.[7] It is not necessary that Dr. Felder have particularized experience with the legal duties a hospital owes to its patients, or with hospital administration, in order to be qualified to render an expert opinion on the issue of corporate negligence. See Whittington v. Episcopal Hosp., 768 A.2d 1144, 1155-56 (Pa. Super. 2001) (doctor qualified to render expert opinion on corporate negligence where doctor: had been board-certified in obstetrics/gynecology, the precise medical field involved in lawsuit, for over twenty years; was an attending obstetrician and gynecologist in three major hospitals and had supervisory duties regarding physicians and nurses who assisted him as attending physician; held academic appointment at Northeastern Ohio College of Medicine; and had consistently treated high risk patients, including those with same condition as decedent).

C. Respondeat Superior

Finally, the Court rejects the argument of TJUH that Plaintiff cannot establish that TJUH should be held vicariously liable for the negligence of Dr. Mancall based upon the theory of

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[7] Dr. Felder's curriculum vitae establishes that, among other things, he has been an attending neurologist at the University of Pittsburgh Medical Center from 1997 to the present, he was an attending neurologist at the Sharon Regional Health System from 1989 to 1997, he has previously been a clinical instructor in neurology at the Shenango Valley Medical Center, and the chief resident in the Department of Neurology at St. Vincent's Hospital and Medical Center, and he is Board Certified in Neurology by the American Academy of Clinical Neurology and the American Board of Psychiatry and Neurology. See TJUH Motion for Summary Judgment, Ex. D.

respondeat superior "because Dr. Mancall is not a direct agent of the hospital." TJUH Motion for Summary Judgment at 23. Specifically, TJUH contends that at the time of Dr. Mancall's examination of Plaintiff, Dr. Mancall was a professor of neurology at Jefferson Medical College ("JMC"), his office was located at JMC, and that JMC is distinct from TJUH. See id.

> General agency principles apply to hospitals and physicians. In order to establish actual agency, it must be shown that the employer-hospital controlled or had the right to control the physical conduct of the servant-physician in the performance of his work. . . . Where the evidence is conflicting, the jury must decide whether the requisite right of control exists to impose vicarious liability on the employer.

Simmons v. St. Clair Memorial Hosp., 481 A.2d 870, 873-74 (Pa. Super. 1984). Factors which may be considered in determining whether a doctor is the actual agent of a hospital include: (1) whether the doctor maintained an office at the hospital; (2) whether the doctor received a salary from the hospital; (3) whether the doctor held a supervisory position at the hospital (such as department chair); and (4) whether the doctor had responsibilities concerning hospital administration. See id.

In the first place, it seems clear that Dr. Mancall is, at the very least, an agent of JMC,[8] and there is clearly an unresolved factual issue as to the precise relationship between TJUH and JMC. Moreover, Dr. Mancall's curriculum vitae provides that he is currently on the "active medical staff" at TJUH, that he is currently on the Executive Staff at TJUH, see TJUH Motion for Summary Judgment, Ex. G., and at the top of the form upon which Dr. Mancall entered his

[8] The evidence establishes that Dr. Mancall's office address is listed as being located in the Neurology Department at JMC, and that he is currently (1) a professor of Neurology, (2) the Interim Chair of the Neurology Department, and (3) a member of the Executive Faculty Committee, at JMC. TJUH Motion for Summary Judgment, Ex. G.

notes concerning his examination of Plaintiff appears the heading "Thomas Jefferson University Hospital / History - Physical Examination - Progress Notes / Department of Neurology Use Only," Plaintiff's Opposition, Ex. 5.1. Based upon these facts, the Court concludes that there exists a genuine issue of material fact as to whether Dr. Mancall was acting as the actual agent of TJUH at the time in question.[9]

IV. DR. MANCALL'S MOTION FOR SUMMARY JUDGMENT

In his Motion for Summary Judgment, Dr. Mancall sets forth precisely the same statute of limitations argument as TJUH has set forth in its Motion for Summary Judgment. For the reasons stated above in rejecting the TJUH argument regarding the statute of limitations, Dr. Mancall's statute of limitations argument is likewise rejected.

