BURNS WHITE, LLC
By: James A. Young, Esquire
Samantha L. Conway, Esquire
Attorney ID Nos. 00213/87491
1800 John F. Kennedy Boulevard, 10th Floor
Philadelphia, PA 19103
(215) 587-1625/1653
jayoung@burnswhite.com
slconway@burnswhite.com

Attorneys for Defendants, Gyi P. Mo, M.D., Clinical Care Associates of the University of Pennsylvania Health System, Hospital of the University of Pennsylvania, Trustees of the University of Pennsylvania, Internal Medicine Associates of Delaware County, Penn Internal Medicine Media and Penn Care Internal Medicine Associates of Delaware County

LAMB McERLANE PC
By: Maureen M. McBride
Attorney ID No. 57668
24 East Market Street
P.O. Box 565
West Chester, PA 19381
(610) 430-8000
mmcbride@lambmcerlane.com

DIANE MELENDEZ, Plaintiff,	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
vs.	:	AUGUST TERM, 2018
GYI P. MO, M.D., *et al*, Defendants.	:	NO. 01939

BRIEF IN SUPPORT OF MOTION FOR POST-TRIAL RELIEF OF DEFENDANTS, GYI P. MO, M.D. AND CLINICAL CARE ASSOCIATES OF THE UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM

Defendants, Gyi P. Mo, M.D. and Clinical Care Associates of the University of Pennsylvania Health System (hereinafter, collectively, "Defendants"), by and through their attorneys, Burns White, LLC, and Lamb McErlane PC, file this Memorandum of Law in Support of Defendants' Motion for Post-Trial Relief pursuant to Pennsylvania Rule of Civil Procedure 227.1. As set forth in detail below, Defendants are entitled to judgment notwithstanding the verdict pursuant to Pennsylvania Rule of Civil Procedure 227.1(a)(2) or, in the alternative, a new trial as

to all issues pursuant to Pennsylvania Rule of Civil Procedure 227(a)(1), or, in the alternative, remittitur of the verdict pursuant to Pennsylvania Rule of Civil Procedure 227.1(a).

I. INTRODUCTION

Plaintiff obtained an $18,485,000 award against Defendants without proving the most basic elements of a negligence claim— duty, breach, causation and damages. Without proof of each of these elements, Plaintiff failed to carry her burden and judgment notwithstanding the verdict must be granted. Further, because Plaintiff's failure to establish these elements also renders the verdict against the weight of the evidence, because the verdict was the direct result of Plaintiff's counsel blatant, intentional and inappropriate misconduct, and because the Court allowed reference to inadmissible evidence while precluding evidence that clearly was probative, this Court should alternatively grant a new trial. Finally, the verdict is excessive and shocks the conscience. Thus, if judgment notwithstanding the verdict or a new trial is not granted, the verdict should be remitted.

A. Basis for Judgment Notwithstanding the Verdict

Defendants are entitled to judgment notwithstanding the verdict because Plaintiff failed to present sufficient medical evidence at trial to prove the elements of a negligence claim, that is, duty, breach and causation.

1. Plaintiff Failed to Establish an Objective Standard of Care.

First, Plaintiff failed to establish an objective standard of care with regard to use of MRI or a referral to a neurologist. Plaintiff theorized that Dr. Mo should have ordered an MRI or referred Plaintiff, Diane Melendez, to a neurologist in 2015 and 2016. Remarkably, however, Plaintiff never established through expert testimony, to any degree of medical certainty, that there was *a specifically recognized duty* within the medical profession to test, order an MRI or refer the patient to a neurologist within a specific period of time. Without a bright-line rule or evidence of a specific standard of care that applied to these circumstances, Plaintiff failed to prove one of the

most essential elements of her negligence claim. Judgment notwithstanding the verdict should be entered in Defendants' favor for this reason alone.

2. Plaintiff Failed to Establish a Breach of the Standard of Care.

Because Plaintiff failed to establish an objective standard of care with regard to use of MRI or a referral to a neurologist, Plaintiff also failed to prove that Dr. Mo *breached* the standard of care. Judgment notwithstanding the verdict should thus be entered in Defendants' favor for this reason as well.

3. Plaintiff Failed to Prove Causation

Plaintiff also failed to prove that Defendants' breach of the applicable standard of care *caused* Plaintiff's harm. Plaintiff was required to prove that if Defendants had referred her to a neurologist or ordered an MRI, Plaintiff's complained-of damages would have been avoided. Plaintiff completely failed to prove this element. Having opted not to call neurosurgeon Michael Horowitz, M.D.,[1] Plaintiff placed all of her eggs in the basket of testimony from her sole causation expert, neurologist Carolyn Brockington, M.D., who clearly did not testify that "but for" Defendants' failure to order an MRI or neurology consult in a particular period of time, Plaintiff would have avoided the harm from which she suffers or that Defendants' conduct "increased the risk" that Plaintiff would suffer the harm she experiences today. Thus, because Plaintiff failed to prove causation, this Court should enter judgment notwithstanding the verdict in Defendants' favor.

[1] Plaintiff presumably made the decision to omit Dr. Horowitz's testimony because Plaintiff's counsel's numerous interruptions and objections during Dr. Horowitz's deposition rendered the deposition transcript virtually incomprehensible and the fact that counsel's obstreperous conduct may have exposed him to sanctions or provided an independent basis for post-trial relief. *See, e.g., I.L. v. Allegheny Health Network, et al.*, G.D. 18-011924 (C.C.P. Allegheny) (restricting counsel's ability to object and instruct witnesses not to answer in Allegheny County); *Wabote v. Ude*, 5:21-cv-2214 (E.D. Pa. Mar. 8, 2022) (finding that counsel and client's behavior frustrated the purpose of client's deposition and imposing monetary sanctions on both counsel and the client).

B. Basis for a New Trial

In addition to judgment notwithstanding the verdict, Defendants are entitled to a new trial because Plaintiff's counsel's conduct throughout the proceedings – which the Court itself described as "deplorable"– deprived Defendants of a fair trial. Plaintiff's counsel's actions were premeditated and intentional and the instructions this Court provided were insufficient to cure the prejudice Defendants sustained. The resulting verdict is a miscarriage of justice that must be vacated in its entirety.

Other, equally compelling reasons also require the grant of a new trial, including the fact that this Court gave a highly-damaging "spoliation" charge when Defendants did nothing wrong, the Court allowed the introduction of inadmissible hearsay, the verdict is against the weight of the evidence and the damages award is excessive and punitive and must be reduced.

C. Basis for Remittitur

Defendants also submit that if this Court does not grant judgment notwithstanding the verdict or a new trial, it should remit the $18,485,000 verdict in Plaintiff's favor or award a new trial on damages. This Court ruled that punitive damages should not be awarded and Plaintiff did not seek past medical expenses. In such circumstances, the magnitude of the verdict shocks the conscience and should be remitted. For these reasons, addressed in detail below, the jury verdict cannot be allowed to stand. As a result, this Court should grant: (i) judgment notwithstanding the verdict; (ii) a new trial; and/or (iii) remittitur of the jury's verdict.

II. MATTER BEFORE THE COURT

Defendants, Dr. Mo and Clinical Care Associates of the University of Pennsylvania Health System's Motion for Post-Trial Relief seeking: (i) judgment notwithstanding the verdict; (ii) a new trial; and/or (iii) remittitur of the jury's verdict.

III. STATEMENT OF ISSUES

A. Whether this Court should grant judgment notwithstanding the verdict as a result of Plaintiff's failure to prove the existence of an objective standard of care, breach of that standard and evidence offered to the requisite degree of medical certainty that a breach of the standard of care caused Plaintiff's particular harm?

Suggested Answer: yes.

B. Whether this Court should grant a new trial where Plaintiff's counsel's "deplorable" conduct led to an award based on sympathy and/or a desire to punish, the verdict is against the weight of the evidence, and the Court erred in giving a "spoliation" instruction as well as in making other erroneous evidentiary rulings?

Suggested Answer: yes.

C. Whether a $19,665,000 award of damages (reduced to $18,485,393.30 to reflect the jury's comparative negligence finding) in Plaintiff's favor in a case that did not involve an award for punitive damages or past medical expenses shocks the conscience and should be remitted?

Suggested Answer: yes.

IV. FACTS

A. Background

This medical malpractice action involves the care and treatment of Plaintiff Diana Melendez, a patient of Gyi P. Mo, M.D.'s in Media, Pennsylvania.

Plaintiff first began seeing Dr. Mo as her primary care physician in October 2011. Ex. D18. At the time, she was a 46-year-old single woman, with no children, who worked at the Hospital of the University of Pennsylvania as a laboratory technician. In February 2017, Plaintiff was diagnosed with a dural arteriovenous (AV) fistula, which is rarely seen in young and middle-

aged women. Plaintiff's theory at trial was that had Dr. Mo followed up on her complaints sooner, her condition would have been diagnosed more promptly. Neither Plaintiff nor her experts ever opined as to what aspect of her condition would have been different had Dr. Mo taken different steps at some earlier point in time.

On February 6, 2012, Plaintiff presented to Dr. Mo with complaints of mid-back pain lasting for six days with tingling in her ribcage. Ex. D-18 pp. 0294-0296. Dr. Mo told Plaintiff to return if her back symptoms worsened or failed to improve. *Id*. Plaintiff did not return. She next saw Dr. Mo on January 18, 2013, with symptoms of right lower quadrant pain and was diagnosed at that time with kidney stones. Ex. D-18 pp. 0276-0278

Ten months later, in October 2013, Plaintiff appeared to have another kidney stone experience and was seen at Delaware County Memorial Hospital's emergency department. Plaintiff saw Dr. Mo on October 29, 2013, for follow-up care. Ex. D-18 pp.0243-0245.

Another five months passed before Plaintiff contacted Dr. Mo again. On March 5, 2014, Plaintiff went to see Dr. Mo, this time, complaining of fatigue. In the "subjective" section of the note, Dr. Mo documented that Plaintiff reported that "back pain occasionally wakes her up" and under the "Review of Systems" section of the note, the word "weakness" is documented in the neurologic section along with negative notations for dizziness, sensory change and focal weakness. A sleep study was recommended. Ex. D-18 pp. 0243-0245.

Ms. Melendez's next appointment with Dr. Mo was on December 8, 2014 when she presented for a sick visit for a cough and sinus congestion. Ex. D-18 pp. 0232-0234. Ms. Melendez returned again on July 23, 2015 for a check-up. Ex. D-18 pp. 0222-0227. On August 18, 2015, Ms. Melendez saw a new physician, Marguerite Balaste, M.D., but then cancelled several appointments thereafter, because she only wanted to see Dr. Mo. In December 2015, Plaintiff

reached out to Dr. Mo about a "pink eye" condition for which she was diagnosed at an urgent care. Ex. D-18 pp. 0214-0218, 0205, 0200, 0195, 0189, 0181-0184.

Her next visit with Dr. Mo was on January 14, 2016. Ex. D-18 pp. 0175-0179. This is the first time Ms. Melendez reported tingling and sensory changes in her right foot. *Id.* Dr. Mo referred Ms. Melendez to a podiatrist, Dr. D'Angelantonio, and noted that she may also need an EMG. *Id.* Despite the referral in January, 2016, Ms. Melendez did not see co-defendant Dr. D'Angelantonio until July 27, 2016 – seven months later – noting as her chief complaint bilateral foot pain and numbness. Ex. D-18 pp. 0015-0025. She returned to Dr. D'Angelantonio on September 21, 2016 and, for the first time in any medical record (PCP, Orthopedic, Podiatry etc.), reported numbness radiating down her leg. Dr. D'Angelantonio referred Plaintiff to neurology for consultation and follow-up for her lower back pain and numbness radiating down her leg. Ex. D-18 pp. 0004-0014. She did not see a neurologist.

A month later, on October 28, 2016, Ms. Melendez saw Dr. Mo for bilateral knee pain with swelling in the back of the left leg. Ex. D-18 0163-0165. During this appointment, Ms. Melendez also complained that the tingling she was experiencing in both feet was becoming more pronounced. *Id.* However, she denied experiencing severe back pain. *Id.* Dr. Mo ordered an EMG with neurology to assess. *Id.* A month later (November 28, 2016) Ms. Melendez emailed Dr. Mo about ordering blood work and, at the end of her email, wrote "PS I will be making an appointment in Neuro… as soon as I find the paper you gave me!"). Ex. D-18 p. 0161. However, over a month went by before Ms. Melendez made an appointment with a neurologist.

On January 17, 2017, Ms. Melendez saw neurologist Sami Khella, M.D., the chief of neurology at Penn Presbyterian, who referred her to Dr. Schuster a neurosurgeon. Ex. D-22b 0126-0131. In February, 2017, Ms. Melendez was diagnosed with a dural AV fistula.

B. The Underlying Allegations

Plaintiff sued Dr. Mo, Clinical Care Associates of the University of Pennsylvania Health System, Hospital of the University of Pennsylvania, Trustees of the University of Pennsylvania, Internal Medicine Associates of Delaware County, Penn Internal Medicine Media, Dr. D'Angelantonio and Penn Care Internal Medicine Associates of Delaware County, alleging various theories of negligence against Defendants predicated primarily on the contention that Defendants had failed to timely diagnose Plaintiff's dural AV fistula.

