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DAJAH HAGANS, as Parent and Natural Guardian of [redacted], a minor, individually and in her own right Plaintiffs v. HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM, AND TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, ET AL. Defendants.	**COURT OF COMMON PLEAS** **PHILADELPHIA COUNTY** **JUNE TERM, 2019** **No: 007280**

BRIEF IN SUPPORT OF MOTION OF DEFENDANT, HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA,[1] FOR POST-TRIAL RELIEF

[1] There is no verdict against named Defendants the University of Pennsylvania Health System (the "Health System") or the Trustees of the University of Pennsylvania (the "Trustees"). However, to the extent that the verdict against the Hospital of the University of Pennsylvania is construed to be a verdict against these Defendants, they adopt all issues and arguments set forth in HUP's post-trial motions and briefing.

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Defendant, Hospital of the University of Pennsylvania (hereinafter, "HUP"), by and through its attorneys, Tucker Law Group, LLC, and Lamb McErlane PC, files this Brief in Support of HUP's Motion for Post-Trial Relief pursuant to Pennsylvania Rule of Civil Procedure 227.1. As set forth in detail below, HUP is 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), or in the alternative, a new trial on damages.

I. INTRODUCTION

This case involves the largest reported medical malpractice verdict in Pennsylvania history, $182,737,791.00. ***Yet, there was no legal basis for it; Plaintiff's direct liability claim against HUP was dismissed during trial, and Plaintiff failed to prove liability against any agent or employee of HUP, which is a pre-requisite to a finding of vicarious liability against HUP*.**

In the simplest terms, Plaintiff failed to prove that HUP or any of its agents were negligent. The trial court dismissed by agreement Plaintiff's direct (corporate negligence) claim against HUP during trial, leaving vicarious liability as the only claim against HUP. Vicarious liability, however, requires proof of the negligence of a specific agent or employee. Plaintiff failed to prove that any specific agent or employee was negligent. This failure is the death knell of Plaintiff's case and judgment notwithstanding the verdict should be entered.

Plaintiff's counsel ***admitted on the record*** that Plaintiff did not prove liability against any individual provider. First, he said: "[Plaintiff] can't show which individual did

what when." (N.T. 4/19/23 p.m., at 34:17-18.)[2] Then—in what can only be described as a "mic drop" moment—Plaintiff's counsel admitted: "[W]e can't point necessarily to any individual **because there is a complete lack of evidence**." (N.T. 4/20/23 a.m., at 31:8-20) (emphasis added.) This verdict, therefore, should be vacated in its entirety.

If the verdict is not vacated, HUP, at a bare minimum, is entitled to a new trial. The verdict slip, standing alone, compels a new trial because it was legally wrong. The verdict slip did not separately list the purported agents or employees of HUP for whom HUP would purportedly be liable, which is essential in any vicarious liability claim. Second, the causation question on the verdict slip misstated longstanding Pennsylvania law. At Plaintiff's counsel's insistence, and over HUP's objection, the jury was given unprecedented latitude to determine the critical element of causation based on an erroneously lowered burden of proof.

Other legal errors, which caused HUP substantial prejudice and fueled the unprecedented verdict, also require that a new trial be awarded. Among other things, the Court improperly precluded critical testimony from the defendant healthcare providers regarding the results of the umbilical blood cord gas analysis—which would have established that the child, J.H., did not experience a low-oxygen event prior to birth; erroneously allowed Plaintiff to adduce gratuitous and irrelevant evidence about information her healthcare providers shared with her about her treatment options and timing of procedures, notwithstanding the fact that her informed consent claim had been

[2] One provider, Dr. Julie Suyama, was dismissed from the case prior to trial pursuant to a stipulation of the parties dated March 29, 2023. (See Exhibit 21.) Pursuant to the stipulation, the parties agreed that Plaintiff was not dismissing any vicarious liability claims against HUP for the conduct of Dr. Suyama. However, this agreement in no way relieved Plaintiff of her duty to prove negligence on the part of Dr. Suyama in order for HUP to be vicariously liable for her conduct. Plaintiff failed in this regard, as she "[could not] show which individual did what when." (N.T. 4/19/23 p.m., at 34:17-19.)

dismissed; and improperly allowed Plaintiff to project costs in ten-year increments, providing the jury with an improper basis for awarding J.H. damages until age 70. The verdict also was manifestly excessive, particularly given Plaintiff's compromised physical condition and reduced life expectancy; it was incompatible with similar recent verdicts; and it will have a deleterious impact on the availability of, and access to, health care services, and in particular obstetrical care, in Philadelphia. This outsized verdict cannot stand.

A. Basis for Judgment Notwithstanding the Verdict

Plaintiff's direct claim against HUP (for corporate negligence) was dismissed during trial. As a result, vicarious liability was the sole remaining claim against HUP. To hold HUP vicariously liable, Plaintiff was required to prove that one or more of the defendant healthcare providers was negligent. Plaintiff admittedly did not do this. These undisputed facts—no direct corporate claim ***and*** no proof of negligence against an individual medical care provider—require judgment notwithstanding the verdict. These undisputed facts resulted in a runaway jury verdict of $182,737,791.00 that cannot stand.

To compensate for Plaintiff's admitted "complete lack of evidence," Plaintiff's counsel concocted a theory that he was "suing the team" of HUP providers. Plaintiff's counsel's "team" theory of liability, which was invented on the fly and cut out of whole cloth, purportedly relieved Plaintiff of her basic obligation to prove that any one particular medical provider engaged in a specific, identifiable act of negligence that caused harm to Plaintiff. There is no legal support for Plaintiff's counsel's fanciful theory that he did not need to prove that one or more of the individual medical care providers was negligent in order to support a finding of vicarious liability against HUP.

To be clear: Plaintiff's "team" theory has no basis in Pennsylvania law. Plaintiff was required to set forth an objective standard of care, a breach of that standard, and resultant harm ***attributable to at least one individual agent of HUP***, which Plaintiff clearly and admittedly failed to do. See e.g., Terry Rupell & Tonya Rupell v. Lehigh Valley Hosp., No. 2001-C-324V, 2003 Pa. Dist. & Cnty. Dec. LEXIS 550, *13-15 (Lehigh Cnty. Comm. Pl. Mar. 7, 2003). What is more, though the individual medical providers treating Plaintiff and J.H. had varying skills and training (from attending physicians, to residents, to nurses), and they therefore were required to adhere to standards of care specific to their respective skills and training, Plaintiff's experts made no attempt to differentiate between the applicable standards of care for each provider.

Plaintiff's counsel admitted that he did not prove liability against any individual medical care provider: "[W]e can't point necessarily to any individual because there is a complete lack of evidence." (N.T. 4/20/23 a.m., at 31:8-20.) Thus, with the dismissal of all direct claims against HUP and the *de facto* abandonment of any direct claim against its individually named agents, ***no verdict can stand against HUP as a matter of law***, let alone an unprecedented single-plaintiff medical malpractice award of $182,737,791.00, without punitive damages. Judgment notwithstanding the verdict is the only just result.

B. Basis for a New Trial

A new trial must be granted because this trial was overrun by error caused by Plaintiff's counsel. At every step, Plaintiff's counsel did not miss an opportunity to mislead the Court in creating legal error. The most egregious error requiring a new trial occurred when the Court accepted in good faith Plaintiff's counsel's disingenuous argument that

the verdict slip should contain a question equating increased risk of harm to factual causation.

The verdict slip conflicts with Pennsylvania law and longstanding Pennsylvania practice in medical malpractice cases. The verdict slip improperly relieved Plaintiff from the legal requirement that she prove factual causation, let alone factual causation as to each individual Defendant. The submitted verdict slip allowed the jury to conclude that "increased risk of harm" was the same as factual cause, which it is not, and then allowed the jury to impose liability upon HUP on that basis. Increased risk of harm is not, and has never been, a substitute for proving factual causation.

No Pennsylvania court has ever allowed a medical malpractice plaintiff to side-step the requirement of proving factual cause by allowing a plaintiff to alternatively prove "increased risk of harm." The law is *clear* that a medical malpractice plaintiff may show that the defendant's actions increased the risk of harm to a plaintiff; that, however, is just one step, and not the final step to proving factual cause. A plaintiff must then "go further" and show that the increased risk of harm was a substantial factor in bringing about the resultant harm. Mitzelfelt v. Kamrin, 584 A.2d 888, 892 (Pa. 1990). Because the verdict slip submitted to the jury is inconsistent with the law and is at odds with Pennsylvania practice, a new trial is warranted.

Other compelling reasons also require the granting of a new trial, including the facts that: (1) the Court erred when it ruled that the verdict slip would not list each individual defendant, thereby allowing the jury to find HUP liable to Plaintiff on Plaintiff's legally faulty and invented theory of "team" liability; (2) the Court erred when it precluded HUP's healthcare providers from testifying about the umbilical cord blood gas results that

demonstrated J.H. was not hypoxic at the time of birth; (3) the Court erred in allowing Plaintiff to introduce irrelevant testimony regarding discussions she had with providers, notwithstanding that her informed consent claim had been previously dismissed at the preliminary objection stage of the case; and (4) the verdict was against the weight of the evidence, most notably as it relates to the jury's award of future medical expenses and non-economic loss damages based on a projected life expectancy for J.H. of 70 years, where ***no expert ever opined that J.H. would live until age 70***. In fact, the only expert who offered testimony of this nature opined that J.H. unfortunately has a substantially reduced life expectancy, and may, at the most, live to age 29. A new trial is appropriate on these grounds to rectify the errors and the significant prejudice suffered by HUP.

C. Basis for Remittitur or, in the Alternative, a New Trial on Damages

The unprecedented, nearly $183,000,000 verdict returned in this case is grossly excessive. If this Court does not grant judgment notwithstanding the verdict or a new trial, the Court should substantially remit the verdict or, in the alternative, grant a new trial on damages. The magnitude of the verdict shocks the conscience, particularly in a case without punitive damages. The jury based its verdict on a multitude of improper assumptions and the staggering result, when compared to other verdicts in similar cases, is a complete outlier.

Moreover, the General Assembly, in enacting MCARE, requires courts to consider evidence of the impact that nuclear medical malpractice verdicts such as the one at issue here will have on the availability and access to healthcare in Philadelphia. Runaway verdicts like this, particularly against the backdrop of financial struggles faced by all Pennsylvania hospitals as a result of the COVID-19 pandemic, will have far-ranging

consequences that will ultimately affect the medical care of all citizens in the Commonwealth if not constrained. If the verdict is left to stand, the already limited access to obstetrical care in Philadelphia could be further curtailed, the willingness of physicians and trainees to provide obstetrical services in Philadelphia will be negatively impacted (particularly affecting already underserved communities), and the availability and cost of insurance will leave hospitals and health systems with substantial uninsured exposure. It is not an overstatement to say that this nuclear verdict, if left undisturbed, will specifically negatively impact the medical care of mothers and newborn babies in Philadelphia and the community. The requested hearing on the impact of this verdict will further elucidate the consequences of this verdict. For all of these reasons, if judgment notwithstanding the verdict or a new trial is not granted, public policy dictates that the verdict must be remitted or a new trial on damages awarded. The health and well-being of the citizens of the Commonwealth, and the City of Philadelphia in particular, depend on it.

II. MATTER BEFORE THE COURT

Motion for Post-Trial Relief of Defendant, Hospital of the University of Pennsylvania seeking: (i) judgment notwithstanding the verdict; (ii) a new trial; and/or (iii) remittitur of the jury's verdict, or in the alternative, a new trial on damages.

III. STATEMENT OF ISSUES

A. Whether in a case where Plaintiff's ***only remaining claim*** against Defendant HUP was for vicarious liability, HUP is entitled to judgment notwithstanding the verdict after Plaintiff voluntarily abandoned her negligence claims against the named individual healthcare providers—and, as a consequence, voluntarily extinguished any legal basis upon which to hold HUP vicariously liable?

Suggested Answer: Yes.

B. Whether, where Plaintiff's ***only remaining claim*** against Defendant HUP was for vicarious liability, HUP is entitled to judgment notwithstanding the verdict where Plaintiff failed to prove: (i) the existence of an objective standard of care applicable to any agent or employee of HUP; (ii) a breach of a standard of care by any agent or employee of HUP; and (iii) a causal connection between a breach of an objective standard of care by any agent or employee of HUP and Plaintiff's alleged harm?

Suggested Answer: Yes.

C. Whether this Court should grant HUP a new trial as a result of the error that occurred when, at Plaintiff's insistence and over HUP's vehement objection, the jury was permitted to find causation based on a determination of whether HUP's conduct "increased the risk of harm and/or was a factual cause" of the harm (rather than whether HUP's conduct was the factual cause of Plaintiff's harm, as Pennsylvania law requires), which misstated Plaintiff's burden of proof on causation and caused HUP great prejudice?

Suggested Answer: Yes.

D. Whether this Court should grant a new trial because the Court erred when it did not ask the jury to determine whether each individually-named defendant was liable to Plaintiff and whether HUP was vicariously liable to Plaintiff based on the conduct of any of its agents?

Suggested Answer: Yes.

E. Whether this Court's error in precluding the named defendant healthcare providers from testifying about the significance of the cord blood gas results (to establish that J.H. was not hypoxic at the time of birth, a critical issue in the case) requires a new

trial in circumstances where: (i) the objection was premature; (ii) the information about which the healthcare providers intended to testify related to facts, not opinions, and therefore were not governed by Pennsylvania law regarding expert opinions; and (iii) the healthcare providers, as parties, were permitted under Pennsylvania law to provide relevant opinions without prior notice and without submission of expert reports?

Suggested Answer: Yes.

F. Whether this Court's error in permitting Plaintiff to introduce testimony regarding information about various procedures that Defendant healthcare providers had shared with Plaintiff requires the grant of a new trial, where: (i) evidence about discussion of options and timing of procedures was only relevant to Plaintiff's informed consent claim, which had been dismissed at the preliminary objection stage; (ii) evidence about discussion of options and timing of various procedures was irrelevant to J.H.'s negligence claim; and (iii) evidence about discussion of options and timing of procedures was prejudicial to HUP and confusing to the jury?