V. PLAINTIFF'S PARTIAL SUMMARY JUDGMENT MOTION

Plaintiff's Partial Summary Judgment Motion states: "The plaintiff requests that the Court grant a partial summary judgment on the matter of an incomplete medical record not in compliance with the Pennsylvania Code CS 6101-4 Parts 115.32(e) and 115.33(b); 115.31(a) and (b) and 115.34 on medical records review." Plaintiff's Partial Summary Judgment Motion at 1. The sections Plaintiff cites are actually portions of the Pennsylvania Administrative Code which appear at Title 28 ("Health and Safety"), Part IV ("Health Facilities"), Subpart B ("General and Special Hospitals"), Chapter 115 ("Medical Record Services, Policies and Procedures for Patient

[9] There may also be a genuine issue of material fact as to whether Dr. Mancall may be considered an agent of the hospital with respect to Plaintiff under the "ostensible agency" theory. Simmons, 481 A.2d at 874. "Two factors relevant to a finding of ostensible agency are: 1) whether the patient looks to the institution, rather than the individual physician for care; and 2) whether the hospital 'holds out' the physician as its employee." Id. However, the Court need not address this issue at this juncture as it has not been raised by the parties.

Medical Records").[10] These sections of the Administrative Code have been promulgated pursuant to the Health Care Facilities Act, 35 Pa. Cons. Stat. Ann. § 448.101 *et seq*. Essentially, Plaintiff seeks a ruling from this Court as a matter of law that Defendants violated these sections of the Administrative Code because the medical form generated during Plaintiff's examination at Dr. Mancall's office on December 5, 1996, contains an unsigned entry by an unidentified resident or medical student summarizing Plaintiff's reported history of symptoms.

Defendants argue that Plaintiff should not be allowed to proceed with a cause of action based upon a violation of these Administrative Code sections because Plaintiff did not plead such a cause of action in his Complaint, and because there exists no private right of action for a violation of these Administrative Code sections. The Court agrees that Plaintiff has not plead a cause of action based upon an alleged violation of these Administrative Code sections, and also that there exists no private right of action for a violation of these Administrative Code sections.

However, the Court interprets Plaintiff's Partial Summary Judgment Motion not as asserting a private right of action under these sections, but rather as asserting the doctrine of

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[10] Section 115.31 (entitled "Patient medical records") generally provides that "[a]n adequate medical record shall be maintained for every inpatient, outpatient and patient treated or examined in the emergency unit," and that "[a] patient's medical records shall be complete, readily accessible and available to the professional staff concerned with the care and treatment of the patient." 28 Pa. Code § 115.31. Subdivision (e) of section 115.32 (entitled "Contents") provides that "[a] medical record shall include the findings and results of any pathological or clinical laboratory examinations, radiology examinations, medical and surgical treatment, and other diagnostic or therapeutic procedures." 28 Pa. Code § 115.32(e). Subdivision (b) of section 115.33 (entitled "Entries") provides that "[e]ntries in the record shall be dated and authenticated by the person making the entry." 28 Pa. Code § 115.33(b). Section 115.34 (entitled "Medical records review") generally provides that hospitals must establish medical records committees, that such committees must establish requirements regarding the medical records, and that medical records shall be reviewed periodically in accordance with rules and regulations formulated by the medical records committee. See 28 Pa. Code § 115.34.

negligence *per se*. According to Pennsylvania law, under certain circumstances, the traditional standard of care in a negligence action (that of a reasonable person under the circumstances) may be superceded, and the standard set forth in a particular statute or ordinance enacted by the legislature may, instead, provide the applicable standard of care. See Sharp v. Artifex, Ltd., 110 F.Supp.2d 388, 392 (W.D. Pa. 1999). In such instances, a violation of the statute or ordinance may serve as the basis for a finding of negligence *per se*. Id.

> To establish a claim based on negligence *per se*, the plaintiff must show: (1) that the purpose of the statute is "at least in part, to protect the interest of a group of individuals, as opposed to the public generally;" (2) that the statute clearly applies to the conduct of the defendant; (3) that the defendant violated the statute; and (4) that the violation was the proximate cause of the plaintiff's injuries.