C. The Trial

The case proceeded to a ten-day jury trial.

At trial, Plaintiff contended that Ms. Melendez's back pain in 2012, documented weakness in 2014 and sensory changes in 2016 were evidence of an evolving spinal cord lesion that required referral to a neurologist or ordering of an MRI. Plaintiff also claimed that she reported to Dr. Mo sensory changes in her lower extremities that he did not address.

Defendants, in turn, presented evidence establishing that Ms. Melendez's medical records did not support the conclusion that she had raised these issues of ongoing neurologic symptoms between 2012 and 2016, and expert testimony that they did not violate the standard of care during their treatment of Ms. Melendez.

D. The Verdict.

On September 21, 2022, the jury found in favor of Plaintiff and against Defendant, Dr. Mo. The jury found Plaintiff 6% negligent[2] and returned a defense verdict in favor of Dr. D'Angelantonio. The jury awarded damages as follows:

- Past and future loss of earnings and earning capacity - $1,230,650.

[2] The $19,665,000 verdict has been reduced to $18,485,393.30 to reflect the jury's comparative negligence finding.

- Past non-economic damages - $850,000.
- Future non-economic damages - $9,916,667.
- Future medical expenses (total) - $7,667,995.

(N.T. 9/21/22, pgs. 25-28). Defendants timely filed Post-Trial Motions. Plaintiff filed a Motion for Delay Damages and to Mold the Verdict. Plaintiff also filed a separate motion for a new trial on punitive damages.

This is Defendants' brief in support of their Post-Trial Motions.

V. ARGUMENT

A. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE GRANTED.

Plaintiff failed to support her negligence claims with sufficient evidence.[3] Defendants now seek judgment notwithstanding the verdict in their favor as a result.[4]

1. Plaintiff Failed to Identify or Define an Objective Standard of Care.

The first and most critical reason Defendants are entitled to judgment notwithstanding the verdict is because Plaintiff failed to identify a standard of care that Dr. Mo purportedly breached. Remarkably, Plaintiff obtained an $18,485,000 verdict *without ever once defining* an objective standard of care against which Defendants' conduct could be measured.

Rather than providing the jury with a defined medical standard, accompanied by an explanation as to how that standard was not met, Plaintiff's standard-of-care expert provided general musings about what would have been *within* the standard of care, without identifying the

[3] "Where the evidence is insufficient to sustain the verdict, the remedy granted in civil cases is a judgment notwithstanding the verdict." *Lilley v. Johns-Manville Corp*., 596 A.2d 203, 206 (Pa. Super. 1991).
[4] Defendants moved for a non-suit at the close of Plaintiff's case-in-chief. (N.T. 9/16/22 pm, at 36:15-19). Similarly, at the close of all evidence, Defendants moved for a directed verdict. (N.T. 9/19/22 pm, at 134:5-16). Both motions were denied.

standard or explaining how Defendants' conduct purportedly "breached" it. Moreover, none of Plaintiff's standard of care opinions were offered to any degree of medical certainty.

a. The Standard Must be Objective.

"Generally, to state a cause of action for negligence, a plaintiff must allege facts which establish the breach of a legally recognized duty or obligation of the defendant that is causally connected to actual damages suffered by the plaintiff." *Scampone v. Highland Park Care Center, LLC*, 57 A.3d 582, 596 (Pa. 2012) (citation omitted) (emphasis added); *see also Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166, 1168 (Pa. 2000) ("The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff.") "If the law does not impose a duty on defendants to act under a certain set of circumstances, a claim for negligence will not survive." *Karpf. v. Massachusetts Mut. Life Ins. Co*., No. 10-1401, 2014 WL 1259605.

It is well-settled that to prove a claim of medical malpractice, a plaintiff must introduce expert testimony to show that a defendant-doctor's conduct varied from *accepted* medical practice. *Brannan v. Lankenau Hospital*, 490 Pa. 588, 595, 417 A.2d 196, 199 (1980). "This requirement stems from judicial concern that, absent the guidance of an expert, jurors are unable to determine relationships among scientific factual circumstances." *Id.* at 595-96, 417 A.2d at 199-200 (*citing McMahon v. Young*, 442 Pa. 484, 276 A.2d 534 (1971)); *Passarello v. Grumbine*, 87 A.3d 285, 297 (Pa. 2014) ("We observe that the mere fact that a physician commits a medical error does not render him negligent as a matter of law. Rather, to establish malpractice, the plaintiff must show that the physician owed him a duty, there was a breach of that duty, the breach was a substantial factor in causing the harm suffered by the plaintiff, and damage resulted from the harm"); *Thierfelder v. Wolfert*, 617 295, 316-17, 52 A.3d 1251, 1264 (Pa. 2012) ("Breach of duty is not present unless the physician deviated from *the applicable standard of care*."); *Shaw v.*

Kirschbaum, 439 Pa. Super. 24, 653 A.2d 12, 15 (Pa. Super. 1994) ("[a] breach of a legal duty is a condition precedent to a finding of negligence").

Appellate courts in Pennsylvania have not hesitated to overturn jury verdicts in circumstances where the plaintiff has not established sufficient evidence of a standard of care. *See, e.g., Maurer v. Trustees of Univ. of Pa.*, 418 Pa. Super. 510, 614 A.2d 754 (1992) (overturning jury verdict where plaintiff's expert failed to articulate a standard of care regarding the administration of a particular drug); *Pomroy v. Hosp. of Univ. of Pa.*, 105 A.3d 740, 2014, WL 6465840 (Pa. Super. 2014) (overturning a $19.5 million verdict on the grounds that, *inter alia*, "Appellees failed to establish a valid standard of care for a medical malpractice claim.").

b. Plaintiff's Expert Did Not Articulate an Objective Standard of Care.

In this case, Plaintiff did not establish an objective standard under the case law cited above. In fact, quite tellingly, Plaintiff's counsel never once asked Plaintiff's sole standard-of-care expert to define to any degree of medical certainty the precise standard of care applicable to this case. While Plaintiff identified areas where Defendants would have acted *within* the standard of care, Plaintiff never once identified what "standard" applied, let alone "how" it was breached. For instance:

- While Plaintiff claimed that Plaintiff "needed to be worked up for a problem with her spinal cord, and "needed an MRI beginning in 2012 and going forward to 2017" and "a referral to a neurologist;" Plaintiff's expert, Dr. Paul Genecin, merely testified that Dr. Mo "would have adhered to the standard of care if he had acted that way." He did not testify that the standard of care *required* certain testing on a certain date or dates or that it was a breach of the standard of care to not have performed these tests at a particular point in time. (N.T. 9/12/22 am, at 30:7-15).

- Similarly, when asked whether the "standard of care require[d] the doctor to rule out the worst possible, most potentially catastrophic thing that can explain the symptom," (N.T. 9/12/22 am, at 32:15-18), Dr. Genecin answered "yes." However, nowhere in his testimony did he define *when* such "ruling out" is required by the standard of care or offer a bright line rule against which Dr. Mo's conduct could be measured.

- When asked if the standard of care requires the doctor "the second they become concerned" to undertake certain testing, Dr. Genecin *did not answer with an unqualified "yes."* Rather, he merely stated that the standard requires that the patient "get an imaging study" without defining specifically *when* that study must occur. He stated that it "could be acceptable" to send the patient to a neurologist if there was no MRI available and refused to state unequivocally that ordering such tests was mandated by the standard of care when asked if ordering such tests or referrals were "optional." He simply described these tests or referrals as an "important first step." (N.T. 9/12/22 am, at 34:16-35:12).

- Later, Dr. Genecin testified that the standard of care does not allow a doctor "to guess," (N.T. 9/12/22 am, at 44:9), but merely explained what a "reasonable doctor's differential diagnosis" would be (which, of course, is not the same as articulating an objective standard of care). (N.T. 9/12/22 am, at 57:1-10).

- When Dr. Genecin was asked directly whether Mo "adhered to the standard of care in his treatment of Ms. Melendez on February 6, 2012," (N.T. 9/12/22 am, at 61:7-15), Dr. Genecin again declined to articulate the precise standard that applied or how Dr. Mo deviated from this standard. Instead, Dr. Genecin testified that concerns with a patient's back pain with certain other symptoms mandate a "very urgent workup" without defining when or within what precise time frame such workup must occur. (N.T. 9/12/22 am, at 61:16-20).

- Dr. Genecin testified that the "standard of care" mandates "following a patient over time and tying together things the patient tells you in March 2014 with what she said at past visits;" however, he did not explain the precise objective standard of care that applies or how it was breached. (N.T. 9/12/22 am, at 66).

- When he was asked, point blank, by Plaintiff's counsel whether or not "Dr. Mo met or did not meet the standard of care based on his treatment of Ms. Melendez on March 5, 2014 when she came in with a positive for back pain," Dr. Genecin did not answer with an unqualified "yes" or testify that the standard of care was not met. Instead, he speculated about what he believed Dr. Mo knew or understood was possible and, based on that, stated that the standard of care required an MRI and timely referral to a neurologist or neurosurgeon. (N.T. 9/12/22 am, at 78:23-79:8).

- Near the conclusion of his testimony, Dr. Genecin was asked for his opinion about whether Dr. Mo adhered to or deviated from the standard of care on January 16, 2016. Once again, despite being the only standard of care expert to testify on Plaintiff's behalf, Dr. Genecin testified simply that: "all reasonable doctors know that the patient in this situation must have an MRI…" (N.T. 9/12/22 am, at 91:3-15), even though a description of what is "important" or "reasonable" is clearly not the same as an opinion from an expert that certain testing or referrals at a particular time are **required** by the standard of care.

In sum, one can scour the entire transcript from this ten-day trial and *not find any testimony* from Plaintiff's standard-of-care expert witness that described, in general or specific terms, any formulation of the standard of care applicable to this case.[5] Because proof of an objective standard of care by which Defendants' conduct could be measured is a fundamental element of any malpractice claim, Plaintiff failed to carry her burden of proof. This Court should grant judgment notwithstanding the verdict in Defendants' favor.

c. Plaintiff's Standard-of-Care Expert Did Not Present His Opinions to Any Degree of Medical Certainty.

Our Superior Court has made it clear on numerous occasions that an expert must provide his or her opinions to a reasonable degree of medical certainty. *Vicari v. Spiegel*, 936 A.2d 410 (Pa. Super. 2009) (expert must testify to a reasonable degree of medical certainty that the defendant physician deviated from acceptable standards, and that the deviation was the proximate cause of the plaintiff's harm).

To determine whether the expert's opinion is rendered to the requisite degree of certainty, courts in Pennsylvania review the expert's testimony in its entirety. While it is true "that an expert's opinion will not be deemed deficient merely because he or she failed to expressly use the specific words, 'reasonable degree of medical certainty,'" *Commonwealth v. Spotz*, 756 A.2d 1139 (Pa. 2000), an expert who merely alleges that a particular cause 'possibly,' or 'could have' led to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result fails to satisfy the standard for expert testimony. *Id.* at 510-11. *See also Griffin v. University of Pittsburgh Medical Center*, 950 A.2d 996 (Pa. Super. 2008),

[5] If there were any doubt about whether Plaintiff failed to carry their burden of proving an objective standard of care, Plaintiff's counsel's closing argument should put that doubt squarely to rest. During his closing argument, Plaintiff's' counsel did not reference any testimony or evidence that purportedly established the standard of care. (N.T. 9/20/22, at 35:3-70:23)

(where plaintiff's expert testified that the probability that plaintiff's injury was either the result of forcible restraint was 51% probability but that there was a 49% probability it was caused by a seizure, the Superior Court concluded the expert's opinion was insufficient, despite his use of the words "reasonable degree of medical certainty"); *Corrado v. Thomas Jefferson Univ. Hosp*., 790 A.2d 1022 (Pa. Super. 2001) (affirming entry of nonsuit where expert testified that, "more likely than not in my opinion [defendant] deviated from the standard of care," and that it was "more likely than not [the decedent] would have responded to [timely] treatment.").

Here, Dr. Genecin did not deign to give any probabilities at all. He danced around the issue and failed to state any opinion with any particular conviction, let alone to any degree of certainty. The Court acknowledged that Dr. Genecin did not use the words "reasonable degree of certainty" during his testimony.[6] Dr. Genecin testified regarding:

> - A differential diagnosis would include disc disease because she had a history of that, but there are some points against that; right. It could include any kind of a spinal cord lesion that could be at that point pus, blood, a disc, other -- tumor, other types of space-occupying lesions. It could be other kinds of diseases of the spinal cord, multiple sclerosis, MS, is an example. Other kinds of neurologic diseases that can present early on with an unusual symptom and where further diagnostic workup could be indicated. (N.T. 9/12/22 am, at 56:25-57:10).
>
> - This is a problem in an adult patient who has not had an injury. It's not traumatic. It's not a typical distribution of low back pain, lumbar or sacral disc disease which tends to travel downward. The location is a little concerning in the mid back and radiating through the rib. That gets to be unusual and that would be a situation where the standard of care would mandate some careful questions to get a little more specificity, a careful physical examination in

[6] When defense counsel raised the fact that Plaintiff's standard of care expert failed to present testimony to the degree of medical certainty required, the Court agreed that Plaintiff's expert, at the very least, failed to use the "magic words." *See* N.T. 9/19/22 pm, at 134:17-135:21 ("THE COURT: You didn't. You didn't. I anticipate these motions all the time. I listen very carefully to the testimony and I do feel the sum and substance of Dr. Genecin's testimony showed a reasonable degree of medical certainty despite the fact that Mr. Bosworth didn't ask that simple introductory question that could have avoided a lot of issues now and down the road. For that reason, I'm going to deny your motion and hope people learned a lesson here.").

order to look at all of the different neurologic systems that could be involved and to try to localize what is going on. And then assessment and plans would follow from that. (N.T. 9/12/22 am, at 57:13-58:1).