Suggested Answer: Yes.

G. Whether where the verdict in favor of a single Plaintiff in the astounding amount of $182,737,791.00 without a basis for direct or vicarious liability against HUP, or competent evidence to support the amount, is against the manifest weight of the evidence requiring the grant of a new trial?

Suggested Answer: Yes.

H. Whether this Court should grant a new trial on damages or remittitur of the verdict of $182,737,791.00 in Plaintiff's favor where: (a) the economic award far exceeds what could be supported based on the evidence presented on Plaintiff's purported life

expectancy; (b) the non-economic award of $80,000,000 is manifestly excessive and shocks the conscience, particularly where there is no claim for punitive damages; and (c) the verdict could have a deleterious impact on the availability of healthcare, and obstetrical care in particular, in the community?

Suggested Answer: Yes.

I. Whether this Court should reduce Plaintiff's future medical expenses to present value, as required by MCARE?

Suggested Answer: Yes.

IV. FACTS

A. Factual Background

This medical malpractice action involves the care and treatment of Plaintiff, Dajah Hagans, an obstetrical patient at the Hospital of the University of Pennsylvania in 2018, and her minor son, J.H.

The parties agree that Plaintiff arrived at the hospital on February 22, 2018 with chorioamnionitis ("chorio"), an infection that enters through the uterus and can infect the amniotic fluid, the placenta, and the umbilical cord. (E.g., N.T. 4/3/23 a.m., at 66:23-67:2; 67:18-22.) The parties also agree that J.H. did not need to be delivered immediately, and that it was a reasonable plan under the circumstances to have allowed Plaintiff time to progress to deliver vaginally because there are known risks associated with C-section deliveries when a mother has chorioamnionitis. (Id. at 75:11-15; N.T. 4/4/23 p.m., at 18:20-19:4.) The parties' positions diverge as to when J.H. should have been delivered, as well as the timing and the mechanism of the hypoxia that led to J.H.'s brain injury.

Plaintiff presented to HUP on February 22, 2018, around 11:45 a.m. She was just over 40 weeks pregnant and in active labor. (Defense Trial Exhibit D-1A, attached hereto as Exhibit 22, at 000005; N.T. 4/3/23 a.m., at 74:7-23; 4/12/23 a.m., at 80:14-24.) By shortly after 2:30 p.m., J.H. was delivered. (D-1A, at 000017, 19.) He was later diagnosed with severe hypoxic ischemic encephalopathy ("HIE") and cerebral palsy. (N.T. 4/3/23 p.m. 29:21-22; N.T. 4/6/23 a.m., at 53:11.)

While Plaintiff was in the labor and delivery unit of HUP, she was continuously cared for and monitored by at least five medical providers, all of whom were named individually in this case: Dr. Julie Suyama (first-year obstetrics and gynecology resident), Dr. Kirsten Leitner (obstetrics and gynecology attending physician), Dr. Whitney Bender (chief resident in obstetrics and gynecology), Dr. Sarah Gutman (second-year obstetrics and gynecology resident), and Nurse Victoria Kroesche (labor and delivery nurse). At around 11:50 a.m., one of the nurses examined Plaintiff (N.T. 4/11/23 a.m., at 49:5-6) and reported that she was 7 cm dilated. (Id. at 49:10-15; D-1A.) At 11:53 a.m., J.H.'s heart rate was elevated to 180, which was consistent with a chorioamnionitis diagnosis. (N.T. 4/11/23 a.m., at 51:18-22; D-1A, at 000423.) Plaintiff was given fluids and oxygen (N.T. 4/11/23 a.m., at 51:23-52:25; D-1A, at 000423) and then moved to the labor floor around 12:09 p.m. (D-1A, at 000423.)

Around 12:29 p.m., Dr. Suyama examined Plaintiff and made her report to Dr. Leitner. (D-1A, at 000005.) Dr. Leitner also examined Plaintiff sometime between 12:15 and 12:45 p.m. (N.T. 4/11/23 a.m., at 64:1-4.) Dr. Leitner testified that she would have discussed with Dr. Gutman and Dr. Suyama Plaintiff's presentation and diagnosis, and she would have reviewed Plaintiff's fetal heart rate tracing. (Id. at 64:9-17.) At 12:30 p.m.,

Dr. Suyama noted that Plaintiff started on Tylenol and Unasyn, an antibiotic, for her infection. (D-1A, at 000011; 000381.)[3]

At all times, Plaintiff was monitored inside her room and outside her room via the nurse's station and a multi-purpose room equipped with wide-screen monitors. (N.T. 4/11/23 a.m., at 38:11-19.) In fact, Plaintiff was seen by physicians a total of six times over the course of the less than three hours she was at the hospital prior to her delivery: twice by Dr. Suyama, twice by Dr. Gutman, once by Dr. Leitner and once by Dr. Bender. (D-1A; N.T. 4/3/23 a.m., at 77:1-4; N.T. 4/17/23 a.m., at 51:20-24; D-1A.)

Drs. Leitner and Bender noted that the plan was to deliver J.H. vaginally because it is known to be safer for both the mother and the baby, and an infection alone is not an indication for a C-section, but merely an indication to progress towards delivery. (N.T. 4/11/23 a.m., at 70:15-18; N.T. 4/12/23 a.m., at 31:13-23.) At no point did the fetal monitoring tracing on Plaintiff indicate that there was an emergency. Dr. Leitner, along with every other medical provider, and Defense expert, observed areas of moderate and minimal variability on the fetal heart tracing, but no areas of "absent variability," *i.e.*, what would essentially be a flat line. (E.g., N.T. 4/11/23 a.m., at 77:11-20 (Dr. Leitner); N.T. 4/12/23 a.m., at 35:18-25 (Dr. Bender); N.T. 4/17/23 a.m., at 60:1-9 (Defense expert, Dr. Laura Goetzl).)[4] Dr. Leitner stated that Plaintiff's fetal heart tracing indicated that the entire time she was in the hospital her fetal heart rate monitoring was a Category II tracing,

[3] Plaintiff attempted to highlight the fact that the Unasyn was noted to be "infusing en route to the OR" by one of the anesthesiologists, and therefore could not have been given at 12:30 p.m. as indicated. (D-1A, at 000316.) But Dr. Leitner testified that the bag of Unasyn would have continued to hang on the IV pole until the next dose was due. (N.T. 4/11/23 a.m., at 88:1-2.) The medical records also indicate that the next dose was given at "0653" which comports with Nurse Kroesche administering the Unasyn at 12:30, as the medicine is given every six hours. (D-1A, at 000381.)

[4] In contrast, Plaintiff's expert, Dr. Michael Cardwell, was the ***only*** individual to testify that he noted periods of "absent variability" on the fetal strips, particularly after the 1:08 p.m. mark, which is the point at which he opined the baby would have been "born healthy." (N.T. 4/4/3 p.m., at 23:23-25; 28:1-6.)

in the category of "close monitoring but not an alarm." (N.T. 4/11/23 a.m., at 66:20-24.) In response to any prolonged deceleration, the doctors continued to reposition Plaintiff to increase blood flow back to J.H., and J.H.'s heart rate always returned to baseline. (D-1A, at 000423; N.T. 4/11/23 p.m., at 19:20-21:19.)

To help Plaintiff progress in labor, Pitocin was administered to Plaintiff around 1:53 p.m. (D-1A, at 000381.) However, the Pitocin was quickly turned off a couple of minutes later due to its effects on the fetal heart tracing. (N.T. 4/12/23 a.m., at 34:3-9.) At around 2:00 p.m., Plaintiff began to have recurrent late decelerations with more than 50% of her contractions. (N.T. 4/11/23 p.m., at 34:25-35:3.) Dr. Gutman immediately examined Plaintiff at 2:05 p.m., and the decision was made to perform a C-section. (N.T. 4/11/23 a.m., at 79:11-15; 4/11/23 p.m., at 36:1-3.) Plaintiff was taken to the operating room at 2:19 p.m.; she was placed under general anesthesia; and J.H. was delivered in 17 minutes. (N.T. 4/11/23 p.m., at 48:2-8.) J.H.'s umbilical cord blood gas was taken and sent out for analysis. (D-1A.) **The blood gas, labeled as arterial cord gas, returned a pH of 7.23, signifying that there was no evidence of a low-oxygen event at the time of birth.** (See Defense Trial Exhibit 3, attached hereto as Exhibit 23, at 000281; N.T. 4/17/23 a.m., at 38:1-22.)

Plaintiff's expert witnesses provided inconsistent and/or nonexistent opinions regarding the results of the cord blood gas analysis, which is a critical factor in the determination of the timing of J.H.'s injury. Dr. Armando Correa, Plaintiff's infectious disease expert, opined there was a "hypoxic event, an event where there is not enough oxygen to get to the baby, and, in addition you have the infection, it's a double whammy…." (N.T. 4/6/23 a.m., at 70:24-71:2.) However, Dr. Correa offered no objective

medical or scientific evidence to support the conclusion that a hypoxic event occurred *in utero*. Moreover, Dr. Correa testified that the **cord blood gas results taken at birth were "consistent with an injury that occurred right before delivery."** (N.T. 4/6/23 a.m., at 62:5-6.) (emphasis added), but this testimony directly contradicted another of Plaintiff's experts, Dr. Laura Zinkhan, as well as the testimony of all of the defense experts.

Dr. Zinkhan, Plaintiff's expert neonatologist, stated that the **cord blood gas results taken at birth were "not terribly concerning."** (N.T. 4/5/23 p.m., at 6:9-12.) (**A**: So here with a pH of 7.23 and a cord gas then it's labeled as arterial cord gas, that by itself is slightly low, but by itself is not terribly concerning."). However, to establish that a hypoxic event occurred immediately prior to birth, the cord blood gas results would have had to have been abnormal. Because cord blood gas results that were "not terribly concerning" was inconsistent with a narrative that a severe hypoxic injury occurred at birth, Dr. Zinkhan attempted to change the facts. She claimed, without any basis whatsoever, that the cord blood gas, labeled by hospital personnel as "arterial cord gas," was actually "venous cord gas." (Id. at 6:13-21.) (Q: Do you have an opinion as to whether this gas was an arterial cord gas? **A**: I do have an opinion on that. Q: What is your opinion? **A**: This is not an arterial cord gas. Q: What cord gas is it? **A**: This is a venous cord gas, so it's coming from the placenta to the baby, not the baby to the placenta."). The juxtaposition of these two experts' testimony on this fundamental issue is direct evidence of the speculative theory of Plaintiff's case.

B. Plaintiff's Claims

Based on her theory that an acute hypoxic event occurred immediately before J.H.'s birth and an earlier delivery would have prevented J.H.'s neurological injuries,

Plaintiff brought the instant suit alleging various theories of negligence (and a claim for lack of informed consent) against HUP, the Trustees of the University of Pennsylvania, the University of Pennsylvania Health System, and various healthcare providers, including Denise Johnson, M.D., Kirsten Leitner, M.D., Jessica Peterson, M.D., Julie Suyama, M.D., Whitney Bender, M.D., Sarah Gutman, M.D., and Victoria Kroesche, R.N. At the start of trial, Drs. Leitner, Bender, and Gutman remained as defendants, as well as Nurse Kroesche.[5] This Court dismissed Plaintiff's informed consent claim at the preliminary objection stage, but allowed her causes of action for negligence against the providers, and corporate negligence and vicarious liability against HUP, the Trustees and the Health System, to proceed.

C. The Trial

This case proceeded to a 14-day trial. At trial, Plaintiff presented one standard of care expert – Dr. Michael Cardwell – to allegedly support Plaintiff's contention that the individual defendants breached a recognized objective standard of care when treating Plaintiff and delivering J.H., resulting in an acute event that deprived J.H. of oxygen minutes before birth. As discussed, *infra*, Dr. Cardwell failed to identify any standard of care by which the providers' conduct could be measured, let alone a breach of that standard, or harm caused to J.H. because of a breach.

Defendants, on the other hand, presented significant testimony and evidence demonstrating that Plaintiff's chorioamnionitis infection had been ongoing for at least 18 hours before Plaintiff arrived at the hospital. Defendant's expert, Dr. Laura Goetzl,

[5] As noted, *supra,* n.2, though Dr. Suyama was dismissed from the case prior to trial pursuant to a stipulation of the parties dated March 29, 2023, the parties agreed that Plaintiff was not dismissing any vicarious liability claims against HUP for the conduct of Dr. Suyama. See Exhibit 21.

testified that HUP's providers followed the applicable standard of care during their treatment of Plaintiff. She further testified that there is no scientific evidence that there is a decreased chance of brain injury if a baby is delivered sooner from a mother infected with chorioamnionitis, and that delivery of J.H. an hour earlier would not have changed the outcome for J.H. HUP's physicians continuously and diligently monitored both Plaintiff and J.H. during the less than three hours they were in the hospital. Plaintiff's fetal monitoring tracing never indicated an emergency, and all of the evidence – including the cord blood gas analyzed after delivery – confirmed that J.H. was getting enough oxygen during this time. Thus, Plaintiff's theory that delivery an hour earlier would have prevented J.H.'s neurologic disabilities failed on the evidence.

1. The Dismissal of Plaintiff's Corporate Negligence Claim

The Court dismissed Plaintiff's corporate negligence claim against HUP at the non-suit stage. After Plaintiff rested her case, HUP (and the other defendant entities) moved for nonsuit as to the corporate negligence claim. (N.T. 4/11/23 a.m., at 20:18-23.) Counsel for Plaintiff stated, "[N]o response as to the corporate negligence directed verdict. We are fine with that." (Id. at 20:25-21:2.) The Court then granted the motion for nonsuit on the corporate negligence claim. (Id. at 21:3-4) ("The motion for nonsuit is granted as to the corporate negligence claim.") Thus, no claims of direct liability against HUP remained.