Id. Furthermore, courts in Pennsylvania have recognized that the absence of a private right of action in a statutory scheme does not necessarily preclude the statute's use as the basis of a claim of negligence *per se*. Id.

Here, the Court interprets Plaintiff's Partial Summary Judgment Motion as a request for a ruling as a matter of law that Defendants were negligent *per se* as a result of having violated the Administrative Code sections cited by Plaintiff.[11] However, the Court further concludes that the request must be denied because, even assuming *arguendo* that the Administrative Code sections cited by Plaintiff apply to Defendants,[12] and that Defendants violated these sections, the purpose

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[11] See Plaintiff's Response to Dr. Mancall's Response to Plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 39) at ¶ 7 ("The Court may consider the recommended standard for hospital medical records preparation cited [in the Administrative Code] in applying a fair yardstick to measure the 'Standard of Care in the Philadelphia area'.").

[12] The Court notes that, on their face, these Administrative Code sections do not appear to apply to individual doctors, but only to health care *facilities*. See 28 Pa. Code § 101.3 (continued...)

of these sections (and, indeed, the entire Health Care Facilities Act) is to protect the interests of the public generally, and not to protect the interests of any particular group of individuals. See Chalfin v. Beverly Enterprises, Inc., 745 F.Supp. 1117, 1119 (E.D. Pa. 1990); cf. McCain v. Beverly Health and Rehabilitation Services, 2002 WL 1565526, at *1 (E.D. Pa. 2002) (holding that the plaintiff's negligence *per se* allegations would not be dismissed because the Omnibus Budget Reconciliation Act (OBRA), the regulations enacting OBRA (42 C.F.R. § 483), and the Older Adult Protective Services Act were intended to protect "older persons" in particular, and not merely the public generally, and that they were intended, at least in part, to obviate the specific kind of harm alleged to have been sustained, namely "pressure sores"). Moreover, Plaintiff does not contend, and there is no evidence tending to establish, that the alleged violation of these Administrative Code sections by Defendants was the proximate cause of Plaintiff's injuries. For these reasons, Plaintiff's Partial Summary Judgment Motion will be denied.

VI. PLAINTIFF'S MOTION IN LIMINE

In a related motion, Plaintiff asks the Court to exclude as evidence the top portion of the medical form from Plaintiff's examination by Dr. Mancall, specifically the unsigned entry by an unidentified resident or medical student setting forth a summary of Plaintiff's reported history of symptoms. Plaintiff does not contend that the symptoms listed in the entry are inaccurate, but rather contends that the entry is incomplete because it does not contain two particular symptoms allegedly reported by Plaintiff to the resident during the examination, namely his inability to perform a sit-up and his inability to run. See Motion in Limine at 1. Plaintiff further contends

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[12](...continued)
("[t]his subpart shall apply to all general and special hospitals within this Commonwealth").

that he would be prejudiced by the admission of this portion of the medical form because he would not be able to question at trial the author of the entry regarding the purported omissions (since neither Dr. Mancall nor TJUH have been able to identify the author). See id. Presumably, Plaintiff believes that Dr. Mancall's alleged failure to diagnose his condition at the time of his December 5, 1996 visit will be significantly more evident to a jury if Plaintiff can establish that the symptoms he reported included the inability to perform a sit-up and the inability to run.[13]

Plaintiff's primary argument is that the evidence should be excluded because the unsigned entry does not comply with the Medical Malpractice Act of 1985, 63 Pa. Cons. Stat. Ann. §§ 422.51 - 422.51a. However, the Medical Malpractice Act, and the regulations adopted thereunder, provide only a basis for the imposition of fees, fines, and civil penalties by the State Board of Medicine upon medical practitioners and entities who are regulated by the Board, and does not form a basis for the exclusion of evidence in a medical malpractice action.