- Well, absent from his note is a differential diagnosis, which is what could be causing this problem. The first concern in a patient with back pain with a sensory symptom of radiation and with four plus knee and ankle reflexes is a spinal cord problem. That mandates a very urgent workup. . . . Well, MRI is the most immediate [testing that is directed at finding out what the cause is]. It would be up to a neurologist or neurosurgeon to think about other testing. That internist has met the standard of care get the MRI, get this patient to a neurologist. Those are the urgent issues. The reason why I say "urgent" is because some of these disease processes can be very fast-moving and can cause devastating neurologic injury in a matter of hours or days. So when you see this picture of new clonus and new symptom of mid back pain and the symptom of radiation, that patient really has to get into the MRI scanner quite urgently. (N.T. 9/12/22 am, at 61:13-19; 61:25-62:12).

- At this point Dr. Mo had as much proof as a doctor can have that there is a spine problem, beginning with pain in the upper back with radiation, that sensory symptom, as well as pain, weakness, abnormal reflexes and now a focal, in other words, localizing problem that can only arise in the back. So I think all reasonable doctors know that the patient in this situation must have an MRI. There is enough going on here all converging on a problem in the spine that it would be just mandatory to get an MRI and to have this patient see a neurologist. (N.T. 9/12/22 am, at 91:3-15).

- Again, this is really conscious disregard of a situation where lines of evidence over multiple visits are of a spinal cord problem that's not just present at this point, but also worsening. Various clues are not followed up. For example, the fact that the patient had clonus and never again had reflex tests. The fact that the patient had an L5 sensory deficit. Again, not followed up. Now a problem with bilateral foot numbness, not followed up. So all falls, not followed up. So this is a situation where a neurologic problem is going from bad to worse without a diagnosis. (N.T. 9/12/22 am, at 94:20-95:7).

- The significance to me is that, in the face of multiple clear neurologic problems, including symptoms and findings, Dr. Mo didn't even mention them in his note which was an assessment of the risk of her undergoing a procedure. That's not accurate documentation certainly. (N.T. 9/12/22 pm, at 15:8-13).

- Like reckless driving, it's a situation when you can reasonably foresee that something bad can happen to the patient and

> you know better. And the reason I said that is because Dr. Mo testified multiple times in his deposition to a factual knowledge that this could be a spine problem. That doctor has to protect the patient from harm, that there were all these different problems going on, so that's what I mean. (N.T. 9/12/22 pm, at 19:1-9).

Dr. Genecin only offered one opinion with any degree of certainty, when he testified as follows:

> My opinion is that a condition involving the spine **was of very great likelihood.** And I think Dr. Mo testified that he knew that it was – a spine problem was possible. The standard of care mandated an MRI of the spine and timely referral to a neurologist or neurosurgeon. This was not just a persisting problem, but a progressing problem of the spine that's not yet diagnosed. And this seems like to me conscious disregard of the standard of care, which is to get this patient's spine MRI done.

N.T. 9/12/22 am, at 78:23-79:8 (emphasis added).

While the Court ultimately concluded that Dr. Genecin's testimony as a whole satisfied the standard necessary for expert testimony under Pennsylvania law, careful review of Dr. Genecin's testimony reveals that he not only failed to use the "magic words;" his overall testimony is vague, generic and equivocal and fails to state the standard of care in objective terms. In fact, the only aspect of Dr. Genecin's testimony offered to any degree of certainty, regarding his diagnostic impression, does not even relate to the standard of care.

Plaintiff's abject failure to carry her burden of proving this critical element of her claim is fatal to her verdict. Judgment notwithstanding the verdict should be granted on these grounds alone.

2. Plaintiff Failed to Prove a Breach of the Standard of Care.

Plaintiff also failed to present sufficient evidence of a breach of the standard of care. To establish a breach, Plaintiff was required to present competent evidence that Defendants deviated from the standard of care that Plaintiff's expert articulated. Because, as explained above, Dr. Genecin failed to articulate an objective standard of care, it is beyond dispute that Dr. Genecin's

testimony is insufficient to establish to any degree of medical certainty that a breach of the standard of care occurred. *Viener v. Jacobs*, 834 A.2d 546 (Pa. Super. 2003) (expert opinion based on mere possibilities is not competent evidence). *Peerless Dyeing Co. v. Indus. Risk Insurers*, 573 A.2d 541 (Pa. Super. 1990) (to be competent, expert testimony must be stated with reasonable certainty).

Defendants are entitled to judgment notwithstanding the verdict for this reason as well.

3. Plaintiff Failed to Prove Causation.

Plaintiff's evidence on causation also fell short of what is required to establish a prima facie medical malpractice case. *Not one* of Plaintiff's experts testified that an earlier referral to a neurologist or a MRI or neurological test performed on Ms. Melendez sooner *would have* prevented Ms. Melendez's current condition. Without testimony based on what actually occurred (as opposed to what might have occurred assuming that test results *would have* revealed information necessitating a different course of treatment) and that "but for" Defendants' acts Ms. Melendez *would not* have suffered harm, Plaintiff failed to carry her burden of proof on liability. This Court should enter judgment in Defendants' favor for this reason as well.

It is well-settled that a Plaintiff in a medical malpractice case bears the burden of proving a causal connection between Defendants' alleged wrongful act and Plaintiff's injuries. *Hamil v. Bashline*, 481 Pa. 256, 265, 392 A.2d 1280, 1284 (1978). As in any negligence action, Plaintiff's causation burden is broken into two parts: (i) cause-in-fact and (ii) legal or proximate cause. *First v. Zem Temple*, 454 Pa. Super. 548, 686 A.2d 18, 21 n.2 (1996) (citations omitted) ("Cause in fact or 'but for' causation provides that if the harmful result would not have come about but for the negligent conduct then there is a direct causal connection between the negligence and the injury. Legal or proximate causation involves a determination that the nexus between the wrongful acts

or omissions and the injury sustained is of such a nature that it is socially and economically desirable to hold the wrongdoer liable.")

As our Superior Court has repeatedly noted, one of the most distinguishing features of a medical malpractice suit is the need for expert testimony. *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 573 Pa. 245, 824 A.2d 1140, 1145 (Pa. 2003) ("Because the negligence of a physician encompasses matters not within the ordinary knowledge and experience of laypersons[,] a medical malpractice plaintiff must present expert testimony to establish the applicable standard of care, the deviation from that standard, causation and the extent of the injury.") *See also Merlini v. Gallitzin Water Authority*, 934 A.2d 100, 104-05 (Pa. Super. 2007). Therefore, to establish "cause-in-fact," (otherwise known as "but for" causation), a plaintiff must prove, through expert testimony, that but for that defendant's alleged negligent conduct, the harm would not have occurred. *See Whitner v. Von Hintz*, 263 A.2d 889, 894 (Pa. 1970) (Pennsylvania "but for" causation requires a showing that the "harmful result would not have come about but for the negligent conduct."). Applying that analysis here with regard to Dr. Mo means that Plaintiff was required to prove that "but for" Defendants' failure to order MRI testing or refer Ms. Melendez to a neurologist earlier, Ms. Melendez would not have suffered any harm.

Plaintiff did not satisfy her burden. Dr. Brockington did not testify with any degree of specificity that had Defendants ordered an MRI or an earlier neurological consult, Ms. Melendez's outcome would have been different. Instead, when Dr. Brockington was asked, "do you have an opinion as to whether earlier treatment at any of these junctures in 2012, '13, '14, '15, '16, had she gotten the MRI, had she gotten the neurology consult would have prevented her from being permanently injured?", Dr. Brockington answered "Yes, I have an opinion." When asked "[w]hat's your opinion?" she responded, "that **when you treat people** before the development of the

neurological deficits is the time that you can keep the injury from happening. So people – really the treatment has to – the identification of the problem has to develop or has to occur before **someone** has neurological deficits," (N.T. 9/12/22 pm, at 97:13-18). Notably, this is a generic opinion that is not directed specifically to Ms. Melendez's case. When asked specifically whether Ms. Melendez would not be permanently disabled if she had received "that treatment" at any point in time," Dr. Brockington stated, "Yes," and then gave the following opinion:

> Initially, when she came in, she didn't have neurological deficits, but she had symptoms consistent with a spinal cord etiology or cause, I should say, so she would be the way she was."

(N.T. 9/12/22 pm, at 98:9-15)

This testimony, too, is a far cry from what is required to present a sufficient causation opinion under Pennsylvania law. Like the earlier portion of her testimony, this portion of Dr. Brockington's opinion does not identify in any detail whatsoever, what "deficits" she is referring to or what "the way [Ms. Melendez] was" even means. What is clear is this: Plaintiff's expert did not testify that Dr. Mo's actions or omissions caused or increased Ms. Melendez's risk of harm from a dural AV fistula.

Because none of Plaintiff's experts opined – anywhere in their testimony – that but for Dr. Mo's conduct, Ms. Melendez would not have any specific deficits today, Plaintiff failed to prove causation.

As if that were not enough to establish that Plaintiff failed to carry her burden of proof on causation, Dr. Brockington also provided no scientific basis, as required by *Snizavich v. Rohm & Haas Co.*, 83 A.3d 191, 197 (Pa. Super. 2013), to support the suggestion that a MRI or earlier referral to a neurologist would have led to a different outcome.

Under the Superior Court's precedential decision in *Snizavich*, expert opinions, to be admissible, must be based on scientific authority that the expert applies to the facts. Specifically, the Court held: "[t]hus, the minimal threshold that expert testimony must meet to qualify as an expert opinion rather than merely an opinion expressed by an expert, is this: the proffered expert testimony must point to, rely on or cite some scientific authority – whether facts, empirical studies, or the expert's own research – that the expert has applied to the facts at hand and which supports the expert's ultimate conclusion." When an expert fails to meet this threshold, "the trial court has no choice but to conclude that the expert opinion reflects nothing more than mere personal belief." *Id.* Additionally, Pennsylvania law requires that the expert's methodology be generally accepted, and that the expert utilize the methodology in a generally accepted manner. *See, e.g., Trach v. Fellin*, 817 A.2d 1102, 1114 (Pa. Super. 2003). Specifically, *Snizavich* holds that an expert, even a medical doctor, who presents evidence based solely on the expert's review of medical records and expertise in the applicable medical field, must "point to some scientific authority applied to the facts at hand and show that the facts, studies and research support the expert's ultimate conclusion." *Id.* at 197.

In this case, Dr. Brockington pointed to *no scientific evidence* to support her conclusions that had a MRI been performed, or if there had been an earlier referral to a neurologist, Ms. Melendez would have avoided any harm. Rather, Dr. Brockington testified in *ipse dixit* fashion. Like the expert in *Snizavich*, Dr. Brockington offered nothing more than her personal opinions (and speculation) plainly lacking in empirical basis or scientific authority; at bottom, her testimony is nothing more than an extrapolation backward from a known result (Plaintiff's current condition) to a theory that causative negligence must have occurred. An opinion that "she would be the way she was" had earlier treatment occurred is not a theory of "but for" causation. Dr. Brockington

does not make any attempt to "connect the dots" between a breach of the standard of care and the harm sustained.

Because Dr. Brockington's testimony was bereft of any methodology, let alone a methodology that is generally accepted in the relevant field, her subjective beliefs should not be considered a sufficient basis upon which to sustain this $18,454,000 verdict; hence, judgment in Defendants' favor should be entered as a result. *See generally General Electric v. Joiner*, 522 U.S. 136, 146 (1997) ("an expert opinion is inadmissible when the only connection between the conclusion and the existing data is the expert's own assertions…"); *McDowell v. Brown*, 392 F.3d 1283 (11th Cir. 2004) (where one of plaintiff's experts relied on a "logic" theory that a plaintiff would have sustained less injury had he been treated earlier but that opinion was not supported by any empirical evidence or scientific support, the trial court correctly precluded the expert from drawing conclusions "where there was no existing data."); *Clark v. Takata Corp.*, 192 F.3d 750, 759, n.5 (7th Cir. 1999) (even "a supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based on some recognized scientific method.").

B. THIS COURT SHOULD GRANT A NEW TRIAL

If the Court does not grant Defendants' motion for judgment notwithstanding the verdict, this Court should grant Defendants a new trial. It is well-established that a new trial "is warranted to achieve justice in those instances where the original trial was tainted, unfair, or marred by error." *Klaus v. Kirkland*, 16 Pa. D. & C.5th 1, 12 (Phila. Cnty. Ct. Com. Pl. 2010) (*citing Harman v. Borah*, 756 A.2d 1116, 1121 (Pa. 2000)). There is a "two-step process that a trial court must follow when responding to a request for a new trial." *Lockley v. CSX Transp. Inc.*, 5 A.3d 383, 388 (Pa. Super. 2010).