2. The Discussion about the Names on the Verdict Slip.

Because five named healthcare providers remained Defendants in the case, Defendants' proposed verdict slip asked the jury to determine, on an individual basis, the liability of each of the named defendants: HUP (for the care of Julie Suyama, M.D.), Kirstin Leitner, M.D., Whitney R. Bender, M.D., Sarah Gutman, M.D. and Victoria Kroesche, R.N. (See Defendants' Proposed Verdict Slip, attached hereto as Exhibit 27.) Counsel for

Defendants explained that it was appropriate to list all of the defendants because "the jury should be asked to find as to each of them whether [each was] negligent, and if so, whether [each was] the cause of the injuries." (N.T. 4/19/23 p.m. at 32:21-24.) (See also, id. at 38:10-13 ("[T]hey were sued as individual defendants. And the jury has to find liability as to each of them individually."))

Plaintiff disagreed. In a response that can only be construed as abandoning her claims against the individual Defendants, Plaintiff objected to Defendants' verdict slip and asked the Court to only include HUP on the verdict slip. In a moment of candor, Plaintiff's counsel explained his request that only HUP, and not the individually-named Defendants, be placed on the verdict slip was based on the fact that: "[Plaintiff] can't show which individual did what when." (N.T. 4/19/23 p.m., at 34:17-18.) The next day, Plaintiff's counsel reiterated Plaintiff's inability to prove individual liability of the agents, stating:

> I'm in a Catch-22. If they want to list every individual and say, what did Dr. Leitner do? The answer is nothing. If you look at the record, she did nothing, other than testify that she did everything right. The same thing with the nurse. There is no documentation of anything…[W]hat we are saying is this whole team, on this day, failed this patient. And that is all under HUP. Because we can't point necessarily to any individual because there is a complete lack of evidence.

(N.T. 4/20/23 a.m., at 31:8-20 (emphasis added.).) The Court ultimately submitted a verdict slip that asked the jury to determine:

> 1. Do you find that the conduct of the Hospital of the University of Pennsylvania, acting by and through Dr. Kirstin Leitner, Dr. Whitney Bender, Dr. Sarah Gutman, Dr. Julie Suyama, and Nurse Victoria Kroesche, fell below the applicable standard of care? In other words, was the Defendant negligent?

(See Final Verdict Slip, attached hereto as Exhibit 28.) Thus, the jury was never asked to determine individual liability of any of the healthcare providers.

3. The Discussion about the Causation Question on the Verdict Slip

Plaintiff presented a verdict slip to the Court that proposed two questions related to the issue of causation: "Was the Defendant's negligence a factual cause of any harm to the minor-Plaintiff?" (Question number 2), and "Did the Defendant's negligence increase the risk of any harm to the minor-Plaintiff?" (Question number 3). (See Plaintiff's Proposed Verdict Slip (filed May 3, 2023), attached hereto as Exhibit 26; N.T. 4/20/23 a.m., at 5:3-6.)

Defense counsel objected. As Defense counsel explained: "[i]increased risk of harm is…another way to prove factual cause**. It's not a separate basis for causation under the verdict slip. There should be one question about factual cause.** The jury is instructed on increased risk of harm." (N.T. 4/20/23 a.m., at 7:10-15 (emphasis added).)

Plaintiff's counsel nonetheless insisted that Plaintiff was entitled to both proposed questions because Plaintiff "put on a case involving both direct factual cause as well as increased risk of harm" and referred to them as "alternative aspects of medical causation." (Id. at 5:18-21; 6:18-19.)

After hearing additional argument from both parties on this issue, and over Defense counsel's steadfast objections, this Court ruled, "[t]he Court will instruct you to frame the verdict slip [combining factual cause and increased risk of harm queries], over defense objection." (Id. at 13:9-11.) Thus, the jury was erroneously permitted to find causation based on factual cause *or* increased risk of harm.

a. The Verdict

On April 21, 2023, the jury found in favor of Plaintiff and against Defendant, the Hospital of the University of Pennsylvania. The jury awarded damages as follows:

- Future loss of earnings - $1,700,000.

- Past non-economic damages - $10,000,000.
- Future non-economic damages - $70,000,000.
- Future medical expenses (total) - $101,037,791.

(N.T. 4/21/23 a.m., at 4-20; See Exhibit 28.)

Plaintiff filed a Motion for Delay Damages on April 28, 2023, which is opposed. HUP timely filed Post-Trial Motions on May 1, 2023 and respectfully submits the instant briefing in support of its Post-Trial Motions.

V. ARGUMENT

A. THIS COURT SHOULD GRANT HUP'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO PROVE ANY CLAIM AGAINST HUP.

In Pennsylvania, "[w]here 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). Here, Plaintiff failed to support her claims against HUP with sufficient evidence, and therefore entry of judgment notwithstanding the verdict is required.

1. The Court Dismissed Plaintiff's Only Claim of Direct Liability Against HUP

Plaintiff brought one direct claim against HUP – Corporate Negligence. As discussed, *supra*, the record is clear that the Court dismissed this cause of action. (N.T. 4/11/23 a.m., at 21:3-4.) Thus, no claims of direct liability against HUP remained.

2. Plaintiff Failed to Prove Her Vicarious Liability Claim Against HUP

a. Plaintiff Abandoned Her Claims Against HUP's Agents

To establish a claim of vicarious liability, Plaintiff was required to prove that one or more of the named defendant healthcare providers was negligent during the course of,

and within the scope of, the agent's employment. Sutherland v. Monongahela Valley Hosp., 856 A.2d 55, 62 (Pa. Super. 2004) ("It is well settled that an employer is held vicariously liable for the negligent acts of his employee which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment.") (citing R.A. v. First Church of Christ, 748 A.2d 693 (Pa. Super. 2000)). However, Plaintiff failed to prove the liability of any of these named healthcare providers – a necessary predicate to having that liability imputed to HUP. Despite the fact that Plaintiff named and served each of the individually-named Defendant healthcare providers, Plaintiff chose not to have the jury separately determine the negligence of each one.[6] Without a finding of negligence against an agent or employee of HUP, there is no basis for a verdict of vicarious liability against HUP. Mamalis v. Atlas Van Lines, Inc., 560 A.2d 1380, 1381 (Pa. 1989) ("absent any showing of an affirmative act, or failure to act when required to do so, by the principal, termination of the claim against the agent extinguishes the derivative claim against the principal. A claim of vicarious liability is inseparable from the claim against the agent since any cause of action is based on the acts of only one tortfeasor"); see also Maloney v. Valley Med. Facilities, Inc., 984 A.2d 478, 481 (Pa. 2009) ("termination of the claim against the agent extinguishe[s] the derivative claim against the principal," regardless of the "purported" reservation of rights against the principal).

[6] To be clear, Plaintiff could have chosen to bring suit *only* against HUP, pursuant to a claim of vicarious liability. E.g., Mamalis v. Atlas Van Lines, Inc., 528 A.2d 198, 200 (Pa. Super. 1987) (In a vicarious liability suit, it is well-settled that "the injured party may sue either (principal or agent) as he elects.'") (citing Betcher v. McChesney, 100 A. 124 (Pa. 1917). Even assuming Plaintiff had done so, Plaintiff would *still* have been required to ultimately prove the liability (*i.e.*, the tortious conduct) of at least one of HUP's *agents*, *i.e.*, its healthcare providers. See id. Thus, in both the instant case, and in the hypothetical case of Plaintiff having only named HUP in the Complaint, if Plaintiff could not prove liability of one of the agents, then the claim against the principal (HUP) would also necessarily be extinguished. See id. ("Termination of the claim against the agent extinguishes the derivative claim against the principal.")

The only Defendant that Plaintiff listed on her proposed verdict slip was "the Hospital of the University of Pennsylvania, acting by and through the obstetrical team of doctors and nurses." (See Exhibit 26.) Defendants' proposed verdict slip, however, individually listed defendants HUP (for the care of Julie Suyama, M.D.)[7], Kirstin Leitner, M.D., Whitney R. Bender, M.D., Sarah Gutman, M.D. and Victoria Kroesche, R.N. (See Exhibit 27.) During a discussion with the Court, defense counsel explained that listing all of the defendants was required because "the jury should be asked to find as to each of them whether [each was] negligent, and if so, whether [each was] the cause of the injuries." (N.T. 4/19/23 p.m., at 32:21-24.) (See also, id. at 38:10-13 ("[T]hey were sued as individual defendants. And the jury has to find liability as to each of them individually."))

In response, Plaintiff's counsel made clear that Plaintiff was abandoning her claim against the individual defendants because "[Plaintiff] can't show which individual did what when." (N.T. 4/19/23 p.m., at 34:17-18.) Then again, on the next day, Plaintiff's counsel reiterated Plaintiff's inability to prove individual liability of the agents, stating:

> I'm in a Catch-22. **If they want to list every individual and say, what did Dr. Leitner do? The answer is nothing**. If you look at the record, she did nothing, other than testify that she did everything right. The same thing with the nurse. There is no documentation of anything**…[W]hat we are saying is this whole team, on this day, failed this patient. And that is all under HUP. Because we can't point necessarily to any individual because there is a complete lack of evidence**.

(N.T. 4/20/23 a.m., at 31:8-20 (emphasis added).)

Indeed, counsel was in a Catch-22. He knew that in order to establish a claim of vicarious liability against HUP, the jury would need to find that one or more of the

[7] As explained, *supra*, Dr. Suyama was dismissed from the case pursuant to a stipulation of the parties dated March 29, 2023 and therefore could not be properly listed as a defendant in the case. (See Exhibit 21.) However, pursuant to the stipulation, the parties agreed that Plaintiff was not dismissing any vicarious liability claims against HUP for the conduct of Dr. Suyama. Id.

individual defendants was negligent; however, he also knew that he had not proven that any individual had breached a duty of care to Plaintiff. To distract from this fatal problem, Plaintiff's counsel argued that the Court did not need to list the individual defendants on the verdict slip (to have the jury determine their liability on an individual basis) because HUP had earlier stipulated to the fact that the providers were agents and servants of the hospital, acting within the scope of their employment. (See e.g., N.T. 4/19/23 p.m., at 33:15-21.)[8]

This purported simplification of the issue by Plaintiff's counsel, however, is plainly wrong.

A stipulation as to agency (that merely eliminated the need for Plaintiff to have to ask the three or four questions necessary to establish that the individual healthcare providers were employed by, or were agents of, HUP), only relieved Plaintiff's burden to prove *agency*.[9] It did not (and could not) excuse Plaintiff from her obligation to prove that one or more of the individual providers were negligent in the first place, and that the negligence caused Plaintiff's injuries. **Plaintiff's admitted failure to prove negligence on the part of the individuals is the death knell of her vicarious liability claim**. This failure, standing alone, requires this Court to grant judgment notwithstanding the verdict.

i. Plaintiff's Invented Theory of "Team" Liability is Not Viable

Plaintiff cannot end run her burden of proof by presenting evidence against a "team" instead of an individual medical care provider where her only claim against HUP

[8] Defendant does not dispute that such a stipulation exists. The parties did in fact place on the record at trial on April 11, 2023 that "it has been stipulated between the parties that… the individual defendants in this case, Kirstin Leitner, M.D., Whitney Bender, M.D., Sarah Gutman, M.D., Julie Suyama, M.D., and Victoria Kroesche, the nurse, were agents and servants of the hospital, acting within the scope of their employment, when they delivered care to Ms. Hagans and Baby Jay." (N.T., 4/11/23 a.m., at 8:7-15.)

[9] The stipulation merely allowed HUP to become a secondary source *of payment* if Plaintiff proved that the individuals were liable—which Plaintiff did not.

was for vicarious liability. Plaintiff was required to establish a breach of the standard of care by at least one of the individually named defendants[10] to hold HUP vicariously liable. See Holmes v. Univ. of Pa. Health Sys., No. 0349, 2007 Phila. Ct. Com. Pl. LEXIS 94, at *25 (Phila. Cnty. Comm. Pl. Mar. 28, 2007) ("**As the jury found no liability against any individual defendants, no liability could have been entered against the employer** [health system]…[The defendant health system] is only liable if an individual Defendant-physician was negligent, and said negligence was a factual or substantial factor of the injury suffered.") (emphasis added).

Near the close of trial, Plaintiff's counsel realized that he had failed to meet the legally required standard of showing that one or more of the individually named defendants was negligent. Like a magician with a faulty wand, Plaintiff's counsel announced he was "suing the team." (N.T. 4/19/23 p.m., at 34:16-17) ("[W]e're suing the team because we can't show which individual did what").

Problem: there is no such theory of liability in Pennsylvania. See Rupell, 2003 Pa. Dist. & Cnty. Dec. LEXIS 550, at *13-15 (precluding plaintiff's expert report and testimony as legally deficient where it "fail[ed] to establish the standard of care applicable to pediatric pulmonologists or each pediatrician, a breach thereof, and the requisite causal nexus to the alleged injuries purportedly sustained by the decedent with respect to each individual

[10] As acknowledged by the Court in its instructions to the jury, more than one standard of care was applicable in this case given that the healthcare provider Defendants varied in their roles, skill, and training. N.T. 4/20/23 p.m., at 23:25-24:3 ("A nurse owes a duty of care to conduct himself or herself as a reasonably prudent nurse would act under the circumstances."); Id. at 24:4-18 ("[O]ne or more of the defendant physicians were residents…A resident physician is not required to meet the same standard of care as a fully-trained specialist in his or her field."); Id. at 24:23-25:4 ("A physician who professes to be a specialist in a particular field of medicine must have the same knowledge and skill and use the same care as others in that same medical specialty."). However, under Plaintiff's "sue the team" theory, the jury never needed to determine whether each individual provider met the specific standard of care applicable to him or her.

physician"). The Rupell court explained that "[a]s a matter of law, the expert report…fails to alert the Defendants as to the alleged negligence **attributable to each individual Defendant** whose care and treatment is at issue." Id. at *14 (emphasis added). Further, because the expert report (and anticipated trial testimony) was precluded, the Rupell plaintiffs could not sustain a *prima facie* case of medical negligence against any of the defendants and summary judgment in favor of the defendants was granted. Id. at *14-15. Importantly, summary judgment was granted for the defendant hospital because the only theory of negligence asserted against the hospital was vicarious liability, and plaintiff failed to set forth the applicable standard of care relative to any healthcare provider identified, or a breach thereof. Id.