Although Plaintiff's brief accompanying his Motion in Limine does not include an argument that the evidence should be excluded as hearsay, Defendants have addressed the hearsay issue in their responses to the Motion (Docket Entry No.s 41 and 43), and Plaintiff likewise addresses the hearsay issue in his additional reply briefs (Docket Entry No.s 44 and 45). Defendants contend that the evidence need not be excluded as hearsay because it falls within the

[13] The Court notes that it is not clear how Plaintiff would be able to establish at trial all of the information that Dr. Mancall did have at the time of his alleged failure to diagnose Plaintiff's conditions if the top portion of the examination form is excluded from evidence. Nonetheless, Plaintiff seeks exclusion of this evidence.

exception for "records of regularly conducted activity" as set forth in Fed. R. Evid. 803(6).[14] That Rule provides that the following is "not excluded by the hearsay rule":

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, *unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness*. . . .

Fed. R. Evid. 803(6) (emphasis added). Plaintiff contends that the circumstances surrounding the entry of the top portion of the medical form (namely that it is not signed and that Defendants are unable to identify the author) indicate a lack of trustworthiness. The Court does not agree.

Plaintiff does not, in fact, dispute that he reported his symptoms to a resident or medical student during his visit, that this unidentified individual thus had personal knowledge of Plaintiff's reported symptoms at the time of making the unsigned entry, that the entry on the medical form in question was made by this unidentified individual, and that the symptoms that *are* included in the entry are accurate. Nor does Plaintiff contend that the author of the entry had any motivation to intentionally omit symptoms from the entry, or that the entry has ever been altered. Plaintiff also does not dispute that the entry was made in the regular course of business,

[14] The history portion of the medical form actually includes two levels of hearsay: (1) the assertions by Plaintiff regarding his symptoms, and (2) the written assertions by the unidentified author of the entry that what is written in the entry comprises an accurate recitation of Plaintiff's reported symptoms. However, it is clear that the first level of hearsay falls within the exception for statements made for the purposes of medical diagnosis or treatment as set forth in Fed. R. Evid. 803(4). Thus, only the second level of hearsay is at issue here.

or that such histories were regularly documented on medical forms during patient examinations. The mere fact that the entry is not signed does not necessarily compel the conclusion that it is not trustworthy. See In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 296-97 (3d Cir. 1983), *reversed on other grounds*, 475 U.S. 574 (1986). Presuming that Defendants establish a sufficient foundation at trial through "the testimony of the custodian or other qualified witness," as required by Rule 803(6), the top portion of the medical form will be held to satisfy the requirements of Rule 803(6). See, e.g., U.S. v. Pelullo, 964 F.2d 193, 200 (3d Cir. 1992) ("The business records exception permits admission of documents containing hearsay provided foundation testimony is made by 'the custodian or other qualified witness,' that: (1) the declarant in the records had personal knowledge to make accurate statements; (2) the declarant recorded the statements contemporaneously with the actions that were the subject of the reports; (3) the declarant made the record in the regular course of the business activity; and (4) such records were regularly kept by the business."). For these reasons, Plaintiff's Motion in Limine will be denied.

VII. CONCLUSION

An Order setting forth the Court's rulings on the Motions addressed herein follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH MARESCA, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 01-5355
ELLIOT L. MANCALL, M.D., and THOMAS JEFFERSON UNIVERSITY HOSPITAL, Defendants.	:	

O R D E R

AND NOW, this day of June, 2003, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED as follows:

1. The Motion for Summary Judgment filed by Defendant Thomas Jefferson University Hospital on January 13, 2003 (**Docket Entry No. 31**) is DENIED.

2. The Partial Summary Judgment Motion filed by Plaintiff Joseph S. Maresca ("Plaintiff") on January 13, 2003 (**Docket Entry No. 32**) is DENIED.

3. The Motion for Summary Judgment filed by Defendant Elliot L. Mancall, M.D., on January 13, 2003 (**Docket Entry No. 33**) is DENIED.

4. The Motion in Limine filed by Plaintiff on February 18, 2003 (**Docket Entry No. 37**) is DENIED.

BY THE COURT:

Legrome D. Davis