First, the trial court must decide whether one or more mistakes occurred at trial. These mistakes might involve factual, legal, or discretionary matters. Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting a new trial. *Id*. (citation omitted). To obtain a new trial, "the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake" or mistakes. *Id.* (citation omitted). A new trial is appropriate even if the trial court has taken "affirmative steps to attempt to cure harm" following an objection when "no curative instruction can adequately obliterate the taint." *Siegal v. Stefanyszyn*, 718 A.2d 1274, 1277 (Pa. Super. 1998).

Here, significant mistakes were made with regard to the Court's response to Plaintiff's counsel's repeated attempts to inflame the jury as well as with regard to other evidentiary rulings. While this Court sustained numerous objections and attempted to cure the prejudice, the fact is that the entire trial was tainted by Plaintiff's counsel's conduct and the resulting prejudice could not be erased. The proof, of course, is in the pudding. Plaintiff's counsel successfully stirred anger among the jurors and encouraged them to "punish" – to the tune of $18,485,000 – Defendants, in part, for employment decisions over which they had no control and in which they were not involved. These mistakes require the grant of a new trial.

1. Plaintiff's Counsel's Misconduct Warrants the Grant of a New Trial.

As our Supreme Court made clear almost a century ago, the "winning of a verdict should be a hollow reward to the advocate who has brought it to pass by appeals to a jury's prejudices and not by the strength of the case presented. *Such verdicts are, moreover, worthless, for the courts will not let them stand*." *Mittleman v. Bartikowsky*, 486, 129 A. 566 (Pa. 1925) (emphasis added).

There can be no doubt but that Plaintiff in this case obtained a verdict based on false, misleading and inflammatory statements intended to prejudice the jury against Defendants, not

simply as Plaintiff's medical providers, but *as Plaintiff's employer*. Defendants were denied their right to a fair trial as a result of Plaintiff's counsel's rampant misconduct. As the Superior Court has repeatedly stated, a trial court may grant a new trial where "the original trial, because of taint, unfairness or error, produces something other than a just and fair result." *Koziar v. Rayner*, 200 A.3d 513, 518 (Pa. Super. 2018) (citation omitted). This is the poster child for a case where Plaintiff's counsel's conduct led to an unfair and unjust result.

The Court made extensive comments about Plaintiff's counsel's conduct on the record, mentioned the possibility of a mistrial more than once and ultimately, by the end of the case, described Plaintiff's counsel's misconduct as "deplorable." It is inconceivable that where a party's counsel's conduct is described by the judge who presided as "deplorable" that the verdict was not somehow adversely affected.

This Court throughout these proceedings explicitly warned counsel that his gratuitous comments, violations of the court's rulings and other conduct were unacceptable and could result in the grant of a mistrial. Indeed, Defendants moved for a mistrial, *see* N.T. 9/16/22 pm, at 36:2-12, but this Court denied that request. Despite this Court's admonitions, Plaintiff's counsel's behavior did not improve. Instead, it became progressively worse. As set forth below, on multiple occasions, Plaintiff's counsel violated the rules of evidence and this Court's prior rulings and clearly attempted to persuade the jury to reach a verdict based on improper considerations, including, but not limited to, the erroneous claim that Ms. Melendez was "fired," that she was purportedly "terminated" and that the purported "termination" of Ms. Melendez's employment was a decision made by Defendants, and not by the Hospital of the University of Pennsylvania, her actual employer.[7]

[7] Defendants clearly preserved their right to request a new trial based on Plaintiff's counsel's conduct by way of their repeated objections and mistrial request. In *Wilson v. Univ. of Pa. Med. Ctr.*, J-A22008-17,

a. Plaintiff's Counsel's Repeated Attempts to Falsely Suggest that Ms. Melendez had been "Fired" or "Terminated" by the "Penn" Defendants.

Plaintiff's counsel wasted no time attempting to conflate this medical malpractice case with a wrongful termination case.

i. Plaintiff's Counsel Claimed that Defendants "Fired" Plaintiff.

Indeed, in his opening statement, Plaintiff claimed that Ms. Melendez was "fired" by the Penn Defendants. *See* N.T. 9/6/22 am, at 101:8-18. The Court directed Plaintiff's counsel to not do it again. *See* N.T. 9/6/22 pm, at 4:5-6:14.

Despite the express direction of the Court, Plaintiff proceeded almost immediately to violate this Court's admonition when, during the examination of his witness, Peter Quinn, M.D., Plaintiff's counsel rhetorically asked Dr. Quinn if he was aware that Plaintiff got "fired" because she could not do her job. *See* N.T. 9/9/22, at 66:17-21 ("[Y]ou wouldn't have been aware that they fired her because she couldn't do her job."). Given the fact that this Court had told Plaintiff that he should not use the word "fired," only one conclusion can be drawn: Plaintiff's counsel intentionally asked a question he had been admonished not to ask in order to inflame the jury. This Court understood that fact. As the Court explained:

> MR. BOSWORTH: I want the record to be clear I didn't use the word terminated.
>
> THE COURT: You said fired.
>
> MR. BOSWORTH: And then I stopped saying fired.
>
> THE COURT: It doesn't matter that you stopped. You said it in front of the jury.

(Pa. Super. Ct. Jul. 10, 2018), the Superior Court held that counsel's "repeated objections and the trial court's curative instructions were sufficient to preserve her right to seek a new trial," as a result of opposing counsel's purported misconduct. The Court specifically referenced Pa.R.C.P. 227.1(b)(1), which only requires litigants to make timely objections at trial to preserve the ability to seek post-trial relief. *See also Deeds v. Univ. of Pa. Medical Ctr.*, 110 A.3d 1009 (Pa. Super. 2015) (new trial granted due to the defense's improper questioning of a witness, notwithstanding that plaintiff did not seek a mistrial).

> MR. BOSWORTH: Terminated is fired.
>
> THE COURT: You did it to inflame the jury. That's the difference. It wasn't just not only the words you used – it's how you used the words.
>
> MR. BOSWORTH: I believe I should be entitled to say to the jury, as it's reflected in their record, they used the words she's terminated.
>
> THE COURT: I'm not arguing that you can't use that. I'm just saying you – in your style yelled that she was fired and that's what we're trying to – we don't want the jury to decide this case for a different reason. Discuss and let's see what we can come up with. Ultimately, I'll make the final decision.

N.T. 9/19/22 pm, at 115:13-116:13.

The morning of closing arguments, Plaintiff's Counsel gave the Court his personal assurance that he would not continue to violate the Court's order regarding commentary on Plaintiff's termination of employment:

> The only argument I will make in closing within the confines of Your Honor's instructions is how her lack of employment and not having a job relates to her damages and her inability to work. **I am not going to argue that Penn is liable because they terminated her or that they are liable for terminating her.** I am merely going to argue that the termination and her lack of employment is relevant to the fact that she is unable to work because of her injury.

N.T. 9/20/22, at 19:21-20:6 (emphasis added).

Yet, notwithstanding that colloquy, the Court's directions, and Plaintiff's counsel's personal assurances the morning of closing arguments about what he was *not* going to argue, Plaintiff's counsel repeated his offensive conduct. During his closing argument – at the rebuttal stage, no less, *when he knew he would have the last word* – Plaintiff's counsel provided one of the most egregious statements of all:

> And now Ms. Melendez who is here, she's not here, she's here, her life is ruined. They don't dispute that. Oh, we feel so bad. You feel so bad? Give us – **turn your property in, turn in your badge. They**

> **kicked her to the curb and now they dragged her through the mud. Don't let them do it anymore.**

N.T. 9/20/22, at 123:4-11 (emphasis added).[8]

[8] When Defendants' counsel raised the issue of Plaintiff's counsel's comments and the following discussion occurred on the record:

> MS. CONWAY: Your Honor, I believe that we need a more curative statement now related to employment after Mr. Bosworth's "they kicked her to the curb statement --
>
> THE COURT: It's closing argument.
>
> MS. CONWAY: But Penn is not a defendant in the sense --
>
> THE COURT: Yes. You're trying to stretch it a little too much. I heard the argument through the whole trial. You guys are going a little too far. It's closing argument. If the jury doesn't want to believe that or they think Mr. Bosworth is exaggerating, so be it. They heard the evidence. It's closing argument. They will not get confused. They know it's not a wrongful termination. It's not there. You want a mistrial? I don't know how you cure that. What am I supposed to do, bring them back in here and say you know what this is. It isn't about this, that and the other thing and get them thinking about issues that they are not thinking of. It's clear. The will get the verdict slip. It will say: Was Dr. Mo negligent? Was Dr. D'Angelantonio negligent? The issues are going to be really clear. I'm not going to start instructing them on other stuff. I'm just not doing it.
>
> MS. CONWAY: I understand your position. I think I stated my objection. I think it was inappropriate and it's irrelevant and it's been an issue, ongoing issue in this case.
>
> THE COURT: I think it's directly relevant to the damages.
>
> MS. CONWAY: I would -- you don't want to hear my argument.

N.T. 9/20/22, at 124:1-126:8

ii. Plaintiff Falsely Suggested that *Defendants* had Terminated Plaintiff.

Plaintiff's counsel clearly knew that Ms. Melendez was not employed by Dr. Mo, Dr. D'Angelantonio or their medical practices but was an employee of the Hospital of the University of Pennsylvania only. Yet, this knowledge did not stop Plaintiff's counsel from attempting to paint the false picture that Defendants bore some responsibility for her employment status.

Plaintiff's counsel continued his attempt to confuse the jury by blurring the lines between the Defendants and Ms. Melendez's employer by suggesting that "Penn" "terminated" Ms. Melendez's employment. Plaintiff's counsel repeatedly, and over objections, referred to "Penn" as a single entity when there was no claim, employment related or otherwise, against "Penn" in this case and Plaintiff's counsel knew it. *See* N.T. 9/16/22 pm, at 36:3-37:16. During Plaintiff's counsel's direct examination of Ms. Melendez, he repeatedly asked, over the objection of Moving Defendants' counsel, whether anyone in the "Health System" offered her another job. *See* N.T. 9/16/22 pm, at 22:2 -24:24. Notwithstanding the fact that Plaintiff's counsel was well aware that there was no claim asserted against "Penn" in this case, and that Defendants played no role in Ms. Melendez's employment status, he again suggested otherwise, in his closing argument. Indeed, Plaintiff's counsel's very last statement to the jury was a transparent invitation to punish Defendants (in circumstances where only Dr. Mo and Dr. D'Angelantonio — again, whom Plaintiff's counsel knew had absolutely no employment relationship with Ms. Melendez —were on the verdict slip) because "they kicked her to the curb and now they dragged her through the mud. Don't let them do it anymore." N.T. 9/20/22, at 123:4-11.

Plaintiff's counsel's conduct – including his insinuation to the jury during his closing argument that the "they" were not being truthful when "they" said they "feel so bad" for Plaintiff, *See* N.T. 9/20/22, at 123:4-11, was his final attempt to confuse the jury about the issues to be

decided. This Court acknowledged the inappropriate nature of Plaintiff's counsel's comment in his rebuttal. *See* N.T. 9/19/22 pm, at 115:17-116:1 and N.T. 9/20/22, at 127:24, respectively (referencing that counsel's references to termination/firing were intended to "inflame the jury").[9]

Defendants moved for a mistrial after the close of Plaintiff's case-in-chief but this Court denied that request; yet, it is clear that Plaintiff's counsel knowingly violated a court order or rule. In circumstances where a party's counsel refused to listen to this Court's admonitions, our Superior Court has clearly held that the only remedy is a new trial:

> We have held that when a party intentionally violates a pretrial order, the only remedy is a new trial, in order to promote fundamental fairness, to ensure professional respect for the rulings of the trial court, to guarantee the orderly administration of justice, and to preserve the sanctity of the rule of law.

Mirabel v. Morales, 57 A.3d 144, 151 (Pa. Super. 2012) (internal quotation marks omitted). *See also Poust v. Hylton*, 940 A.2d 380, 384-86 (Pa. Super. 2007) (granting new trial where defense counsel "intentionally [used] a prejudicial word . . . in violation of" a motion *in limine*, "compromising the ability of the [plaintiff] to receive a fair trial").

Moreover, the Pennsylvania Superior Court has held that the trial court's order could constitute reversible error in circumstances where a mistrial was requested, but denied. *See Mirabel v. Morales*, 57 A.3d 144, 151 (Pa. Super. 2012) (where counsel's references in closing

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[9] This Court demonstrated its dismay at Plaintiff's counsel's conduct on the record:

> I just don't understand you, Mr. Bosworth. You get an inch and you take 10 yards. We had a – don't look at him. You know what you did. You did this several times during the course of the trial. We talked about it before. You were lucky enough to get an agreed-upon charge which really didn't call into account some of your behavior in this trial. But now, because you just couldn't help yourself, I have to now instruct the jury specifically, and I'm going to instruct them specifically they're to ignore those comments.