Locke v. Fox Chase Cancer Center, 2020 Pa. Super. Unpub. LEXIS 2636 (Pa. Super. Ct. 2020) also undermines Plaintiff's "team" liability theory. In Locke, the plaintiff claimed the court failed to instruct the jury that the defendant hospital could still be liable if the jury found that, although unnamed, the hospital's "staff" acted negligently as a unit. Id. at *18 n.14. The Superior Court rejected this argument as irrelevant because plaintiff did not include unnamed employees or staff in the complaint, but rather only sought to hold the hospital employer vicariously liable for the actions of the two named doctors. Id. [11] Thus, where a plaintiff has named individual healthcare providers in her complaint and seeks to hold the defendant employer hospital vicariously liable for plaintiff's alleged

[11] It should be noted that the case upon which plaintiff relied upon in Locke for his theory of vicarious liability (Estate of Denmark v. Williams, 117 A.3d 300, 307 (Pa. Super. 2015)) merely held that it was not necessary for a plaintiff to allege claims against specific employees *at the motion to dismiss stage*, because more specific information could be "ascertained during discovery." Id. Still, the Locke court rejected the idea that a plaintiff could skirt the required proof of showing that an individual medical care provider was negligent by arguing that some unnamed staff (read "the team") acted negligently.

damages, the plaintiff must prove that at least one of the individual providers was negligent while acting in the course and scope of his or her employment. Id.

Other jurisdictions likewise have held that a plaintiff in a medical malpractice case must prove that an individual doctor was negligent in order to hold the physician's employer responsible for negligence. For example, in Miller v. Vanderbilt Univ., No. M2015-02223-COA-R3-CV, 2017 Tenn. App. LEXIS 655, at *7 n.5 (Tenn. Ct. App. Sep. 29, 2017), the plaintiff argued that because the orthopedic trauma service at Vanderbilt used a "team approach" to patient care, he should not be required to determine which individual physician was responsible for his care. However, the appellate court was not persuaded that it would be "unfair to require the plaintiff to meet the statutory burden of proof under these circumstances" and refused to impute liability to Vanderbilt under this "team approach." Id. Instead, the court concluded that the physician's testimony failed to adequately identify a *specific agent* of Vanderbilt who deviated from the standard of care and whose deviation caused an injury that would not otherwise have occurred. Id. Rather than identify the specific orthopedic surgeon or surgeons who were subject to that standard and how the surgeon(s) deviated from that standard, the plaintiff's expert physician only opined more generally that "they failed to investigate," "they didn't follow up on it," and "nobody did anything else after that." Id. at *13. Because his testimony did not specify which doctors were responsible, the appellate court held the trial court did not err in directing a verdict in favor of Vanderbilt on the vicarious liability claim against it. Id. at *15.

Plaintiff's counsel's theory of "team" liability against the named individual defendants in this case cannot stand, as it is not cognizable under Pennsylvania law.

Plaintiff's theory of liability, reflected in her counsel's submission of the erroneous verdict slip, attempted to mask her failure of proof. Rather than asking the jury to decide whether any of the providers were negligent, Plaintiff's verdict slip incorrectly asked the jury to find whether HUP, "acting by and through the obstetrical team of doctors and nurses" was negligent. See Exhibit 26.

Plaintiff's decision to proceed only against HUP at trial, and not list out the individual defendants, effected a *de facto* dismissal of those parties, thereby extinguishing any basis for a verdict against HUP on the grounds of vicarious liability. See Mamalis, 560 A.2d at 1381; Maloney, 984 A.2d at 481. The Court ultimately added the names of the providers into Question number 1, asking the jury to find whether HUP, "acting by and through Dr. Kirstin Leitner, Dr. Whitney Bender, Dr. Sarah Gutman, Dr. Julie Suyama, and Nurse Kroesche" was negligent. (See Exhibit 28.) The addition of these names, however, does not change the fact that the providers were no longer defendants in the case, as the jury was not asked to determine liability against each of them.

b. In Any Event, Plaintiff Did Not Establish a Claim of Negligence Against Any of HUP's Agents

i. The Standard for Negligence in Medical Malpractice Cases

"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 Ctr., LLC, 57 A.3d 582, 598 (Pa. 2012) (citation omitted); 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.") In medical malpractice cases, the plaintiff must demonstrate (a) a duty owed by the

physician to the patient; (b) a breach of duty from the physician to the patient; (c) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (d) damages suffered by the patient that were a direct result of that harm. Winschel v. Jain, 925 A.2d 782 (Pa Super. 2007); see also Hornig v. Lehigh Valley Hosp. & Valley Physician Grp. & Stephanie L. Goren-Garcia, 135 A.3d 650 (Pa. Super. Ct. 2015) ("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.") (citations omitted).

It is equally 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, also known as the standard of care. Brannan v. Lankenau Hosp., 490 Pa. 588, 595, 417 A.2d 196, 199 (Pa. 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 (Pa. 1971)); Hornig v. Lehigh Valley Hosp. & Valley Physician Grp. & Stephanie L. Goren-Garcia, 135 A.3d 650 (Pa. Super. Ct. 2015) ("Breach of duty is not present unless the physician deviated from *the applicable standard of care*.") (emphasis added); 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") (emphasis in original).

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 (Pa. Super. 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 (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.").

As set forth, *supra*, Plaintiff needed to establish a standard of care applicable to ***each one*** of the named individual defendants, as well as a breach of the applicable standard by ***each individual separately***. See Holmes, 2007 Phila. Ct. Com. Pl. LEXIS 94, at *25.

ii. Plaintiff's Expert Did Not Articulate Any Objective Standard of Care

Plaintiff called a single doctor, Dr. Michael Cardwell, to purportedly establish the standard of care applicable to each individual provider Defendant. (N.T. 4/4/23 a.m., 71:20-72:2) ("Your Honor, at this point, plaintiffs would ask the Court to accept Dr. Cardwell as an expert in the field of OBGYN in maternal-fetal medicine. We ask the Court to allow him to give opinions as to standards of care, any deviations from the standards of care, and any proximate harm that came from those deviations from the standards of care.") Dr. Cardwell is board certified in maternal-fetal medicine only, yet he was the sole expert offered by Plaintiff to establish the standard of care for all of the OB/GYN attending and resident physicians, as well as Nurse Kroesche, a labor and delivery nurse.

Plaintiff's counsel understood that he needed to establish the applicable standard of care through competent expert testimony for each medical care provider. In fact, in his opening statement, he stated: "the standard of care required that Jay be delivered no later than 1:30 because he was approaching the cliff." (N.T. 4/3/23 a.m., at 53:23-25.)[12] But Dr. Cardwell ***never testified as to the details of any particular objective standard of care*** to which the individual defendants allegedly failed to adhere. To the contrary, Dr. Cardwell simply agreed with Plaintiff's counsel that the medical providers as a team deviated from some amorphous and unidentified standard of care, and his answers to those questions were not a substitute for the requisite expert testimony articulating an objective standard of care:

> Q. Doctor, I want to be sure, your opinion—because I used it globally as the team, the team of health care providers… Do you hold that they all individually and collectively deviated from the standards of care?
> A. **Yes.**
> Q. They were functioning as a team, correct.
> A. **Yes.**

(N.T. 4/20/23 p.m., 48:4-13.)

Dr. Cardwell's additional testimony offered no more insight regarding any standard of care applicable to any of the providers, or even (consistent with Plaintiff's theory) the team as a whole. Dr. Cardwell opined on *why* a national standard of care exists, (N.T. 4/4/23 p.m., at 7:9-12), but he never actually stated what standard or standard(s) of care control in this case:

- Dr. Cardwell stated that all the healthcare providers involved in Ms. Hagans' care "should have recognized a non-reassuring fetal heart rate pattern and

[12] Recognizing his failure, Plaintiff's counsel never referenced any testimony or evidence regarding any specific standards of care in his closing statement. (See generally, N.T. 4/20/23 a.m.) That is because Plaintiff never set forth a standard of care in her case, and Plaintiff therefore failed to meet her burden of proof in articulating a standard of care by which the defendant healthcare providers' conduct could be measured by the jury.

recommended and moved to deliver the baby in a timely fashion by an appropriate Caesarean section, that would have been around 1:30 or so in the afternoon." (N.T. 4/4/23 p.m., at 10:15-21.) However, Dr. Cardwell never discussed what a reassuring or non-reassuring fetal heart rate pattern would be, and what delivery within a "timely fashion" would require under a particular standard of care.

- Dr. Cardwell discussed that the plan for Ms. Hagans that was put in place by Dr. Leitner (the attending physician) was to possibly perform a C-section if there was no "improvement" in her tracing. Moreover, Dr. Cardwell opined that Dr. Leitner's plan was a "reasonable" one. (Id. at 18:20-19:4.) However, Dr. Cardwell never opined as to what an "improvement" (or no improvement) in tracing would look like per an objective standard of care.

- Dr. Cardwell opined, without any supporting evidence, that Ms. Hagans was not evaluated by Dr. Leitner from noontime until her C-section at 2:30 p.m., and that was a "deviation from the standard of care." (Id. at 19:23-20:6.) However, Dr. Cardwell never set forth the standard of care for how often any patient, or a patient such as Ms. Hagans who had been diagnosed with chorioamnionitis, should have been examined by the attending doctor, or any of the resident doctors.

- Dr. Cardwell generally discussed terms such as "prolonged deceleration," "tachycardia" and "decreased variability." (Id. at 26:3-6, 24: 5-23; 26:21-24; 28:5-7.) However, he never defined the point at which those three conditions, either on their own or taken together, amount to an emergency requiring a C-section delivery of a baby per an objective standard of care. Instead, he merely stated, in a conclusory fashion, that "under the circumstances, the tachycardia, the decreased variability, the previous deceleration, when this occurs, the patient needs to be prepared for emergency Cesarean section." (Id. at 26:21-25.)

- Dr. Cardwell stated what the drug Pitocin is, and his opinion that the administration of Pitocin to Ms. Hagans was a deviation from the standard of care. (Id. at 41:23-43:12.) However, he did not state what the standard of care is for administering, and ceasing the administration of, Pitocin.

- Dr. Cardwell also opined that the antibiotic Unasyn was administered late (despite admitting that there were "representations that this medication was given at around 12:30.") (Id. at 34:21-22.) He further opined that any delay of administering Unasyn would have been "a deviation from the standard of care" (id. at 37:16-21) but he never articulated what the standard of care is for administering the antibiotic in the first place.

Plaintiff's other medical experts – Dr. Erin Zinkhan (neonatologist), Dr. Armando Correa (pediatric infectious disease specialist), and Dr. Mary Edwards-Brown (pediatric

neuroradiologist) – were not offered for, and therefore did not opine on, *any* standards of care in this case. The record demonstrates that there was no testimony whatsoever from Plaintiff's expert witnesses regarding an objective standard of care that would be applicable to this case or the individual Defendants. Therefore, judgment notwithstanding the verdict should be entered in favor of HUP on this ground.

iii. Plaintiff Failed to Establish That Any Provider Breached a Standard of Care

Judgment notwithstanding the verdict is also warranted because Plaintiff has failed to prove any *breach* of a standard of care. To establish that a defendant breached a standard of care, a plaintiff must first articulate the standard of care from which the legal duty arises. E.g., Catlin v. Hamburg, 56 A.3d 914, 920 (Pa. Super. 2012) ("When the alleged negligence is rooted in professional malpractice, the determination of whether there was a breach of duty comprises two steps: first, a determination of the relevant standard of care, and second, a determination of whether the defendant's conduct met that standard."). As set forth above, Plaintiff failed to establish any standard of care applicable to this case. Therefore, it is impossible for Plaintiff to argue that she has presented any evidence at all of a *breach* of this invisible standard.

As noted, *supra,* when Dr. Cardwell was asked whether HUP's medical providers had "all individually and collectively deviated from the standards of care", Dr. Cardwell answered in the affirmative without further explanation. (N.T. 4/4/23 p.m., at 48:4-13.)

There are two critical and distinct problems with this conclusory testimony. First and foremost, because Dr. Cardwell failed to articulate an objective standard of care in the first instance, Dr. Cardwell'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).

Second, Plaintiff's expert testimony fails to specify how each of the doctors *individually* breached the standard of care specific to each one of them. Instead, Dr. Cardwell's testimony lumped together actions taken by the providers as a group and concluded that such conduct violated some undefined standard of care. As noted above, this "team" approach to proving liability has been rejected in Pennsylvania and elsewhere. This is especially true when each individual provider should have been held only to the standard of care of their particular level of expertise, *i.e.,* an attending to an attending's standard of care, a resident to a resident's standard of care, and a nurse to a nurse's standard of care. (See N.T. 4/20/23 p.m., at 23:25-25:4.)

Even assuming that Dr. Cardwell *did* articulate an objective standard of care for each provider, he still failed to establish that any breach of the standard by any particular provider occurred. An examination of Dr. Cardwell's testimony reveals the following with respect to his opinions as to each specific provider:

Dr. Kirsten Leitner, M.D., attending physician:

- As mentioned above, Dr. Cardwell states that Ms. Hagans was not evaluated by Dr. Leitner from noontime until her C-section at 2:30, which he claims (without any supporting evidence) is a "deviation from the standard of care." (N.T. 4/4/23 p.m., at 19:23-20:6.) To support his claim that this was a deviation, Dr. Cardwell merely stated it was because the patient "presented with chorioamnionitis, which is a very concerning condition, both for the mother and baby, but in addition to that, there's evidence of a non-reassuring fetal heart rate tracing, what we call a category II tracing." (Id. at 20:8-13.) Dr. Cardwell offered no explanation regarding what standard was supposedly breached or how the actions of Dr. Leitner breached that standard.

Dr. Sarah Gutman, M.D., the second-year resident at HUP:

- Dr. Cardwell testified that around 1:08 p.m., when Dr. Gutman made a note that she was attempting resuscitation, she should have been preparing Ms. Hagans for emergency Cesarean section due to the prolonged deceleration of J.H.'s

heartrate on the fetal monitoring strip. (Id. at 26:16-27:18.) Importantly, and as previously stated, Dr. Cardwell did not offer a relevant standard of care or how that standard was breached. Indeed, he did not explain why that prolonged deceleration would have necessitated delivery, other than to say he believes "[a]t this point in time, with everything else previously, it's necessary to deliver the baby because even if this goes back to the baseline tachycardia, the next deceleration may be, won't return to the baseline, the baby will be deprived of more oxygen." (Id. at 27:9-14.) No standard of care was mentioned.