(N.T. 9/20/22, at 127).

argument to race appealed to the passions and prejudices of the jury, and were so egregious that no curative instruction could alleviate the taint, new trial was required); *Poust v. Hylton*, 940 A.2d 380, 385 (Pa. Super. 2007); *Young v. Washington Hosp*., 761 A.2d 559, 563 (Pa. Super. 2000) (if counsel's misconduct contributed to the verdict, it will be deemed prejudicial and a new trial will be required.); *Narciso v. Mauch Chunk Twp*., 87 A.2d 233, 234 (Pa. 1952) (it is "well established that any statements by counsel, not based on evidence, which tend to influence the jury in resolving the issues before them solely by an appeal to passion and prejudice is improper and will not be countenanced."). *Saxton v. Pittsburg Railways Co*., 219 Pa. 492, 495, 68 A. 1022 ("verdict obtained by incorrect statements or unfair argument or by an appeal to passion or prejudice stands on but little higher ground than one obtained by false testimony").

The purpose of pretrial motions *in limine* is to "give [ ] the trial judge the opportunity to weigh potentially prejudicial and harmful evidence before the trial occurs, thus preventing the evidence from ever reaching the jury." *See Parr v. Ford Motor Co*., 109 A.3d 682, 690 (Pa. Super. 2014) (*en banc*) (citation omitted). "[W]hen a party intentionally violates a pre-trial order, *the only remedy* is a new trial, in order to promote fundamental fairness, to ensure professional respect for the rulings of the trial court, to guarantee the orderly administration of justice, and to preserve the sanctity of the rule of law." (emphasis added).

In *Poust v. Hylton*, 940 A.2d 380, 387 (Pa. Super. 2007), the Superior Court ordered a new trial in a wrongful death action after counsel disregarded a trial court's order precluding mention of decedent's cocaine use, and asked decedent's treating physician, point blank, whether decedent had cocaine in his system at time of death. As the *Poust* Court explained:

> The grant of a motion in limine is a court order that must be observed. To allow [defense] counsel to violate such a court order, without the declaration of a mistrial, as was immediately sought by [plaintiff's] counsel here, would defeat the intended purpose of such orders. Why would counsel ever bother filing such

> a motion if opposing counsel were free to blithely ignore it without the court's affording any relief to the offended party by way of the grant of a mistrial upon proper application?

Id. at 385.

In this case, Plaintiff's counsel cannot deny that his repeated references to Defendants' purported "termination" or "firing" of Plaintiff violated the trial court's ruling in connection with Plaintiff's opening statement. In fact, he apologized to the Court for his violations. *See* N.T. 9/20/22, at 129:2-7 (MR. BOSWORTH: I apologize –THE COURT: I'm tired of your apologies. I heard them during trial. You seem to keep going, I'm sorry, I'm sorry, I'm sorry. You're good for a little while and then you go off…).

Moreover, there can be no question but that the conduct caused Defendants prejudice. Plaintiff adduced no evidence or expert testimony to establish that Defendants, in particular, Dr. Mo, had anything to do with Plaintiff's employment or any decisions related thereto; thus, Plaintiff had no foundation to claim that he was part of any group that "fired" her or euphemistically "kicked her to the curb." By repeatedly injecting inflammatory statements about employment issues into the case, counsel drew attention to a theory that the jury never should have heard and invited the jury to decide the case on an improper basis. Although this Court attempted to cure counsel's improper remarks, the vast number of counsel's improper references were "too numerous to be harmless." *Pioneer Commercial Funding Corp. v. American Fin. Mortg. Corp.*, 797 A.2d 269, 291 (Pa. Super. 2002), *rev'd on other grounds*, 5855 A.2d 818 (Pa. 2004) (new trial on punitive damages granted where plaintiff's counsel made multiple inflammatory remarks during closing argument); *see also Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978, 987 (Pa. Super. 2005) (plaintiff's counsel's repeated interjections of evidence of foreign crash test standards, which trial court had precluded in pretrial order, was reversible error requiring new trial); *Nigra v. Walsh*, 797

A.2d 353, 358 (Pa. Super. 2002) (new trial warranted in personal injury action where defense counsel violated collateral source rule with multiple questions or comments where "cumulative effect" of references suggested to the jury that plaintiff was receiving social security disability benefits for injuries for which plaintiff sought damages in personal injury action).

Indeed, in *Wilson v. Univ. of Pa. Med. Ctr.*, J-A22008-17, 11 (Pa. Super. Ct. Jul. 10, 2018),[10] a case out of the Philadelphia Court of Common Pleas, the Superior Court affirmed a trial court's grant of a new trial based on defense counsel's attempt to introduce evidence that the court held was not permitted purportedly in derogation of the court's rulings. As the Court noted:

> We find ample record support for the trial court's conclusion that defense counsel, despite admonishment from the court, repeatedly attempted to introduce evidence beyond the scope of the court's rulings, thereby diverting attention from the issues. Although the defense acknowledges on appeal that, "[w]hether the procedure was 'successful' or 'properly' performed was not the issue[,]" Appellants' Brief, at 46, *defense counsel repeatedly disregarded the trial court's directive to focus on the relevant post-procedure care and treatment*.

Id. (emphasis added).

The conduct here is, by orders of magnitude, more egregious than the conduct described in the *Wilson* case discussed above. Here, Plaintiff's counsel repeatedly attempted to inject into this case false, misleading, inflammatory, irrelevant references to Ms. Melendez's treatment as an employee, rather than as a patient, even though her own counsel was fully aware of the precise details of her employment status. Thus, this case warrants no less of a remedy than that determined to be warranted in *Wilson*.

Defendants are entitled to a new trial as a result of Plaintiff's counsel's repeated misconduct during the course of the trial of this matter.

[10] Coincidentally, the attorney whose conduct was at issue in the *Wilson* case was co-counsel for Defendant Dr. Mo in this case; thus, application of the holding of the *Wilson* case is particularly important to ensure fair and equitable treatment of attorneys on both sides of medical malpractice cases.

b. The Court's "Curative" Instruction Was Insufficient to Cure the Harm.

The fact that the Court sustained some of defense counsel's objections and cautioned plaintiff's counsel once was not adequate to overcome the prejudice and taint stemming from plaintiff's counsel's persistent inflammatory comments. During the charging conference, given the Court's denial of a mistrial, the Defendants requested a curative statement based on Plaintiff's counsel's repeated inflammatory statements that Ms. Melendez had been fired/terminated by Defendant "Penn." *See* N.T. 9/19/22 pm, at 111:20-117:2.

The Court's curative instruction was insufficient to cure the harm for three essential reasons. First, the instruction did not instruct the jury to disregard the evidence and instead advised the jury that it could consider it "if you're considering whether she cannot work." N.T. 9/20/22, at 140:24-141:9.[11] Thus, it is debatable whether the instruction can fairly be classified as a curative instruction. The Court's directive reminded the jury that Ms. Melendez had been separated from her employer (against whom Plaintiff had repeatedly suggested there was a claim in the action). Thus, it is impossible to say with any fair assurance that the verdict for Plaintiff was not

[11] The Court gave the following curative statement:

> During the course of the trial, you heard statements or comments regarding the plaintiff's termination from her employment with the University of Pennsylvania. You heard it in the closing arguments and I think you may have heard it in the opening arguments. I don't want the jury to be confused. This is not a case against Penn as a corporate entity. This is not a case for wrongful termination. So that those comments or any evidence regarding that has nothing to do with those issues. This is a case about negligence for the two doctors that are part of this trial.
>
> This evidence, though, is relevant if you're considering whether she can work or she cannot work. There may have been some evidence or some comments during the course of the trial questioning whether she can still work. So that evidence, whether she was terminated, is relevant, but only to that issue and not any other issue, and you cannot consider that evidence for anything other than whether she has the ability to continue her employment.

N.T. 9/20/22, at 140:10-141:9.

substantially swayed by the error in allowing the jury to repeatedly hear counsel's unfairly prejudicial statements. *Siegal v. Stefanyszyn*, 718 A.2d 1274, 1277 (Pa. Super. 1998) (curative instructions have been found insufficient when they do not address the prejudicial misconduct and are not "directed toward the damage done" by such misconduct); *Young v. Washington Hospital*, 761 A.2d 559, 561 (Pa. Super. 2000) (when a prejudicial remark is objected to, it is the duty of a trial court to cure the harm caused by counsel's misconduct).

Second, the Court's instruction omitted any reference to Plaintiff's counsel's other prejudicial comments or, specifically, to Plaintiff's counsel's highly inflammatory "kicked her to the curb" comment and/or invitation to punish Defendants. Accordingly, the instruction was insufficient to cure the harm that counsel's repeated references to Ms. Melendez's firing/termination by "Penn" caused Defendants over the course of trial.

Third, the prejudice itself was so great that it could not be cured. *See Com. v. McEachin*, 537 A.2d 883 (Pa. 1988) (Cirillo, J, dissenting) (where the evidence presented to the jury is unduly inflammatory, or where such evidence, if presented at trial, would so compromise the fact finder that it would be unable to remain impartial, a curative instruction cannot provide a defendant with a fair trial.). The Court's instruction likely brought more, not less, attention to the issue. *See Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) ("[o]ne cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it"): *Thompson v. United States*, 546 A.2d 414, 425 (D.C. 1988) ("Stated more simply, a drop of ink cannot be removed from a glass of milk.") *Id.* (citation and internal quotation marks omitted). The United States Supreme Court, too, has recognized that "some occurrences at trial may be too clearly prejudicial for . . . a curative instruction to mitigate their effect." *Donnelly v. DeChristoforo,* 416 U.S. 637, 644 (1974). *Cox v. Wilson*, No. 15-cv-

0128, 2017 WL 1632506, at *6 (D. Col. May 2, 2017) ("cautionary instructions are effective only up to a certain point" and granting Plaintiff's new trial motion after noting that the Court "has little confidence that the instruction was sufficient to ameliorate the prejudicial impact and harm done").

Given the nature and seriousness of the misconduct, Plaintiff's counsel's continued total disregard for this Court's rulings and admonitions, and the fact that Plaintiff's counsel essentially dared this Court to grant a mistrial as a result of his behavior, this Court should now award a new trial. In the Court's own words, Plaintiff's counsel was given "an inch" but "took 10 yards," using this Court's conciliatory judicial temperament to his own benefit. By ignoring this Court's rulings, Plaintiff's counsel made it inevitable that the jury would conclude that it, too, did not need to pay attention to the instruction not to consider this a wrongful termination case.[12]

Where, as here, "an error in trial is of such consequence that, like a dash of ink in a can of milk, it cannot be strained out, the only remedy, so that justice may not inject a tainted fare, is a new trial." *Lobalzo v. Varoli* 185 A.2d 557, 561 (Pa. 1962).

Plaintiff's counsel's misconduct, which should have resulted in a mistrial, combined to create a tainted trial atmosphere that deprived Defendants of a fair trial. Accordingly, Moving Defendants respectfully request the Court to order a new trial.

[12] This case presents a perfect example of a case where numerous rulings and errors resulted in an unfair trial and an outcome that was highly prejudicial to Defendants. The Supreme Court of New Jersey addressed the circumstances in which aggregation of errors will be sufficient to overturn a verdict. In *Pellicer ex rel. Pellicer v. St. Barnabas Hosp*., 200 N.J. 22 974 A.2d 1070 (2008), the New Jersey Supreme Court recognized that "the cumulative effect of small errors may be so great as to work prejudice," and described a trial as a "dynamic organism which can be desensitized by too much error or too much curative instruction." *Diakamopoulos v. Monmouth Med. Ctr*., 312 N.J. Super. 20, 37, 711 A.2d 321 (App.Div.1998).

c. Plaintiff's Counsel's Other Inappropriate Trial Conduct.

After Plaintiff's opening statement, and throughout the remainder of trial, Plaintiff's counsel continued to engage in unnecessary and prejudicial commentary and act inappropriately in front of the jury, to the point that the Court had to remind and admonish Plaintiff's counsel to restrain himself **forty-eight times during ten days of trial**.

For example, during examination of witnesses, the Court admonished Plaintiff's counsel to only ask questions of the witness, to "[k]eep it without the theatrics." *See* N.T. 9/6/22 pm, at 25:2-26:25, and to "ask the question without comment." *Id.* at 30:25-31:3. The Court reminded Plaintiff's counsel repeatedly to permit witnesses to answer Plaintiff's counsel's questions and to only ask one question at a time. *Id.* at 59:15-24, 62:4-7 and 81:3-13.

In other instances, Plaintiff's counsel interjected commentary in his questioning, which he persisted in doing, prompting objections and further admonishment from the Court. N.T. 9/7/22 am, at 18:21-24. However, despite Plaintiff's counsel's representations that he understood the Court's instructions, he continued this highly improper practice. *See* N.T. 9/12/22 pm, at 11:15-12:11. While questioning witnesses - in particular, those presented by Defendants - Plaintiff's counsel would provide the jury his view of the topic in question before posing the question to the witness.