Victoria Kroesche, R.N.:

- The only mention Dr. Cardwell makes of any nurse is that "the nurse" did not document the interpretation of the fetal heart rate every 15 minutes into the medical records, which he considered to be a violation of the hospital's policy. (Id. at 44:13-45:1.) However, he never identified Nurse Kroesche by name, nor did he state that any of her actions was a deviation from any specified objective standard of care. (See id.) Moreover, it is well-established in Pennsylvania that there is no cognizable cause of action for negligent recordkeeping. No. 2011-C-4318, DeFrancesco v. Lehigh Valley Hospital-Muhlenberg, Inc., 2014 Pa. Dist. & Cnty. Dec. LEXIS 101, *8 (Lehigh Cty. Com.Pl. 2014) ("there is no cause of action in Pennsylvania for a doctor's failure to document"), *aff'd sub nom*., 122 A.3d 457 (Pa. Super. 2015), *appeal denied*, 634 Pa. 736 (Pa. 2015); Neives v. Gottlieb, MD, 2017 WL 1181461, at *1 (Pa.Com.Pl. Phila. 2017) (Order of March 3, 2017, Ceisler, J.) (providing that plaintiff's expert "is precluded from testifying regarding Dr. Gottlieb's allegedly negligent documentation procedures, insofar as Plaintiffs seek to argue that this allegedly negligent documentation means that Dr. Gottlieb breached the relevant standard of care or failed to obtain informed consent[.]").

Finally, there is a complete absence in Dr. Cardwell's testimony that either **Dr. Bender, M.D.,** the chief resident in obstetrics at HUP, or **Dr. Suyama,** the first-year resident, did anything in particular to breach a standard of care.

Because Plaintiff failed to prove that any individual provider breached any specified standard of care, Defendant HUP is entitled to judgment notwithstanding the verdict for this reason as well.

iv. Plaintiff Failed to Prove Causation

Plaintiff's evidence on causation is also insufficient to establish a *prima facie* medical malpractice case against the individual provider Defendants, and therefore this Court should enter judgment notwithstanding the verdict in HUP's favor on this basis as

well. As set forth above in more detail, Plaintiff failed to articulate any objective standard of care and therefore could not have established any breach of a standard. Likewise, it is impossible for Plaintiff to have proven that any breach of a standard of care *caused* Plaintiff's injuries.

Even assuming, however, that Plaintiff did in fact establish a relevant standard of care and breach of same, Plaintiff's expert testimony is not sufficient to prove causation. Plaintiff's experts testified at great length about their belief that a delivery performed an hour earlier would have completely avoided J.H.'s injuries. Yet *not one* of Plaintiff's experts testified (nor could they have) ***that delivery an hour earlier was mandated by the standard of care***, let alone ***how*** or ***why*** an earlier delivery of J.H. would have prevented his injuries, especially if, as Plaintiff claims, Plaintiff had been experiencing "non-reassuring" fetal monitoring the entire time she was in the hospital.

A plaintiff in a medical malpractice case bears the burden of proving a causal connection between a defendant's 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, a 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.")

The Superior Court has repeatedly noted that one of the most distinguishing features of a medical malpractice action is the need for expert testimony to prove each element of the claim, including causation. 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's "but for" causation requires a showing that the "harmful result would not have come about but for the negligent conduct."). Applying that analysis to the instant case, Plaintiff was required to prove that "but for" one or more of the individual defendant's failure(s) to perform Ms. Hagans' C-section earlier, J.H. would not have suffered any harm.

Expert testimony on the issue of causation is not competent if it provides "no basis other than conjecture, surmise, or speculation upon which to consider causation." See Haney v. Pagnanelli, 830 A.2d 978, 991 (Pa. Super. 2003). Here, when asked to explain his theory that a delivery an hour earlier would have "avoided this horrible outcome," Dr. Cardwell stated:

> A. Well at 1:00, there was a prolonged deceleration. The baby was still maintaining a heart rate but it's tachycardia. There's evidence as discussed of fetal hypoxia, the non-reassuring sign on a fetal monitor with the prolonged deceleration. At that time, if the baby was delivered in a timely

> fashion, the baby, in my opinion, would have been born in a healthy condition.

(N.T. 4/4/23 p.m., at 52:5-13.)

If this seems like a speculative and unsupported conclusion, it is. Dr. Cardwell never adequately explained, to a reasonable degree of medical certainty, why this earlier delivery *would* have resulted in a healthy baby, and he also never explained the converse: *i.e.*, ***how or why J.H. would not have experienced the exact same injury if he had been delivered at the time Ms. Hagans arrived at the hospital***. Dr. Caldwell's statements are the dictionary definition of conjecture and speculation, as they were based on nothing other than his own, unsupported opinion.

Plaintiff's neonatologist, Dr. Zinkhan, opined that the acute HIE occurred "very soon before birth, within the last 30-45 minutes before he was delivered." (N.T. 4/5/23 a.m., at 30:15-17.) She testified about the difference between an "acute" injury and a "chronic" injury, and how, in her opinion, J.H.'s injury was not "chronic" merely because his growth on February 16, 2018, a full eight days before his birth, was normal. (See e.g., N.T. 4/5/23 a.m., at 38:10-12) ("His growth [on February 16, 2018] is where it should be; perfectly normal. That is a sign there is not a chronic component to this. Anything that happened to him was very acute in that last little bit before he was born.") However, Dr. Zinkhan never provided any support or explanation for either of these contentions; nor for her idea that a delivery of J.H. any time prior to "that last little bit" would have yielded a different result for J.H. Indeed, her testimony is incredulous in its unsupported conclusions and reflects no more than her personal beliefs unmoored to any scientific medical evidence:

> Q. What were they telling Ms. Hagans about what that MRI [from February 26] showed?
> **A.** Extensive hypoxic insult and that large areas of brain had been deprived of oxygen for an undetermined period of time.
> Q. Do you have an opinion today as to when that deprivation of oxygen occurred?
> **A.** In that last 30-45 minutes before he was delivered.
> Q. Had he been delivered before that time, would we be here today?
> **A:** No.
> Q. And every minute that he was in utero after that time period continued to increase the risk of harm to J. of HIE?
> **A:** Yes it did.

(N.T. 4/5/23 p.m., at 24:20-25:10.) Dr. Zinkhan did not cite any medical evidence, from either the medical records or from any treatise, to support her completely fabricated timeline.

Plaintiff's pediatric infectious disease expert, Dr. Correa, also claimed that the cord gas testing results were consistent in his opinion with an injury that "occurred right before delivery" or "very close to the time of birth." He never testified, however, to the specific timing of the injury to any degree of medical certainty. (See N.T. 4/6/23 a.m., at 62:4-6; 65:6-7.) Finally, Plaintiff's pediatric neuroradiologist, Dr. Edwards-Brown, testified that "[the injury] happened right at the end." (N.T. 4/6/23 p.m., at 21:12-13.) Again, Plaintiff's experts offered no testimony regarding the specific time of injury to any degree of medical certainty. Notably, both Drs. Zinkhan and Edwards-Brown admit that they were relying, at least in part, on Dr. Cardwell's opinion for the timing of the injury. (N.T. 4/5/23 p.m., at 73:11-15; and 4/6/23 p.m., at 54:16-18.)

This type of testimony is wholly insufficient under controlling case law. In Snizavich v. Rohm & Haas Co., 83 A.3d 191, 197 (Pa. Super. 2013), the Superior Court recognized that 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." Id. 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.

Judgment in HUP's favor should be entered as a result of Plaintiff's failure to present the requisite expert testimony on the issue of causation. 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.").

Moreover, the inconsistency among the various experts' opinions was fatal to Plaintiff's ability to prove causation. Under Mudano v. Philadelphia Rapid Transit Co., 137 A. 104, 108 (Pa. 1927), "a plaintiff fails to sustain his burden of proof where he presents two scientific experts who so vitally disagree on essential points as to neutralize each other's opinion evidence." In Mudano, our Supreme Court expressly ruled that where a plaintiff who carries the burden of proof calls more than one expert, there must be no absolute contradiction in their essential conclusions. If plaintiffs' experts contradict one another, "the jury would be confused rather than instructed," and a non-suit should be granted. Id.; see also Brannan v. Lankenau Hosp., 417 A.2d 196 (Pa. 1980) (limiting application of Mudano to cases where the plaintiff's experts "so vitally disagree on essential points as to neutralize each other's opinion evidence"); Brodowski v. Ryave, 885 A.2d 1045, 1060 (Pa. Super. 2005) (where plaintiff's experts were "in irreconcilable conflict" regarding the standard of care applicable to one of the defendant physicians, conflicting opinions would lead to jury speculation, the very ill the Mudano rule was designed to prevent). Here, there can be no doubt that Plaintiff's experts' opinions are inconsistent on issues such as the timing and mechanism of J.H.'s injury. Because there can be no issue more important than the cause of the injury, Plaintiff failed to carry her burden of proof on causation under Mudano. For this reason as well, the verdict should be vacated.

B. THIS COURT SHOULD GRANT A NEW TRIAL BECAUSE HUP SUFFERED SUBSTANTIAL PREJUDICE AS A RESULT OF MULTIPLE ERRORS AT THE ORIGINAL TRIAL

If this Court does not grant HUP's motion for judgment notwithstanding the verdict, this Court should order 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)).

Evidentiary Rulings

A new trial should be granted based on erroneous and prejudicial evidentiary rulings at trial. [T]he standard that a trial court must follow in deciding a motion for a new trial involves a two-step inquiry, in which a trial court must first determine if it made a mistake, and if so, whether the mistake prejudiced the moving party. Steltz v. Meyers, 265 A.3d 335, 342 (Pa. 2021) (citation omitted).

Jury Instructions

Error in a charge is sufficient ground for a new trial if the charge has a tendency to mislead or confuse rather than clarify a material issue. Error will be found where the jury was probably misled by what the trial judge charged or where there was an omission in the charge. Passarello v. Grumbine, 87 A.3d 285, 296–97 (Pa. 2014) (awarding new trial based upon erroneous jury charge); see also, Farley v. SEPTA, 421 A.2d 346 (1980) (issuance of adverse inference jury charge was reversible error).

Weight of the Evidence

When a verdict is so contrary to the evidence as to shock one's sense of justice, a new trial must be ordered. Dilauro v. One Bala Avenue Associates, 419 Pa. Super. 191,

615 A.2d 90, 91 (Pa. Super. 1992) (citations omitted). The Pennsylvania Supreme Court has stated:

> When a jury's finding is so opposed to demonstrated facts that, looking at the verdict, the mind stands baffled, the intellect searches in vain for cause and effect, and reason rebels against a bizarre and erratic conclusion, it can be said that the verdict is shocking and unjust, and that a new trial is imperative.

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

1. The Court Erred When It Permitted the Jury to Decide the Issue of Causation on a Legally Improper Basis

At Plaintiff's insistence, and over HUP's vehement objection, this Court gave the jury unprecedented latitude to determine, in the context of deciding the critical element of causation, whether HUP's conduct "**increased the risk of harm and/or was a factual cause**" of the harm (rather than requiring the jury to determine, as required, that the breach was a factual cause of the harm). This error misled the jury, erroneously lowered Plaintiff's burden of proof, and caused HUP substantial prejudice.

Plaintiff's counsel argued that Plaintiff was entitled to both of his proposed causation-related questions because Plaintiff "put on a case involving both direct factual cause as well as increased risk of harm" and referred to them as "alternative aspects of medical causation." Id. at 5:18-21; 6:18-19. This is a blatant misstatement of the law, which Plaintiff knew or should have known. [13]

[13] **On April 30, 2023**, after Defense counsel had filed the verdict slip which he had proposed to the Court, Plaintiff furtively filed with the Court a proposed verdict slip **dated April 19, 2023**. (See Plaintiff's April 19, 2023 Verdict Slip, attached hereto as Exhibit 25.). This verdict slip was never submitted to the Court

After hearing additional argument from both parties on this issue, and over Defense counsel's steadfast objections, this Court ruled, "The Court will instruct you to frame the verdict slip [combining factual cause and increased risk of harm queries], over defense objection." (N.T. 4/20/23 a.m., at 13:9-11). As a result, Question number 2 on the verdict slip read, "Was the Defendant's negligence a factual cause of any harm to the minor-Plaintiff, **and/or** did the Defendant's negligence increase the risk of harm to the minor-Plaintiff?" (See Exhibit 28) (emphasis added.). Thus, the Court invited the jury to decide the causation question based on an improper standard, causing substantial prejudice to HUP.

Under Pennsylvania law, increased risk of harm may be *considered* as a basis from which to find factual cause, but a finding of increased harm does not end the inquiry. Instead, as the Superior Court in Smith v. Grab stated, "once a plaintiff has demonstrated that a defendant's acts or omissions… have **increased the risk of harm** to another, **such evidence furnishes the basis for the fact-finder to go further and find that such increased risk of harm was in turn a substantial factor in bringing about the resultant harm**." Id. (citing Hamil, 392 A.2d at 1288 (footnote omitted)) (emphasis added); see also, Winschel, 925 A.2d at 788-789 (once plaintiff introduces evidence that a defendant-physician's negligent acts or omissions **increased the risk of harm** to the

during trial, nor was it shared with Defense counsel. However, it is direct evidence that Plaintiff's counsel knew, even while arguing differently to this Court, how the factual cause question *should* appear on the verdict slip. In Plaintiff's April 19 verdict slip, Plaintiff proposed *one* question regarding factual cause: "Was the Defendant's negligence a factual cause of any harm to the minor-Plaintiff?" See Exhibit 25. This question is substantively the same as the factual cause question proposed by Defense counsel. See Exhibit 27. Indeed, nowhere on Plaintiff's April 19 verdict slip does an "increased risk of harm" question appear. See Exhibit 25. Nevertheless, Plaintiff's counsel disingenuously and purposefully chose to argue to the Court that it was proper for not only an "increased risk of harm" question to appear, but to also combine it with the factual cause question as an alternative theory of causation. (It should be noted that Plaintiff's April 19 verdict slip was still in error because it too failed to have the jury identify which, if any of the individual medical care providers was negligent and the percentage of fault attributable to each one.)

plaintiff, "**then the jury must be given the task of balancing the probabilities and determining, by a preponderance of the evidence, whether the physician's conduct was a substantial factor in bringing about the plaintiff's harm**.") (emphasis added).