This occurred numerous times during the testimony of the very first witness, Paul Maurer, until the Court felt compelled to interrupt and admonish Plaintiff's counsel to only ask questions of the witness and to "[k]eep it without the theatrics." *See* N.T. 9/6/22 pm, at 25:2-26:25. The Court repeated its instruction to Plaintiff's counsel during the same examination when it directed Plaintiff's counsel to "ask the question without comment." *Id.* at 30:21-31:6. Despite these

directions from the court, the following argumentative exchange took place before the jury at the end of Mr. Maurer's testimony:

> Q. There's only one specific point in time that we're talking about, where we're talking about he says there was a glitch. That's March 5, 2014, where he says there's a glitch. **The other excuse was it was a click error**.
>
> MS. CONWAY: Objection, Your Honor.
>
> BY MR. BOSWORTH:
>
> Q. **We'll talk about that**.
>
> THE COURT: Hold on.
>
> MR. BOSWORTH: I wasn't done with the question.
>
> THE COURT: I don't [sic] if that was a question or argument. Make it a question.

Id. at 81:6-18. This pattern of conduct was repeated throughout the trial despite repeated admonishments from the Court. *See* N.T. 9/13/22 pm, at 108:11-109:14.

As another example, just before the re-cross-examination of Dr. D'Angelantonio, the Court was forced again to admonish Plaintiff's Counsel for injecting his own commentary into the trial in disregard of the Court's prior instructions:

> MR. BOSWORTH: I certainly have some questions based on that testimony.
>
> THE COURT: Are you going to ask questions, or are you going to comment?

Id. at 102:16-19. Soon thereafter, in response to more of Plaintiff's counsel's commentary, the Court ordered Plaintiff's counsel to simply ask questions. *Id.* at 109:10-14.

At another juncture, the Court once again had to remind Plaintiff's counsel to refrain from speaking objections and inflammatory commentary after the jury had left the room:

> THE COURT: I get it you're excited. I get it you can be frustrated. You need to get that under control. Because the next time it's going to be in front of that jury and it's not going to be on me, it's going to be on you. Do we understand each other?
>
> MR. BOSWORTH: Yes.
>
> THE COURT: Ask your questions. Make your points. Do not make comments. I'm not going to tell you again.

See N.T. 9/19/22 am, at 100:7-25.

During Dr. Dickey's cross examination, Plaintiff's counsel had to be admonished by the Court for attempting to circumvent the rules of evidence in connection with introduction of a purported authoritative text. *Id.* at 76:6-78:15. Despite being instructed by the Court on how to introduce such a document, Plaintiff's counsel failed to heed this instruction and once again injected inappropriate commentary, prompting this Court again to instruct him to stop his commentary. *See Id.* at 81:15-83:16

Plaintiff's counsel continued to engage in inappropriate and inflammatory commentary in front of the jury, *Id.* at 92:13-21, resulting in an exchange where this Court asked counsel: "why are you begging me to admonish you in front of the jury? Tell me why because I'm trying my hardest not to admonish you in front of the jury. I don't want to do anything that the jury can take any clues from me to decide this case. I want this case decided on evidence. So you tell me why you're having trouble following my directions." *Id.* at 100:8-102:6.

Taken alone and collectively, Plaintiff's counsel's conduct resulted in scenario where the rules of evidence and adherence to this Court's rulings were optional. Defendants sustained severe prejudice as a result of Plaintiff's counsel's blatant misconduct throughout the entire proceedings. Thus, for this reason as well, this Court should grant a new trial.

2. This Court Should Grant a New Trial as a Result of this Court's Decision to Allow Irrelevant Evidence and Argument Regarding Ms. Melendez's "Termination" from her Employment in Circumstances where the Evidence was Irrelevant to Plaintiff's Damages Claim.

It is well-established in Pennsylvania that "[e]vidence that is not relevant is not admissible." Pa.R.E. 402. In this case, the Court permitted, over the objections of defense counsel, wholly irrelevant and immaterial evidence regarding the circumstances of Ms. Melendez's employment with the Hospital of the University of Pennsylvania and the facts surrounding her departure from that job.

While there can be no doubt that evidence regarding Plaintiff's physical ability (or lack thereof) to work clearly was relevant to Plaintiff's claims for past and future lost wages, evidence regarding Plaintiff's job *performance*— including whether Plaintiff was "punctual," "gets along with everyone she comes into contact with" or obtained good job performance scores – as well as any and all decisions made by her employer in connection with her separation of employment *had absolutely no relevance to any issue in this case*. The plain fact is that none of this evidence was relevant or probative to any issue in the case. Ironically, Plaintiff's counsel made this point when he asked the witness, the custodian of the Hospital of the University of Pennsylvania's employment records relating to Ms. Melendez (Ms. Whitney Jackson) whether she had been involved in Ms. Melendez's care:

PLAINTIFF'S COUNSEL:	Obviously, we just met before, but I want to be clear that you're obviously not here – like you were not involved in Ms. Melendez's care or any of the facts of the case?
MS. JACKSON:	**No, I was not**.

N.T. 9/13/22, am, at 40:13-17.

As Defendants' counsel argued repeatedly during trial, there was no dispute that Plaintiff and her employer, the Hospital of the University of Pennsylvania, *agreed* that Plaintiff could no longer perform her job; thus, there were no *facts* that needed to be proven in that regard. Moreover, there was no direct claim of negligence, no claim of any violation of the Family Medical Leave Act ("FMLA") or other employment law claim against the Hospital. Yet, Plaintiff was given free rein to present testimony from a Penn Medicine human resources record administrator recounting the circumstances pursuant to which Ms. Melendez left her employment.

Plaintiff's counsel continued to refer to Ms. Melendez's termination of employment during Ms. Melendez's direct examination, *see* N.T. 9/16/22 pm, at 22:2-24:24, in questioning that implied that the Defendants had a duty to provide Ms. Melendez with another job. Specifically, Plaintiff's counsel asked Ms. Melendez whether anyone at "Penn" offered anything to the effect of "welcome back, we have a spot here for you at Penn, you can do this job." *Id.* at 23:17-20. This Court instructed Plaintiff's counsel that he was "going too far." *Id.* at 23:23-24.

Without a claim against her employer – which, in any event, would not be properly joined into a medical malpractice action against physicians – none of this information had any relevance whatsoever to this case, let alone Plaintiff's claims against Dr. Mo. Yet, despite Defendants' counsel's repeated pleas that the evidence be precluded, this Court overruled the objections and permitted the evidence to be presented to the jury. This Court did so, even though the Court itself acknowledged that claims that "[Ms. Melendez] was terminated … had a prejudicial tone."

Our Supreme Court has made clear that irrelevant evidence should not be introduced if its introduction risks confusing the jury with extraneous facts unrelated to the issues in the case. In *Price v. Guy*, 735 A.2d 668 (Pa. 1999), the Court overturned the trial court's denial of a new trial after concluding that irrelevant evidence regarding plaintiff's choice of limited tort coverage was

admitted at trial. Finding that "the fact that appellants paid lower insurance premiums in exchange for limited tort coverage" was wholly irrelevant to issues regarding the "severity of the non-economic injuries suffered by a plaintiff and the corresponding level of damages," the Court overturned the decision of both the trial court and the Superior Court. The Court further explained that the jury "simply did not require an explanation of why appellants had to demonstrate the existence of a 'serious injury' before they could recover non-economic damages." *Id.* "All that was required," the Court noted, "was a clear explanation of the criteria which the jury was permitted to consider in determining whether appellants had demonstrated the existence of a 'serious injury." Thus, the Court held, "[b]y delving into an explanation of why appellants shouldered their burden, the trial court brought facts to the jury's attention which were of no consequence to any issue in the case." *Id.*

This Court should reach the same result here. Evidence regarding Plaintiff's separation from her employment – however it is described – is of no relevance whatsoever to any claim at issue in this case. Because this Court allowed this irrelevant testimony to be introduced in a manner that prejudiced Dr. Mo (by allowing the jury to conflate the medical malpractice case with a wrongful termination case), this Court should grant a new trial.

3. This Court Should Grant a New Trial as a Result of the Prejudice Caused by the Court's Erroneous "Spoliation" Charge.

This Court should also grant a new trial as a result of the prejudice that occurred when this Court – in the middle of trial and without basis – gave the jury a "spoliation" charge that told the jury that Defendants had withheld important information from Plaintiff. Plaintiff's counsel asked for this instruction based on a set of facts that Plaintiff's counsel himself implicitly acknowledged and later stipulated was not true.

The issue arose when Paul Maurer, a Hospital of the University of Pennsylvania IT witness called by Plaintiff, testified that he looked at multiple documents in connection with the "software glitch" issue (whereby the electronic medical record software automatically relocated the word 'weakness' from the constitutional section to the neurologic section in the review of systems section of the progress note) that included a screen shot from 2009 and another from 2015. Mr. Maurer testified (it turns out, mistakenly) that these screen shots corroborated the fact that there was a glitch in the software used for electronic medical records that resulted in a symptom of Plaintiff's being recorded in the wrong place. *See* N.T. 9/6/22 pm, at 58:9-63:23. Plaintiff complained that the screen shots should have been produced during discovery. Plaintiff's counsel, however, ultimately agreed that the screenshots did not corroborate Dr. Mo's testimony – which is a tacit acknowledgement that the documents were not responsive to Plaintiff's discovery requests and therefore did not need to be produced during discovery. *See* N.T. 9/19/22 pm, at 108:20-111:10.

Notwithstanding the fact that Defendants' counsel argued – and Plaintiff ultimately agreed – that the screen shots were not relevant, this Court, ruled that the screen shots Mr. Maurer referenced should have been produced by defense counsel before trial. As a result, the Court gave a highly damaging mid-trial instruction to the jury informing the jury that Defendants had done something wrong in failing to produce the screen shots to Plaintiff's counsel.

Immediately after Plaintiff's counsel's questioning of Dr. Quinn, the Court, over objection of Defendants' counsel, gave the following instruction to the jury:

> Any testimony in regard to any screenshots are going to be stricken from the record and stricken from evidence in this case. The jury is to disregard this testimony or any testimony regarding screenshots. These documents were -- **any documents in regards to this issue were supposed to be turned over by the defense to the plaintiff. They were not turned over**. They're not properly part

> of this case and not properly part of the evidence you need to consider. As I told you before we started this trial, the only evidence that you can consider is evidence that was admitted into evidence during the course of this trial, whether it's testimony or it's documents. These documents have not been admitted. They will not be admitted and are not part of this trial. So you need not consider and you should not consider these documents. I may during the course of the trial or at the end of trial in my final charging instructions address this issue further. So for now, these documents should be out of your mind.

N.T. 9/9/22, at 57:24-58:23.

Respectfully, there was no legal basis, at that time, or at any point during the trial, for this instruction. While a trial court has broad discretion in phrasing its instructions and may choose its own wording as long as the law is clearly, adequately, and accurately presented to the jurors, *Commonwealth v. Smith*, 17 A.3d 873, 906 (Pa. 2011), a court errs when its instructions inaccurately state the law or the court otherwise abuses its discretion. *Id.* An abuse of discretion, in turn, is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law. *Commonwealth v. Hoover*, 16 A.3d 1148, 1150 (Pa. Super.2011). Here, this Court erred and abused its discretion in suggesting that the defense had acted improperly in not turning them to Plaintiff's counsel prior to the adjudication of the issue of whether defendants were required to produce the screenshots.

First, as a procedural matter, there was no specific document request for these particular screen shots, no motion to compel and no court order that defense counsel had violated that would possibly give rise to a sanction in the form of an instruction. Second, the Court did not determine that any evidence had been "spoliated" (nor could it have reached this conclusion where it was

clear that Plaintiff's counsel had access to the screen shots during trial) nor consider the elements that must be satisfied before a spoliation charge may be given.[13]

The charge was effectively a discovery sanction, issued at the worst possible time (during trial), without any precatory motion and where Defendants had no obligation to turn over the material.

The Court's instruction was unduly prejudicial to Defendants. Thus, Defendants respectfully request a new trial for this reason as well.

4. This Court Should Grant a New Trial to Ameliorate the Prejudice Caused by the Admission of Inadmissible Social Security Records of Plaintiff.

The Court erred in failing to declare a mistrial after the jury was presented with video testimony from S. Ross Noble, M.D. that referred to findings from Social Security Disability records. *See* N.T. 9/15/22 pm, at 6:11-21:11. This Court ruled the Social Security Disability records and references to them were *inadmissible* two days before Plaintiff presented the video testimony of Dr. Noble. *See* N.T. 9/13/22 am, at 12:19-24:16. The Court explained it was Plaintiff's counsel's responsibility alone to ensure all portions of Dr. Noble's testimony referring to Social Security Disability records were removed from the video. N.T. 9/13/22 am, at 20:12-13.

Whether by accident or design, Plaintiff's counsel failed to carry out that responsibility, causing inadmissible evidence to be presented to the jury and undue prejudice to Defendants. The

[13] The spoliation doctrine is intended to further the public policy of protecting defendants who may be unable to prepare a defense after the destruction or loss of an allegedly defective product. *Schroeder v. DOT*, 551 Pa. 243, 710 A.2d 23 (1998). In determining whether the doctrine of spoliation applies, the *Schroeder* court looked at (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. *Id.* Had the Court considered the request for the charge pursuant to this case law, it would no doubt have concluded that the charge should not be given.

records communicated to the jury that the federal government had rendered a determination of disability which undermined any effort by the defense to suggest otherwise.

Once again, the Court attempted to cure the prejudice by way of curative instruction, out of concern that a verdict in favor of Plaintiff "being reversed on appeal because that came in because it slipped through tech [sic] or because [Plaintiff's Counsel] mentioned it on occasion." However, the instruction was insufficient to cure the extreme prejudice suffered.

Thereafter, Plaintiff compounded the prejudice sustained by questioning Plaintiff's standard of care expert, Paul Genecin, M.D. in a manner that suggested that the disability determination made by the Social Security Administration bore the imprimatur of the federal government and therefore was indisputable.

The following questions and objections on the record occurred during Dr. Genecin's direct examination:

QUESTION: Based on your review of the file, what medical records did the U.S. government rely upon in determining she was disabled, which health system's records?

MS. CONWAY: Objection.

MS. VIZZA: Objection.

THE COURT: Sustained.

BY MR. BOSWORTH: Did you review the records, that of the U.S. Government, to show which health system they relied upon, which records of which health system they relied upon in determining she is disabled?

ANSWER: I did.

QUESTION: What health system?

ANSWER: The records from Penn.

MS. VIZZA: Objection, Your Honor.

COURT: Sustained.

MS. VIZZA: Move to strike.

COURT: Move to strike. You can ask him what records he reviewed.

ANSWER: Well, I reviewed extensive records; most of them from Penn.

QUESTION: Does that include the Social Security records that you already said you reviewed?

ANSWER: Yes.

QUESTION: In those records, what did you review in terms of the findings of the U.S. government?

MS. VIZZA: Objection.

MS. CONWAY: Objection.

*** **** ***

THE COURT: No, that's not what they are suggesting. You're trying to get the finding of the Social Security Administration in, if I understand the question correctly.

MR. BOSWORTH: My question is what documents, what medical records that he reviewed in arriving at their findings. I'm not asking him does he agree with the findings. I'm merely --

THE COURT: I sustained that objection. You can ask what records he reviewed and discuss the records, but I don't see anywhere in that report where you're going to get in the Social Security record, which seems to be the nature of your question.

Am I correct?

MS. VIZZA: Yes.

MS. CONWAY: Yes.

*** **** ***

THE COURT: You can't get in the Social Security findings based on this witness.

*** **** ***

QUESTION: Doctor, before we move on, and just to be clear, based on your review of the file and the documents in this case, is there any document that the defense or anyone in this courtroom could show you that would refute that she's been rendered permanently disabled by the U.S. government?'

Answer: No.

See N.T. 9/12/22 am, at 39:5- 42:16.

The evidence regarding any determination made by the Social Security Administration is clearly hearsay and inadmissible. The Rules of Evidence define hearsay as "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers into evidence to prove the truth of the matter asserted in the statement." Pa.R.E. 801(c). As a matter of law, hearsay testimony is *per se* inadmissible. *See, e.g., Commonwealth v. Cunningham*, 805 A.2d 566, 572 (Pa. Super. 2002), *appeal denied*, 573 Pa. 663, 820 A.2d 703 (2003) ("[h]earsay testimony is per se inadmissible in this Commonwealth, except as provided in the Pennsylvania Rules of Evidence, by other rules prescribed by the Pennsylvania Supreme Court, or by statute."). The only way to cure the obvious prejudice caused by exposing the jury to this inadmissible evidence is to grant a new trial.

5. This Court Should Grant A New Trial to Remedy the Trial Court's Erroneous Decision to Preclude Defendants' Counsel from Cross Examining Plaintiff on Her Medical Records.

This Court should grant a new trial for yet another compelling reason; namely, because this Court precluded Defendants from cross-examining Plaintiff on her medical records in circumstances where those records reflected that Plaintiff specifically reported no sensory changes, no back pain, or similar symptoms. The evidence was directly relevant to the defense that Plaintiff was not reporting neurologic complaints to Dr. Mo and her healthcare providers between 2012 and 2016 and, alternatively, to the Defendants' claim that Plaintiff was comparatively negligent. The evidence was not hearsay and met all of the requirements for use at trial during cross-examination and as substantive evidence. There was no basis under the Rules of Evidence to preclude Defendants' use of these records and, thus, the Court's decision to do so constitutes reversible error. Defendants were prejudiced by the failure of the Court to allow cross-examination using this material as reflected in the fact that the jury obviously accepted Plaintiff's unsubstantiated testimony that she was reporting neurologic complaints to Dr. Mo and her healthcare providers in 2015-16 and only found Plaintiff only 6% liable.

For this reason as well, this Court should grant a new trial.

6. This Court Should Grant a New Trial to Ameliorate the Prejudice Caused by the Court's Preclusion of Evidence and Opinions Regarding Plaintiff's Cancelled Follow-Up Appointments.

This Court should also a grant a new trial to ameliorate the harm caused by this Court's decision to grant Plaintiff's Motion *in Limine* and to preclude defense experts from offering opinions addressing the fact that Ms. Melendez cancelled follow-up appointments.

It is difficult to conceive of evidence more critical to a medical malpractice claim – particularly, where there is a claim of contributory negligence – than evidence of Plaintiff's abject

failure to address her own health needs by following up on appointments as instructed by her physicians. Plaintiff's entire case was predicated on the fact that Plaintiff had been experiencing progressive neurologic symptoms that she was reporting in real time to Dr. Mo. The court held that the missed appointment were simply "facts" and not the basis for the defense experts' opinions.

The Court's decision constitutes reversible error. First, it overlooks that an expert must base his or her opinion on facts of record. *See* Pa.R.E. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.). As the Court recognized, the fact that Ms. Melendez cancelled appointments is a "fact" in this record. Thus, under Rule 703, defense experts were entitled to rely on this information in forming their opinions.

Second, the Court's decision overlooks that defense expert, Dr. Christopher Smith, M.D., *expressly referenced* the fact that Ms. Melendez cancelled two separate appointments in the opinion section of his report. This fact was and is a predicate to his opinion that Ms. Melendez did not have and, indeed, did not report ongoing neurologic issues. In such circumstances, there was no basis to preclude him from referencing this information in rendering his opinion. Defendants are unaware of any case law or rule that would support such a ruling.

In sum, because this Court unfairly limited the expert testimony presented by Defendants – in circumstances where the testimony of experts in a medical malpractice case is given enormous weight – this Court caused Defendants severe prejudice. Therefore, this Court should grant a new trial.

7. This Court Should Grant a New Trial on Weight of the Evidence Grounds.

It is well-established that a new trial should be granted to correct injustice when the verdict is shocking to the conscience of the court. The Pennsylvania Supreme Court has stated:

> "[w]hen a jury's finding is so opposed to demonstrative facts that, looking at the verdict, the mind stands baffled, the intellect searches in vain for cause and effect, and reason rebels against the bizarre and erratic conclusion, it can be said that the verdict is shocking…"

Green v. Johnson, 227 A.2d 644, 645 (Pa. 1967).

As set forth above, Plaintiff failed to present sufficient evidence of an objective standard of care that Defendants breached that caused Ms. Melendez's injury. Defendants hereby incorporate those arguments as well as the arguments set forth with regard to Plaintiff's deficiencies in proving causation.

Overall, a review of the entire record – including the testimony of Defendants' experts — demonstrates that in addition to the fact that Plaintiff failed to provide sufficient evidence to support her claims, the weight of the evidence[14] does not support the verdict on Plaintiff's claims.

At trial, internal medicine physician Christopher Smith, M.D. testified on behalf of Defendants, Dr. Mo and CCA. Dr. Smith testified , to a reasonable degree of medical certainty, that Dr. Mo met the standard of care of an internal medical physician at all times during his care and treatment of Ms. Melendez. *See* N.T. 9/16/22 pm, at 50:22-51:8. Dr. Smith testified as follows:

> Q. In reviewing those records, did you form any opinions as to whether or not Dr. Mo in his care and treatment of Ms. Melendez between 2011 and 2017 met the standard of care?
>
> A. I did form an opinion and felt that he did meet the standard of care throughout that time.
>
> Q. Okay. Are all your opinions to a reasonable degree of medical certainty?

[14] In reviewing a motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-52 (Pa. 2000).

A. They are certainly

See N.T. 9/16/22 pm, at 50:10-18.

Dr. Smith then explained, in detail, how Dr. Mo was very engaged in Ms. Melendez' care, saw her regularly, cared for her many common medical conditions, was responsive in Ms. Melendez' care and answered her questions in a timely manner. He told the jury that Dr. Mo provided high quality care that met the standards of internal medical practice. *See* N.T. 9/16/22 pm, at 50:19-51:8. Regarding the first visit at issue, February 6, 2012, Dr. Smith testified that Ms. Melendez' presenting symptoms of mid back pain and tingling are common. He testified that Ms. Melendez did not have "red-flag" symptoms that would indicate something more worrisome and that, as such, the standard did not require that Dr. Mo refer Ms. Melendez to neurology or for an MRI. *See* N.T. 9/16/22 pm, at 54:2-55:6.

Dr. Smith then testified in detail how Dr. Mo also met the standard of internal medicine care on March 5, 2014. *See* N.T. 9/16/22 pm, at 61:19-62:16. Dr. Smith further testified again there were no worrying signs that would indicate the need for a referral. *See* N.T. 9/16/22 pm, at 64:9-65:1. Dr. Smith also testified that on January 14, 2016, Ms. Melendez's instances of tingling and back pain were isolated with a return to "normal" between visits, which indicated that these were separate occurrences, not indicative of a progressive neurological condition throughout Dr. Mo's treatment from 2012 to 2017, and that Dr. Mo was correct not to diagnose a progressive disease. *See* N.T. 9/16/22 pm, at 78:8 – 80:23. Contrary to Plaintiff's expert's testimony, Dr. Smith articulated an objective standard of care as well as all the facts upon which he relied to determine that Dr. Mo met the standard of care.

To address the issue of causation, Defendants provided testimony from neurosurgeon Philip Dickey, M.D. Dr. Dickey testified that Ms. Melendez did not have a spinal lesion or AV

fistula prior to 2016. He testified that symptoms of spinal edema would not wax and wane for a period of years, (at most they could vary for a few weeks but would then get progressively worse), which indicated that no lesion existed until 2016 at the earliest. *See* N.T. 9/19/22 am, at 29:1-7 and 33:9-34:2; N.T. 9/19/22 pm, at 84:13-85:16. He testified that if Ms. Melendez had 4+ reflexes in 2012 caused by a fistula, they would not improve on their own and Ms. Melendez would not be able to bend her knees or ankles until the fistula was repaired in 2017, which also suggests there was no AV fistula in 2012. *See* N.T. 9/19/22 am, at 43:2-6. Dr. Dickey also testified that if an AV fistula formed between 2012 and 2016, Melendez would have had significant neurological, gait, and walking issues – none of which were reported to her physicians. *See* N.T. 9/19/22 am, at 43:20-44:3. Dr. Dickey testified that the findings on the January 2016 visit of one sided tingling was not suggestive of a spinal emergency. *See* N.T. 9/19/22 am, at 45:8-23. Dr. Dickey told the jury that a spinal fistula would cause sensory loss in a stocking distribution, affecting everything from the T7 dermatome down and that complaint of sensory loss in a strip in the L5 dermatome in January 2016 was not indicative of a spinal injury. *See* N.T. 9/19/22 am, at 48:5-18.

Importantly, Dr. Dickey testified that the first time there was documentation of definite myelopathy was Ms. Melendez's visit with neurologist Dr. Khella in January 2017 when Dr. Khella reported spasticity. *See* N.T. 9/19/22 am, at 52:17-53:10 and 72:4-9. Dr. Dickey testified that imaging studies prior to **late 2016** would not have shown a spinal cord injury and that the AV fistula developed in late 2016. *See* N.T. 9/19/22 pm, at 82:4-13, and 85:8-16. Dr. Dickey's testimony was expressed to a reasonable degree of medical certainty. *See* N.T. 9/19/22 am, at 26:5-15; N.T. 9/19/22 p.m., at 86:7-11. Accordingly, this Court erred in not granting Defendants' motion for directed verdict and should now grant Defendants a new trial on weight of the evidence grounds.

This Court should also grant a new trial on the grounds that the jury's award "shocks the conscience." A court may grant a new trial in circumstances where the verdict is "so contrary to the evidence as to 'shock one's sense of justice." *Fillmore v. Hill*, 665 A.2d 514, 519 (Pa. Super. 1995). The jury awarded a total of more than $18,485,000 in compensatory damages. Because this verdict was grossly excessive, exorbitant in light of the evidence (or lack thereof), and shocking to one's conscience and sense of justice, Defendants should be granted a new trial.

Moreover, even if there was some basis for liability (which, clearly, there is not),[15] the amount of the verdict was grossly excessive. It cannot reasonably be disputed that Plaintiffs did not prevail on her claim of punitive damages and did not request any damages for out-of-pocket expenses for past medical expenses. Under the circumstances, the jury verdict of $18,485,000 is excessive under any definition.