The 1990 Pennsylvania Supreme Court case of Mitzelfelt v. Kamrin gave the following example:

> An example of this type of case is a failure of a physician to timely diagnose breast cancer. Although timely detection of breast cancer may well reduce the likelihood that the patient will have a terminal result, even with timely detection and optimal treatment, a certain percentage of patients unfortunately will succumb to the disease. This statistical factor, however, does not preclude a plaintiff from prevailing in a lawsuit. Rather, once there is testimony that there was a failure to detect the cancer in a timely fashion, and such failure increased the risk that the woman would have either a shortened life expectancy or suffered harm, then it is a question for the jury whether they believe, by a preponderance of the evidence, that the acts or omissions of the physician were a substantial factor in bringing about the harm.

584 A.2d at 892 (cited in Carrozza v. Greenbaum, 866 A.2d 369, 380 (Pa. Super. 2004)). In other words, the determination of whether some action or inaction "increased the risk of harm" does not then end the inquiry into factual cause; rather, at that point it is still for the jury to "go further" and determine whether, "by a preponderance of the evidence…the acts or omissions of the physician were a substantial factor in bringing about the harm." Mitzelfelt, 584 A.2d at 892; Carrozza, 866 A.2d at 380. As further emphasized in Sucharski v. Patel, "[t]here is no cause of action in Pennsylvania for an increased risk of harm." No. 12-3298, 2014 U.S. Dist. LEXIS 2713, *52 (E.D. Pa. Jan. 9. 2014) (citing Pa. SSJI (Civ) 14.20, Subcommittee Note).

Here, the Court's acceptance of the Plaintiff's "increased risk of harm" language as an "and/or" alternative on the verdict slip in this case erroneously lowered Plaintiff's burden of proof. It allowed the jury to find liability on the part of HUP simply by finding that

HUP's conduct increased the risk of harm to Plaintiff, and did not require the necessary step of having to "go further" and determine by a preponderance of the evidence that HUP's negligence was a substantial factor in bringing about the alleged harm. See, e.g., Smith, 705 A.2d at 899 (citing Hamil, 392 A.2d at 1288 (emphasis added)); Mitzelfelt, 584 A.2d at 892.

In the instant case, Pennsylvania law and precedent dictate that the verdict slip should have only contained one question on factual cause, with no mention of increased risk of harm. Because the verdict slip that was given to the jury asked the jury to find whether the conduct of HUP was a factual cause of J.H.'s harm ***and/or*** increased the risk of harm to J.H., Plaintiff's burden was improperly and prejudicially lowered. The jury was improperly permitted to find for Plaintiff under an "increased risk of harm" theory without having to "go further" to determine whether that increased risk was the factual cause of J.H.'s injury. This error resulted in extreme prejudice to HUP, and a new trial is the only means of rectifying the damage to HUP.

2. The Court Erred When It Did Not Ask the Jury to Determine Whether Each Individually-Named Defendant Was Liable to Plaintiff and Whether HUP Was Vicariously Liable to Plaintiff Based on the Conduct of Any of Its Agents

A new trial is also required to eradicate the prejudice to HUP caused by the submission of an erroneous verdict slip to the jury where, at Plaintiff's counsel's request, the slip did not include a separate question directing the jury to determine the liability of each of the individual healthcare provider defendants, but instead listed the providers together as a group:

> 1. Do you find that the conduct of the Hospital of the University of Pennsylvania, acting by and through Dr. Kirstin Leitner, Dr. Whitney Bender, Dr. Sarah Gutman, Dr. Julie Suyama, and Nurse Victoria

> Kroesche, fell below the applicable standard of care? In other words, was the Defendant negligent?

See Exhibit 28.

Moreover, the verdict slip did not include any questions at all on the issue as to whether any individual provider's negligence was a factual cause of harm:

> 2. Was [HUP's] negligence a factual cause of any harm to the minor-Plaintiff, and/or did [HUP's] negligence increase the risk of harm to the minor-Plaintiff?

See Exhibit 28.

Defense counsel objected to this version of the verdict slip numerous times during trial. (See e.g., N.T. 4/19/23 p.m., at 32:17-24; 33:3-6; 38:10-39:1.)

Instead, the jury should have been asked to determine, ***as to each individual provider named by Plaintiff who remained a party at the time of trial*****,** whether each of them was negligent, and whether each individual's negligence was the factual cause of J.H.'s injuries. This is exactly how Defense counsel structured his proposed jury verdict slip, but the Court declined to adopt it. (See Exhibit 27; N.T. 4/20/23 a.m., at 34:5-10.)

The first, and most critical, step in proving the vicarious liability of a principal is to prove the negligence of one, or more, of the principal's agents. As set forth more fully, *supra*, the only way to hold an employer defendant liable pursuant to vicarious liability in Pennsylvania is to first prove liability of an individual employee. See, e.g., Holmes, 2007 Phila. Ct. Com. Pl. LEXIS 94, at *25 (holding that Defendant UPHS would only be held to be liable if an individual Defendant-physician was negligent, and if said negligence was a factual or substantial factor of the injury suffered.) Here, the jury was not required to assess the individual liability of any of the medical providers who were HUP's agents. Rather, the Court grouped all of the medical providers together, and therefore relieved

the jury of its burden to determine whether any particular individual's conduct fell below the standard of care, and whether that individual's negligence was the factual cause of J.H.'s harm. Because the jury was not required to make the requisite determinations about each individual defendant's conduct before finding HUP vicariously liable for its employees' actions, HUP was substantially prejudiced and a new trial should be granted.

3. The Court Erred When It Did Not Allow Defendant Healthcare Providers to Testify Regarding the Significance of the Cord Blood Gas Results

This Court should also grant a new trial to ameliorate the harm caused by the Court's preclusion of testimony from the individual healthcare provider defendants regarding J.H.'s umbilical cord blood gas results. As set forth below, the evidence was relevant, as it related to J.H.'s medical condition at birth—specifically, whether or not he was hypoxic, *i.e.*, whether there was any problem with his oxygen supply before birth, and/or how close to birth that problem may or may not have occurred, *which was the crux of the causation issue*. Moreover, the witnesses who intended to provide the testimony were qualified, competent, and not barred by the rules of procedure from providing factual testimony or expert opinions on this issue.

During trial, the attending physician, Dr. Leitner, was asked questions regarding the significance of the umbilical cord gas analysis. Defense counsel asked Dr. Leitner if she should have performed the C-section earlier; Dr. Leitner responded that she should not have delivered J.H. earlier and noted that "[t]here's nothing to indicate on the tracing or with some of the data we have such as the cord gas that there was an acute event that happened at the end." (N.T. 4/11/23 p.m., at 44:18-21.) As Defense counsel began to probe more fully into the relevance of the umbilical cord gas results, Plaintiff's counsel objected:

MR. MARGULIES: You mentioned something about a cord gas.
MR. BEDIGIAN: Your Honor, I'm going to have to object –
THE COURT: Do you have an objection?
MR. BEDIGIAN: Yes, Your Honor.
THE COURT: Let me see you at sidebar.

(Id. at 51:25-52:8.) At the close of the day's testimony, Defense counsel recounted the sidebar discussion:

> There was an objection by plaintiff's counsel when I was intending to ask Dr. Leitner about the umbilical cord gas and he objected to the question. And I believe it was an appropriate question on the basis that this is a blood that is taken from the baby's umbilical cord in the operating room. It was taken by the obstetricians. It is sent to the laboratory. It is reported in the baby's chart, but it is common practice for the obstetricians to be aware of the cord gas and it's certainly within their scope of practice and knowledge to be familiar with what the [sic] means because it's a reflection of the fetal status prior to delivery.

(Id. at 81:16-82:6.) Plaintiff's counsel stated that he objected on the grounds that he believed Dr. Leitner's testimony would be an opinion formed "in anticipation of litigation," simply because Dr. Leitner was a fact witness who would not have had that information in real time at the delivery. (Id. at 82:12-20.) The Court sustained Plaintiff's objection at sidebar. The next day, Defense counsel again made the same argument, in anticipation of his questioning of another physician defendant, Dr. Bender, but the Court once again sustained Plaintiff's objection, holding such testimony was irrelevant in terms of the doctors' treatment. (N.T. 4/12/23 a.m., at 11:3-7.)

The Court's refusal to permit the individual healthcare provider defendants to testify as to umbilical cord blood gas results was an error on many levels.

First, Plaintiff's objection was premature, as Defense counsel was not even able to get his question out to Dr. Leitner before Plaintiff's counsel's objection was sustained. **Second**, had Defense counsel been allowed to question the witness about the cord blood

gas numbers, this testimony was actually ***fact***, and not expert opinion, and therefore should have been allowed into the record as such.

Third, even if this testimony could be considered expert opinion, the doctors themselves were *named defendants*, and therefore should have been permitted by law to provide expert opinions at trial without the submission of an expert report, particularly, in circumstances where they had been previously deposed and had not been asked questions (or precluded from answering questions) regarding their opinions. Neal by Neal v. Lu, 530 A.2d 103, 106-108 (Pa. Super. 1987) (named defendant not limited by Pa. R.C.P. 4003.5, which governs discovery of opinions that a party or a potential party to litigation solicits from a *non-party* expert); Katz v. St. Mary Hosp., 816 A.2d 1125, 1127-28 (Pa. Super. Ct. 2003); see also Polett v. Public Communs., Inc., 126 A.3d 895, 921 (Pa. 2015) (reiterating that 4003.5 should act as "a shield to protect against surprise" but not "a sword" to be used to prevent the admission of an opinion which a witness developed during the course of performing his or her work duties, and not in the capacity of a paid expert."); Pa.R.C.P. 4003.5, explanatory comment ("It should be emphasized that Rule 4003.5 is not applicable to discovery and deposition procedure where a defendant is himself an expert, such as a physician, architect or other professional person, and the alleged improper exercise of his professional skills is involved in the action.").

Fourth, Plaintiff's counsel had no basis to claim as he did (N.T. 4/11/23 p.m., at 82:12-20), and there was absolutely no evidence to suggest, that the individual Defendants' opinions (assuming they were opinions) were developed "in anticipation of litigation," as opposed to at the time of treatment. Neal, 530 A.2d at 108. Nor should it

even matter if Drs. Leitner and Bender ***had*** "developed their opinions in anticipation of litigation"; this is a misnomer as it does not apply to this category of parties-as-experts. Indeed, the Superior Court in Neal held that Rule 4003.5 did not apply to the testimony of the defendant Dr. Lu because his opinions and knowledge would have naturally "pre-dated any litigation" by virtue of his profession:

> The doctor did not "acquire" his opinions on the treatment of Rebecca's finger "in anticipation of litigation." He did not expend time and money developing his own knowledge or employing himself as an expert to gain a tactical advantage in the law suit brought against him by appellants. His opinions and knowledge, in short, were not the work product of a well-prepared litigant. They pre-dated any litigation and are the very gist of appellants' cause of action. As such, they fall outside any reasonable definition of the phrase "acquired or developed in anticipation of litigation."

Id. at 108 (cited in Katz, 816 A.2d at 1127). "The Rule [4003.5] simply does not apply to expert opinions of a party when a matter within that party's field of expertise is at issue." Neal, 530 A.2d at 108.

Fifth, and relatedly, there was absolutely no basis for Plaintiff's counsel to have claimed that Dr. Leitner was not privy to information about, or involved in decision-making based on, cord blood gas levels. (N.T. 4/12/23 a.m., at 9:11-10:3 ("[t]he blood gases that are at issue here, there is no reporting that she ever saw them. They were not sent to her… it's neonatology that interprets the blood gases and decide what to do, just like they did in this case… She wouldn't have to have that knowledge. It's clearly in anticipation of litigation and it's cumulative, Your Honor.") This is patently false: if they had been allowed to testify, Drs. Leitner and Bender would have stated that they received the results of the baby's blood cord gas, and thus would have had personal knowledge of this important data to share with the jury. Though Defendant's expert, Dr. Goetzl, later testified to the results of the cord gas, the fact that the actual treating physicians could not testify

regarding this important data reduced the significance of these results in the eyes of the jury, and was therefore significantly prejudicial to Defendant.

Moreover, this testimony would not have been "cumulative" in any way; instead, and for the same reasons set forth *supra*, it was corroborative, and therefore improperly excluded. See Hassel v. Franzi, 207 A. 3d 939, 953 (Pa. Super. 2019) (defining "corroborative" evidence as "evidence that **differs from but strengthens or confirms** what other evidence shows" as opposed to "cumulative evidence" which is merely additional evidence that supports a fact established by the existing evidence) (quotations omitted, emphasis added.) Testimony from the actual physician-defendant would naturally differ from (but still strengthen) the testimony from an expert who was hired by the party to opine in the party's favor, and therefore cannot be characterized as "cumulative."

Finally, Plaintiff's counsel had every opportunity to explore these very issues during discovery but failed to avail himself of this opportunity. A physician defendant who qualifies as an expert "can be examined by written interrogatories under Rule 4005 or by oral deposition under Rule 4007.1[,]" thus providing a plaintiff other means to obtain pertinent information. Neal, 530 A.2d at 107 (citing Pa. R. C.P. 4003.5 explanatory note.) Without having explored this line of testimony previously with the providers, Plaintiff's counsel had no basis to object to this line of testimony at trial. See id.

Here, the cord blood gas analysis was a critical issue in this case, as it is determinative of whether an acute hypoxic event took place in the minutes before the birth of J.H., as Plaintiff contends. The issue of J.H.'s condition at birth was of paramount importance to this case; particularly, where Plaintiff's expert, Dr. Correa, claimed that the

cord gas testing results were consistent in his opinion with an injury that "occurred right before delivery" or "very close to the time of birth." (See N.T. 4/6/23 a.m., at 62:4-6; 65:6-7.) Thus, the Court's silencing of the physicians' testimony regarding the significance of the cord blood gas results was extremely prejudicial, and a new trial is warranted on this ground alone.