It is also clear that the jury verdict in this case was based on consideration of improper factors. Although specifically instructed that any verdict returned must be based on the evidence, the jury no doubt was influenced by Plaintiff's counsel's inflammatory statements throughout trial that were intended to evoke sympathy for Plaintiff and animosity toward Defendants, which culminated in Plaintiff's counsel's closing argument. The jury no doubt also was influenced by the notion that the "Penn Defendants" had somehow unfairly treated Ms. Melendez as an employee and it is highly likely that the jury's verdict was intended to "send a message" or punish Defendants as explicitly requested by Plaintiff's counsel in his rebuttal argument. Because sympathy for

[15] As set forth in the judgment notwithstanding the verdict (section A above), there is no evidence upon which a reasonable jury could have found: (a) that Defendants breached an objective standard of care and (b) caused Plaintiff's harm. Because there was no evidence to support any finding of liability, the verdict is against the weight of the evidence and any damages awarded clearly were excessive. Defendants incorporate by reference the arguments they made in connection with their request for JNOV in connection with their weight of the evidence argument and will not burden the court by repeating them, at length, here.

Plaintiff and a desire to punish Defendants are inappropriate bases for compensatory damages awards, the jury's grossly excessive award must be set aside and a new trial on damages awarded.

C. DEFENDANTS ARE ENTITLED TO A REMITTITUR OF THE JURY VERDICT OR, IN THE ALTERNATIVE, A NEW TRIAL ON COMPENSATORY DAMAGES.

Even if this Court does not grant Defendants' motion for judgment notwithstanding the verdict or a new trial, this Court should exercise its discretion and remit the jury verdict, or, in the alternative, should grant a new trial on compensatory damages.

Remittitur is proper when "the jury has returned a verdict excessive in amount and clearly beyond what the evidence warrants." *Murray v. Philadelphia Asbestos Corp*., 640 A.2d 446, 450 (Pa. Super. 1994) (*quoting Taylor v. Celotex Corp*, 574 A.2d 1084, 1099 (Pa. Super. 1990); *Smalls v. Pittsburgh-Corning Corp*., 843 A.2d 410, 415 (Pa. Super. 2004) (remitting compensatory damages award based on Defendants' arguments that the original $2,000,000 and $5,000,000 verdicts were arbitrary, excessive, and not supported by the evidence.).

In determining excessiveness of a compensatory damages award, Pennsylvania courts consider the following factors:

> (1) the severity of the injury;
> (2) whether the plaintiff's injury is manifested by objective physical evidence or whether it is only revealed by the subjective testimony of the plaintiff (and, herein, the court pointed out that where the injury is manifested by broken bones, disfigurement, loss of consciousness, or other objective evidence, the courts have counted this in favor of sustaining a verdict);
> (3) whether the injury will affect the plaintiff permanently;
> (4) whether the plaintiff can continue with his or her employment;
> (5) the size of the plaintiff's out-of-pocket expenses; and
> (6) the amount plaintiff demanded in the original complaint.

Kemp. v. Philadelphia Transp. Co., 239 Pa. Superior Ct. 379, 361 A.2d 362 (1976). Application of these factors here establishes quite clearly that the award is grossly excessive.

As a general proposition, the damages award in this case bears no semblance to the nature of this case, to the alleged negligence, Ms. Melendez's condition, or the damages Plaintiff had requested. This case does not involve a claim for punitive damages (nor, as Defendants previously have explained, could it, as it was a straightforward negligence case).

1. The Award for Pain and Suffering is Excessive.

Plaintiff's award for pain and suffering is clearly excessive.

In particular, the future pain and suffering award ($9,916,667), is inexplicable and is totally lacking in foundation. Not only is the award out of proportion to the testimonial evidence, but it is completely disproportionate to the past pain and suffering award of $850,000. It simply strains all reason to find that Plaintiff's future pain and suffering is worth more than ten times her past pain and suffering, in circumstances, where, if the testimony is believed, the past pain and suffering dated back ten years, to 2012.

"Damages for pain and suffering are compensatory in nature, may not be arbitrary, speculative, or punitive, and must be reasonable." *Haines v. Raven Arms*, 640 A.2d 367, 370 (Pa. 1994). While attempting to reduce pain and suffering to a money damages award is a "highly subjective task ...." "the verdict resulting from this subjective task still requires support in the evidence presented at trial." *Polett v. Pub. Commc'ns, Inc.*, No. 80 EDA 2017, 2017 WL 6395873, at *2 (Pa. Super., Dec. 15, 2017); *see Neison v. Hines*, 653 A.2d 634, 637 (Pa. 1995) (*quoting Paves v. Corson*, 801 A.2d 546, 549 (Pa. 2002)) ("[A] compensatory damage award 'must bear some reasonable relation to the loss suffered by the plaintiff as demonstrated by uncontroverted evidence at trial.'").

In this case, the evidence does not support this aspect of the verdict. To the contrary, the evidence, if believed, was that Plaintiff has a condition that will require medical treatment and

cause her pain. However, Plaintiff did not present evidence that she is incapacitated or bed-ridden or unable to perform any life functions because of her pain. Rather, the uncontroverted testimony established Plaintiff is able to live independently. Even if Plaintiff is entitled to some compensation, the $9,916,667 future pain and suffering award is grossly excessive and unsupported by the evidence.

While each case is different, verdicts in other cases highlight the fact that the verdict in this case is out of line with what is awarded in other cases with serious injuries. *See, e.g.*, *Ocampo v. Paper Converting Mach. Co*., No. 02 C 4054, 2005 WL 2007144, at *5 (N.D. Ill. Aug. 12, 2005) (jury awarded $6,600,000, comprised of approximately $6,000,000 in pain and suffering damages, for woman whose scalp was completely torn off, and who lost an ear, when her hair became caught in a machine; woman needed numerous corrective surgeries and developed PTSD); *Late v. United States*, Civ. No. 1:13-CV-0756, 2017 WL 1405282 (M.D. Pa. Apr. 20, 2017) ($5,000,000 for pain and suffering, in birth injury case for permanent cognitive and physical disabilities); *Hoffer v. Trs. of the Univ. of Pennsylvania*, No. 05-010406, 2012 WL 6859344 (Pa. Ct. Com. PL, Nov. 14, 2012) ($3,000,000 for pain and suffering for baby who sustained permanent brain damage); *Welker v. Carnevale, et al.*, No. 3:14CV00149, 2017 WL 1046038 (W.D. Pa. Jan. 27, 2017) ($2,000,000 in pain and suffering for child with cerebral palsy and permanent cognitive deficits who will require 24-hour care for rest of his life).

Other courts have granted remittitur or a new trial on compensatory damages in cases where the evidence, as here, clearly does not support the magnitude of the verdict. *See, e.g., Polett v. Zimmer*, (1865 EDA 2011 (June 6, 2016)) (remitting verdict of $26.6 million in pain and suffering damages, on excessiveness grounds and remanding to trial court for additional proceedings); *Smalls*, 843 A.2d 410 (new trial on damages granted where $2 million verdict in

favor of husband/plaintiff and $500,000 for wife for loss of consortium was not supported by evidence in a case where plaintiffs sought no out-of-pocket expenses and where the court held that the record is "devoid of evidence that Mr. Smalls' injuries harmed the marriage….[a]though Mr. Smalls has curtailed his household chores, this fact hardly warrants a $500,000 award."); *Hartner v. Home Depot USA, Inc*., 836 A.2d 924, 930-31 (Pa. Super. 2003) (new trial on damages warranted where the $1,000,000 award was against the weight of the evidence; court held that award was supported only by $10,000 actual damages and subjective evidence relating to the plaintiff's pain and suffering); *Haines v. Raven Arms*, 536 Pa. 452, 458, 640 A.2d 367, 370 (Pa. 1994) (remittitur granted and reducing $8,000,000 damage award for pain and suffering to 14-year-old who sustained "serious and permanent debilitating injuries" caused by an accidental shooting); *Truscello v. Raezer*, 28 Phila. Co. Rptr. 544, 546-7 (C.C.P. Aug. 31, 1994) (reducing $1.5 million damage award to $500,000 for man whose surgery caused him to lose three inches off of his penis); *Vogelsberger v. Magee-Womens Hospital*, 903 A.2d 540, 548 (Pa. Super. 2006) (remitting, as excessive, a jury verdict of $250,000 against a gynecologist (based on a claim that the doctor failed to prophylactically remove plaintiff's ovaries during a hysterectomy) to $125,000 and a $350,000 verdict against a hospital (based on a claim that morphine given to plaintiff for pain purportedly caused an episode of respiratory depression) to $75,000

The verdict in this case is, by orders of magnitude, far in excess of all but one of the verdicts identified above. Yet in those cases, the courts saw fit to reduce the verdicts substantially. This Court should adopt the rationale of the *Polett, Smalls, Hartner, Truscello* and *Vogelsberger* courts and award Defendants a new trial on damages, or, in the alternative, remittitur of this grossly excessive verdict.

2. Under MCARE, this Court Should Hold A Hearing on the Reduction of Future Medical Expenses to Present Value.

In the event that this Court does not grant judgment notwithstanding the verdict or a new trial, Defendants request that this Court reduce Plaintiff's future medical expenses to present value, as required by MCARE. While there is a paucity of case law on this issue, the MCARE statute clearly requires that future medical expenses be reduced to present value. Specifically, Section 509(b)(1) of the MCARE Act provides that "future damages for medical and other related expenses shall be paid as periodic payments after payment of the proportionate share of counsel fees and costs based upon the present value of the future damages awarded." 40 P.S. § 1303.509.[16]

In sum, with respect to the jury's award of damages, Defendants request a new trial on the issue of damages and, in the alternative, a substantial remittitur of the excessive verdict rendered

[16] The MCARE statute requires the trier of fact to "make a determination specifying, inter alia, the amount of future damages for "medical and other related expenses by year." 40 P.S. § 1303.509(a)(2)(i) (emphasis supplied). This is in contrast to the requirement that the amounts to be awarded for future lost earnings or earning capacity and noneconomic loss are to be determined "in a lump sum." Id. at (a)(2)(ii)-(iii) (emphasis supplied). In determining the amount of each periodic payment for future medical damages, the trier of fact "may vary the amount ... from year to year for the expected life of the claimant to account for different annual expenditure requirements" and to "provide for purchase and replacement of medically necessary equipment in the years that expenditures will be required. ..." Id. at (b)(1). The trier of fact may also "incorporate into any future medical expense award adjustments to account for reasonably anticipated inflation and medical care improvements. ..." *Id*. at (b)(2). The "[f]uture damages as set forth in subsection (a)(2)(i) shall be paid in the years that the trier of fact finds they will accrue." *Id.* at (b)(3) (emphasis supplied). Thus, the statute specifically provides, albeit circuitously, that the specific dollar amount allocated by the fact finder for each year future medical expenses are awarded must be paid to the claimant, without a reduction to present value, in periodic payments in the year they accrue.

These periodic payments for future medical and related expenses, however, "shall be paid ... after payment of the proportionate share of counsel fees and costs based upon the present value of the future damages awarded pursuant to [subsection (b)(1)]." *Id.* at (b)(1) (emphasis supplied). Thus, the statute requires the court to determine the present value of the total amount of future damages awarded under subsection (a)(2)(i) for the purpose of providing the proportionate payment of counsel fees and costs in a lump sum up front, rather than by future installments as the periodic payments of future medical expenses become due. After the lump sum payment of counsel fees and costs is made, subsection (b)(3) provides that the future periodic payments — "as set forth in subsection (a)(2)(i)" — will be paid to the claimant in the years that the trier of fact found they will accrue. *Id.* at (b)(3) (emphasis supplied).

in this matter. Defendants also request a hearing on the reduction of future medical and related expenses to present value.

V. CONCLUSION

For all of the foregoing reasons, Defendants, Gyi P. Mo, M.D. and Clinical Care Associates of the University of Pennsylvania Health System, respectfully request that this Honorable Court grant their Motion for Post-Trial Relief and grant judgment notwithstanding the verdict, or in the alternative, a new trial or, in the alternative, remittitur of the jury verdict, or a new trial on damages. In the event the Court does not grant judgment notwithstanding the verdict or the other relief requested, Defendants request that this Court schedule an evidentiary hearing on the reduction of future medical and related expenses to present value.

Respectfully submitted,

BURNS WHITE, LLC

By: /s/ James A. Young, Esquire
Samantha L. Conway, Esquire
Attorney ID Nos. 00213/87491
1800 John F. Kennedy Boulevard
10th Floor
Philadelphia, PA 19103
(215) 587-1625/1653
jayoung@burnswhite.com
slconway@burnswhite.com

LAMB McERLANE PC

By: /s/ Maureen M. McBride
Attorney ID No. 57668
24 East Market Street
P.O. Box 565
West Chester, PA 19381
(610) 430-8000
mmcbride@lambmcerlane.com

Attorneys for Defendants, Gyi P. Mo, M.D., Clinical Care Associates of the University of Pennsylvania Health System, The Hospital of the University of Pennsylvania, The Trustees of the University of Pennsylvania, Internal Medicine Associates of Delaware County, Penn Internal Medicine Media and Penn Care Internal Medicine Associates of Delaware County