4. The Court Erred When It Allowed Plaintiff to Introduce Irrelevant Testimony Regarding Plaintiff's Informed Consent Claim That Was Dismissed at the Preliminary Objection Stage of the Case

A new trial is also required because the Court erred in allowing Plaintiff to introduce evidence of discussions Ms. Hagans had with the providers about the performance and/or timing of Plaintiff's C-section and the administration of Pitocin. Plaintiff's views on her "plan of care" or her willingness to undergo an earlier C-section are wholly irrelevant to the seminal issue of whether the providers breached an objective standard of care. In addition to being irrelevant (particularly, once the informed consent claim was dismissed (see Order dismissing Count IX of Plaintiff's Complaint, attached hereto as Exhibit 29)), this evidence also was unduly prejudicial because it wrongfully implied that the providers were required to accede to Ms. Hagans' wishes or include her more robustly in their medical decision-making when there was no expert testimony to remotely support such a conclusion.

Plaintiff's counsel asked Dr. Cardwell at trial about whether Plaintiff should have been asked at an earlier time if she would consent to a C-section, as well as whether she was offered the option of having a C-section. (N.T. 4/4/23 p.m., at 46:25-47:1.) He asked Dr. Bender generally how Plaintiff "factor[ed] into her own plan of care" (N.T. 4/12/23 a.m., at 96:18-19), and more specifically "exactly whose plan was it to decide to augment this labor using Pitocin, known to be a high-risk medication" (id. at 96:3-5); whether the

providers had ever offered to deliver Plaintiff "right now by C-section" (id. at 98:11-15) instead of giving Plaintiff Pitocin; whether they had told Plaintiff that the Pitocin was going to "make her contractions stronger, more frequent, more painful"; and whether there was "a risk of this medication causing her to contract too frequently and there could be an adverse impact on the child." (Id. at 100:10-17.)

Plaintiff's counsel also questioned Plaintiff about whether she was ever "offered the option of having a Cesarean section before that [2:11-2:15] time," (N.T. 4/10/23 p.m., at 29:14-17) to which Plaintiff answered: "Honestly, no. If I may state, that's always been a plan for me. I know people say you get pregnant to have a baby vaginally, but I always wanted a C-section. I always said that if that was ever given to me, I would take that option of having a C-section." (Id. at 29:18-21.)

As objected to and argued by Defense counsel at trial, this line of questioning was improper, as it was irrelevant to any claim in the case at the time of trial. (N.T. 4/13/23 p.m., at 4:25-9:5.) Still, the Court refused to preclude this line of questioning (id. at 15:7-17) and refused to give a curative instruction and charge to the jury indicating that the issue of consent was not a component of Plaintiff's case. (N.T. 4/19/23 p.m., at 23:22-24.) The implication of wrongdoing by HUP's providers that Plaintiff made through this testimony, and the Court permitting the jury to consider it in its decision-making despite no informed consent claim remaining in the case, and its lack of relevance to any claim in the case at the time of trial, was extraordinarily prejudicial to HUP and requires a new trial.

5. The Court Should Grant a New Trial on Weight of the Evidence Grounds

This Court should grant a new trial because the verdict was against the weight of the evidence (a) where Plaintiff withdrew her only direct claim against HUP for corporate negligence, and therefore could only prove her sole remaining claim against HUP (for vicarious liability), by establishing the liability of one or more of its agents, and (b) where the jury's award of future medical expenses and pain and suffering was based on speculation and shocks the conscience.

a. The Verdict Was Against the Weight of the Evidence Where Plaintiff Failed to Establish the Liability of One or More Agents to Support a Claim of Vicarious Liability Against HUP

A review of the trial record as a whole – including testimony presented by both sides – demonstrates that in addition to the fact that Plaintiff failed to provide sufficient evidence to support her claims, the weight of the evidence does not support the verdict in Plaintiff's favor. In examining the weight of the evidence, the court is "not required to consider the evidence in the light most favorable to the verdict winner when passing on the question of whether a verdict is against the weight of the evidence. Rather, the court is to view all of the evidence." Lanning v. W., 803 A.2d 753, 765-66 (Pa. Super. 2002).

Importantly, even Plaintiff's three experts testified to the fact that Ms. Hagans was well-monitored and cared for by four different physicians, six separate times (N.T. 4/4/23 p.m., at 79:1-15, 80:8; 80:12), and that she was appropriately administered an antibiotic shortly after her triage, at 12:30 p.m., to treat her chorioamnionitis (Id. at 75:10-12; 109:15-110:2.) In addition, Plaintiff's experts admitted that chorioamnionitis can occur even prior to the rupture of membranes (N.T. 4/5/23 p.m., at 62:4-15), that there was evidence of chorioamnionitis in J.H.'s placenta (id. at 58:16-25), and that

chorioamnionitis can cause tachycardia (N.T. 4/4/23 p.m. at 25:4-5), and that chorioamnionitis can give the baby sepsis (N.T. 4/5/23 p.m., at 57:18-23), which can itself cause brain injury. (N.T. 4/6/23 a.m., at 112:15-18.) Also important is that Dr. Cardwell is the ***only*** expert to state that he saw minimal to absent variability on the fetal monitoring strips (N.T. 4/4/23 p.m., at 88:5-8) and admitted that "different people can interpret fetal monitoring differently." (Id. at 88:13-15.)

Then, Defendant's well-qualified experts testified that the HUP medical providers met the standard of care with regard to treatment of Plaintiff, and that nothing that they did, or did not do, contributed to J.H.'s injuries. On behalf of Defendant, **Dr. Laura Goetzl**, a physician board certified in obstetrics, gynecology, and maternal-fetal medicine from the University of Texas at Houston, testified to a reasonable degree of medical certainty that the obstetrical providers at HUP met the standard of care with regard to the treatment of Plaintiff from the time she arrived at the hospital up and through the time of delivery (N.T.4/17/23 a.m., at 36:7-12; 78:16-21) in the management of her chorioamnionitis (id. at 36:16-17) and in the management of labor and interpretation of fetal monitoring. (Id. at 36:18-22.) She also testified that there was not a significant delay in performing delivery, that the physicians performed delivery at the appropriate time (id. at 36:23-37:4), and that the timing of the C-section did not contribute to J.H.'s brain injury. (Id. at 37:10-11.) As to the latter, Dr. Goetzl testified that there were "clear signs of fever, there were clear signs of inflammation, but there were no signs of hypoxia." (Id. at 37:21-25.) In addition, she testified that "the cord gas value that was recorded shows very clearly there was no low oxygen at the time of birth" (id. at 38:7-9) and no evidence at all that there was an acute hypoxic or low-oxygen event

that occurred during the time Plaintiff was at HUP. (Id. at 38:10-14.) Therefore, the "most likely cause for the tachycardia was inflammation, fever, infection, going along with the chorioamnionitis." (Id. at 59:15-18.) Dr. Goetzl also testified that the tracing shortly before birth was "reassuring moderate variability" (id. at 38:19-22) and that following any decelerations and resuscitative measures the "heart rate came back up to a normal heart rate…". (Id. at 56:1-3.)

Perhaps most importantly, she testified that "**there is no evidence to show there is a decreased chance of brain injury if you deliver sooner just because of chorioamnionitis**." (Id. at 47:14-17.) In fact, Dr. Goetzl opined that **"[o]nce the baby's brain is exposed to high temperature and inflammation, that is irreversible. Any damage is done. And delivering early does not prevent that.**" (Id. at 47:21-24.) On cross-examination, Dr. Goetzl reiterated that the "**timing of delivery does not reduce the risk of brain injury. That has been well studied in thousands and thousands of babies and we know that whether you deliver immediately or whether you deliver hours later, the risk of brain injury does not get worse. It stays the same**." (Id. at 88:17-23.)

Dr. Stephen Eppes, a pediatric infectious disease physician at ChristianaCare Hospital in Delaware, testified that J.H. presented with Fetal Inflammatory Response Syndrome ("FIRS"), which caused his brain injury. (N.T. 4/17/23 p.m., at 18:24-19:1.) Dr. Eppes testified that "several lines of reasoning would suggest that [the inflammatory process] had been going on for a while, probably many hours…" (Id. at 23:12-14.) In particular, Dr. Eppes testified that the C-Reactive Protein ("C-Rep") of the baby's liver, an inflammatory marker, showed a moderately elevated amount (19.9) three hours after

birth, indicating inflammation starting close to 18-24 hours prior to birth. (Id. at 25:14-19.) Further, Dr. Eppes testified that chorioamnionitis *on its own* is an independent risk factor for cerebral palsy. (Id. at 26:19-28:2.)

Dr. Mark Mintz, a pediatric neurologist and former chief of the child neurology division at Cooper Hospital, head of CHOP's New Jersey programs for child neurology, and former executive director at Bancroft, further supported these experts' opinions. He testified at his deposition that "the cause of cerebral palsy over the years from research has been shown to be very few coming from a labor and delivery event and many more coming from prior to that or after that timeframe." (Ex. 24, Mintz Dep., at 45:8-12) Dr. Mintz testified that from his review of the medical records he could not find "any supporting evidence" for the supposition that J.H.'s injuries arose from any event occurring in the last 30-45 minutes of labor. (Id. at 112:8-10.) Dr. Mintz stated that to get the sort of catastrophic outcome that occurred in this case, "if it's an acute episode in the last parts of labor, the last 45 minutes of labor, there is usually some catastrophic event" and the outcome often is "severe encephalopathy" which is not what J.H.'s brain scans show right after birth. (Id. at 112:8-116:5.) Here, though, "the newborn was not encephalopathic in that first 24 hours or so but what did happen, [he] went into seizures… And neonatal seizures in and of themselves can cause a type of brain injury that would resemble hypoxic ischemic or HIE brain injury." (Id. at 116:6-19.) Dr. Mintz summarized what actually occurred in this case:

> A. So putting it all together, there was an infection/inflammation involving the placenta and umbilical cord that supplies the blood to the fetus occurring hours prior to Ms. Hagans' arrival to the hospital in labor. And during labor, a fetal heart rate that was sufficient to support cerebral blood flow which is really a critical factor in developing this MEM or ME, I should say, multicystic encephalomalacia. And then a lack of an HIE type of

> clinical picture after birth to the point that the clinicians that were involved did not even refer this baby for what's called brain cooling, which is a very common procedure when even you have you a suspicion of HIE or some sort of hypoxic ischemic problem… And they didn't even bother to refer the baby for that because there was really no clinical indications for that. And then all the seizure issues and then of course the subsequent outcome. So I would say it's that sort of problem starting many hours before Ms. Hagans presented to the hospital with infection and inflammation of the placenta and the umbilical cord…

(Id. at 117:19-118:23.)

In short, none of the evidence in this case, aside from the conclusory opinions of Plaintiff's experts, supported a finding that an acute catastrophic event occurred to J.H. in the last minutes prior to his delivery. Rather, the inflammation caused by an infection that Plaintiff had contracted many hours prior to her arrival at HUP was the cause of J.H.'s neurologic condition. Thus, taking all the evidence together, the verdict was against the weight of the evidence, and a new trial should be granted.

b. The Verdict Was Against the Weight of the Evidence Where the Jury's Award of Future Medical Expenses and Non-Economic Loss Damages Was Based on Speculation and 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). Here, the jury awarded a total of nearly $183,000,000 in damages based on inadequate evidence and unsupported speculation. Because this verdict was grossly excessive, particularly in light of Plaintiff's lack of evidence, a new trial should be granted.

First and foremost, the jury awarded future medical expenses until age 70 despite having no basis to do so. There was only one expert who offered testimony about J.H.'s life expectancy, and that was *HUP's* pediatric neurology expert, Dr. Mintz. Dr. Mintz opined that because of the nature of J.H.'s medical conditions, J.H. would unfortunately

have a substantially reduced life expectancy. More specifically, Dr. Mintz testified that J.H.'s life expectancy would be overall 8-13 years of age. (Defense Trial Exhibit D-100, Mintz Dep., attached hereto as Exhibit 24, at 107:5-12.) Further, if the jury were to find that J.H. did not suffer from being in a minimally conscious state, but does have cerebral palsy, Dr. Mintz stated that J.H. would have a 50% chance of survival to age 16 or 17. (Id. at 107:13-20.) Finally, Dr. Mintz opined that if J.H. were to live to 15 years, his additional life expectancy would be another 14 years (age 29), at the most. (Id. at 107:21-24.) Thus, based on the expert testimony offered, the jury's award of future damages to age 70 is unsupported by substantial credible evidence and is therefore manifestly excessive under the circumstances.

Plaintiff's experts never opined on life expectancy. Plaintiff's life care expert, Jody Masterson, was not qualified to offer an opinion about J.H.'s life expectancy, and she did not purport to do so:

> Q: Did you make any assumptions on how long he would need that care?
> A: For the rest of his life. What that is, the terms life expectancy, I used the life tables, so they are general life tables for the purposes of my report.
> **Q: Right. In other words, you're not offering an opinion on what his life expectancy is, meaning J.?**
> **A: No.**
> Q: But you've taken the life tables and you've used the statistics to say if he lives this long, this is how much care he's going to need and how much it's going to cost as we go through the years?
> A: Correct.

(N.T. 4/3/23 p.m., at 37:20-38:10 (emphasis added); see also 4/4/23 a.m., at 40:9-10 ("I don't have an opinion on life expectancy.")); and

> **Q. I believe you told the jury that you do not have an opinion on how long Jay will live. Is that correct?**
> **A. Correct.**
> Q. And that's because you don't have the training and experience to make such a forecast. Correct?
> A. Correct.

(N.T. 4/4/23 a.m., at 35:5-11 (emphasis added).)

While Ms. Masterson's expert report described the cost of care and treatment for J.H. until age 75, the only basis for her use of age 75 was the U.S. Life Tables ***for all males*** in the United States. (Id. at 38:4-40:11 ("I looked at all males and what the life expectancy would be.").) Ms. Masterson admitted that she did not know whether there is a source of information that states how long males live who have the same types of health-related issues as J.H. (Id. at 40:4-6.) In addition, Ms. Masterson claimed that Plaintiff's neurology expert, Dr. Katz, "made an opinion about life expectancy" and "reviewed" and "agreed with" her report, but, in fact, Dr. Katz specifically stated that he did not intend to offer an opinion as to J.H.'s life expectancy:

> Q. My question was, when you signed the form we just identified in terms of agreeing with Ms. Masterson's projections as being medically necessary, were you aware that her projections included a life expectancy to age 75, which she told the jury she got from the lifespan tables that you just identified? Were you aware of that?
> A. No.
> **Q. So did you intend to say anything, when you signed the form, about life expectancy as opposed to the costs of care?**
> **A. No.**

(N.T. 4/10/23 a.m., at 110:13-24 (emphasis added).)

Second, it is clear from the jury's excessive award of future non-economic loss ($70,000,000) that the jury undoubtedly based its calculations of these damages on the same assumption that J.H. would have a normal life expectancy until age 70, which, as set forth *supra*, is not supported by the evidence.

c. Plaintiff Did Not Present Any Evidence of Pain and Suffering, or of J.H.'s Loss of Life's Pleasures, and Therefore This Portion of the Verdict Should Be Vacated, or in the Alternative, a New Trial Should Be Held on Damages

Finally, Plaintiff did not present any evidence of pain and suffering, or of J.H.'s loss of life's pleasures. Defendant's expert, Dr. Mintz, testified that due to J.H.'s limited brain function, J.H. "has a limited ability to interpret" pain. (Dep. of Mintz, at 143:14-15.) Plaintiff did not present ***any*** of its own witnesses to counter this testimony. In fact, Plaintiff's expert pediatric neurologist, Dr. Katz, was the only expert to testify about J.H.'s pain. When Plaintiff's counsel asked Dr. Katz if J.H. "felt pain" from his hip and joint issues, Dr. Katz merely answered: "Oh, yeah. Kids can be quite uncomfortable from this." (N.T. 4/10/23 a.m., at 96:18-20.) Despite this completely generalized statement, Plaintiff's counsel in his closing statement stated:

> I think Ms. Hagans would know if her child is vegetative. I think you would know if the child was vegetative. You saw him with your own eyes. He is not a vegetable. He is a very devastated young man, but he knows his mom. He knows, he smiles, he has emotions, he feels pain. And Dr. Mintz wants to say, no, none of that is true. He doesn't process anything. Does that sound credible? Come in here, and not enough to say he is going to die early. Let me say he can't feel pain, he can't do this, he doesn't recognize his mom. That's why I had Ms. Hagans leave. I didn't want her to get hurt. It made me so mad. I didn't want him to do it to her.

(N.T. 4/20/23 a.m., at 59:19-60:9.) Ms. Hagans cannot provide any factual evidence to support this claim. Plaintiff's closing argument cannot stand in for actual evidence of pain and suffering.

Additionally, Plaintiff's counsel did not present any evidence whatsoever on J.H.'s loss of life pleasures. In fact, he presented no expert testimony that J.H. himself would have the ability to comprehend any type of embarrassment, humiliation, or sadness at all. To make up for this lack of evidence, Plaintiff's counsel presented testimony from J.H.'s

mother, Ms. Hagans, a lay person, to testify as to whether she believes her son can experience happiness or anger:

> Q: I want to talk a little bit about your observations. Does J. recognize you when you come into a room?
> A: Yes.
> Q: Does he recognize your sister?
> A: Yes.
> Q: Does he have displays of happiness?
> A: Yes.
> Q: Does he have displays of anger?
> A: Yes.
> Q: What makes him angry?
> A: A lot can make him angry. Like for example, [J.H.] don't say he's eating but I can tell when [J.H.] is hungry. [J.H.] does a motion with his mouth. He keeps sticking his tongue out. If you're not moving fast enough for him, [J.H.] gets upset, he starts shaking and he starts crying.

(N.T. 4/10/23 p.m., at 43:9-44:1.) Plaintiff's counsel also elicited testimony from Ms. Hagans regarding *her* loss of life's pleasures, rather than her child's loss. (Id. at 44:6-24.) ("Moving forward, my biggest concern is honestly, it's feeing like I didn't do enough. Feeling like I didn't protect him better. I know they say it wasn't my fault, but how can you tell me that. It's my child, my first child.") Then, in his closing, Plaintiff's counsel merely stated, without any basis: "Jalen Hurts signed a contract that paid him $51 million a year. Jay won't be able to pick up a ball. You [the jury] will have to say what that's worth. (N.T. 4/20/23, a.m., at 65:3-6.)

Ms. Hagans' improper lay opinions and Plaintiff counsel's rhetoric are no substitute for competent evidence and/or qualified expert testimony to support an award of non-economic loss damages, including pain and suffering and loss of life's pleasures. Because the jury's verdict with respect to economic and non-economic losses either was not supported by competent evidence or was based on pure speculation with respect to JH's life expectancy, HUP was prejudiced and the future economic and non-economic

damages portion of the verdict must be vacated, or, in the alternative, the Court should order a new trial on damages.

C. THIS COURT SHOULD REMIT THE JURY VERDICT OR, IN THE ALTERNATIVE, ORDER A NEW TRIAL ON DAMAGES BECAUSE THE VERDICT IS MANIFESTLY EXCESSIVE AND WILL NEGATIVELY IMPACT THE DELIVERY OF VITAL HEALTHCARE SERVICES IN THE COMMUNITY

In the event that this Court does not grant HUP's motion for judgment notwithstanding the verdict or a new trial, the Court should exercise its discretion and remit the jury verdict, or, in the alternative, grant a new trial on damages.

The decision to grant a remittitur or a new trial on damages "is peculiarly within the discretion of the trial court[.]" Sprague v. Walter, 656 A.2d 890, 924 (Pa. Super. 1995), appeal denied, 670 A.2d 142 (Pa. 1996) (citations omitted); see also, Polett v. Public Communs., Inc., 2017 Phila. Ct. Com. Pl. LEXIS 52, *10 (Phila. Cty. Com. Pl. Jan. 24, 2017) (ordering remittitur of excessive Philadelphia verdict), *aff'd,* Polett v. Pub. Commc'ns, Inc., 181 A.3d 1237 (Pa. Super. 2017). Pennsylvania appellate courts have long recognized that trial courts have the authority, and indeed the duty, to set aside or reduce excessive jury awards. See, e.g., James v. Ferguson, 162 A.2d 694 (Pa. 1960); and Jones v. Stiffler, 8 A.2d 455, 457-458 (Pa. Super. 1939).

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). It is also the responsibility of the judiciary to keep pain and suffering awards within reasonable bounds in a case such as this where the jury cannot help but have sympathy for the plight of the plaintiff. Haines v. Raven Arms, 24 Phila. 9, 21 (1992) (citing Daley v. J. Wanamaker, Inc., 464 A.2d 355, 357-358 (1983)) (reducing the award for pain and suffering from $8,000,000 to $5,000,000). Where the court recommends a reduced verdict and the plaintiff refuses to accept it, a new trial must be granted. See Corabi v. Curtis Publishing Co., 262 A.2d 665, 669 (Pa. 1970).

The damages award in this case bears no relationship to the alleged negligence, the evidence presented, J.H.'s condition, his future life expectancy, or the actual cost of care. Importantly, this case does not involve a claim for punitive damages.

1. The Jury Made Improper Assumptions as a Basis for Calculating Damages

a. No Basis Exists for Awarding J.H. Damages Until Age 70

A substantial remittitur is required here because there was no basis for awarding J.H. damages to age 70. HUP hereby incorporates its argument at Section V(B)(5)(b), *supra*, regarding the lack of expert testimony to support the conclusion that J.H. has a life expectancy of age 70.

b. The Court Erred in Allowing Plaintiff to Use Cumulative Totals in Calculating Her Damages

A substantial remittitur is also required because the Court erred by (1) allowing Plaintiff's economic expert, Dr. Thomas Borzilleri, to testify regarding the cumulative costs of future medical care at 10-year intervals, as opposed to single-year intervals, and by (2) permitting Plaintiff to use cumulative totals of future medical care costs at various intervals of time during his closing argument. (N.T. 4/20/23 a.m., at 63:19-22 ("Here are simple numbers. If he lives 30 years, it will cost $30 million. If he lives 50 years, it will cost $48

million.); id. at 65:1-2. ("All I can tell you in this world is 50 years of medical care is $48 million.".))

During trial, Defense counsel objected to Dr. Borzilleri's life plan cost summary, which provided totals for life care plan scenarios for J.H. in 10-year increments. (N.T. 4/10/23 a.m., at 8:6-19.) Specifically, Defense counsel argued that there was no basis to introduce evidence as to cumulative totals, other than on an annual basis. (Id.) Indeed, under section 509 of MCARE, 40 Pa. Stat. § 1303.509, any award for future medical expenses is to be separately itemized for each year; allowing for such cumulative totals thus contravenes both the letter and spirit of this provision of the statute. The jury's potential use of these improper cumulative totals provided by Plaintiff's expert was prejudicial to HUP and supports remittitur of the excessive verdict rendered.

2. A Substantial Remittitur is Required Where Plaintiff's Counsel's Inflammatory Statements Invited a Punitive Award Despite the Absence of a Punitive Damages Claim

There is no claim for punitive damages in this case. Although specifically instructed that any verdict returned must be based on the evidence, the jury was no doubt influenced by Plaintiff's counsel's inflammatory statements in his closing argument that were intended not only to evoke sympathy for Plaintiff, but also animosity toward HUP. For example:

- N.T. 4/20/23 a.m., at 45:13-19 ("That's a pretty high-and-mighty attitude to have, when you got a neurologically devastated young man who is in here and this could have been completely avoidable. Just because you go to elite institutions and get an elitist education and you work for a big hospital chain doesn't make you infallible.");

- Id. at 46:12-15 ("They are going to have a first-year and second-year resident, who don't know anything, and they will be the ones maintaining the high-risk patient?");

- Id. at 51:17-24 (“And let me tell you what really irked me, and maybe I was a little indignant to the lady, and I apologize if I offended anybody. But that life care planner that they brought up here from Virginia, to get up there on that stand and to minimize what this young man needed, and to say, you know, his care was excessive. Understand what that means.”);

- Id. at 52:13-21 (That is what they are arguing to you the entire time. Don't give them much money because he won't live long. But that wasn't enough, to sit there and tell this mother her baby will die in eight years. That wasn't enough. They will come in here and say, for those eight years, don't give him all the care we say he needs. Mom is doing just fine.”);

- Id. at 55:8-18 (“They refuse to accept accountability for their actions of their doctors and nurses that day. They will fight it tooth and nail and say it was anything but what we say it is… And they want to do it with a straight face, saying it with made-up defenses, and then, on top of it, saying, don't give this kid the care he needs for his limited life because mom can handle it. I think that is, quite frankly, repugnant, to put it on us.”);

- Id.at 58:1-19 (“Dr. Mintz, the lip-smacking doctor, all the time saying the baby will live eight years, maybe 29 years. He doesn’t know. He didn’t know… Imagine that nurse, the one I got indignant to, the life care planner, oh, well, I put him in the residential facility because it’s the cheapest option. That’s what’s best for him. Well, nurse, did you ever talk to my client about it? No. This is what I think. Put him in a warehouse. Put him in a residential facility. Cheapest option. That’s what will help him the best. That is what they bring in people to do, to minimize.”); and

- Id. at 59:10-60:9 (“And they want to come in and bring lip-smacking Dr. Mintz in here to say, well, he is vegetative… Dr. Mintz wants to say, no, none of that is true. He doesn’t process anything. Does that sound credible? Come in here, and not enough to say he is going to die early. Let me say he can’t feel pain, he can’t do this, he doesn’t recognize his mom. That’s why I had Ms. Hagans leave. I didn’t want her to get hurt. It made me so mad. I didn’t want him to do it to her… Thank you very much, Dr. Mintz. Enjoy your award that you’re getting in California. You must be proud of yourself.”)

Because sympathy for Plaintiff, a desire to punish HUP, and irrelevant, inflammatory language by Plaintiff’s counsel are inappropriate bases for awarding compensatory damages, the jury’s grossly excessive verdict must be reduced.

3. The Verdict is Manifestly Excessive and Incompatible With Past Verdicts

"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. Communs, Inc., No. 80 EDA 2017, 2017 Pa. Super. Unpub. LEXIS 4603, 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.'").

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).

A survey of similar birth injury cases tried in Philadelphia also indicates that this verdict is completely outsized. See, e.g., Nicholson-Upsey v. Touey, et al., 091104525 (Phila. Ct. Com. Pl. 2012) (jury awarded a total of $78.5 million, $10 million of which was for past, present and future pain and suffering, and $2 million in lost future earnings in case of a three year-old who suffered brain injury at birth where hospital's ultrasound machine was so outdated the doctor had told the woman her baby died in utero, patient disagreed and requested a C-section; baby sustained brain damage, spastic quadriplegic cerebral palsy); Harris v. Chou, et. al., No. 2010-04-000284 (Phila. Ct. Com. Pl. 2013) (jury verdict of $41,661,383 for future medical expenses through 2057 in a premature birth case where baby was born with cerebral palsy, and ***no amount*** was awarded for pain and suffering); Hatwood v. HUP, 11-4406 (Phila. Ct. Com. Pl. 2011) (Jury awarded $1.5 million to the parents of a child who suffered brain damage just prior to delivery and who died 17 months later due to complications from cerebral palsy under the Wrongful Death Act, $154,583 was awarded for medical and funeral expenses and $500,000 awarded to the estate of the child under the Survival Act.)

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).

4. MCARE Requires Consideration of the Impact of the Verdict on the Availability of Healthcare in the Community

a. This Excessive Award Should Be Remitted Pursuant to MCARE

This excessive verdict – the largest medical malpractice verdict in Pennsylvania's history – will have far-ranging consequences that will ultimately negatively affect the medical care of all citizens in the Commonwealth if not constrained. The already limited access to obstetrical care in Philadelphia could be further curtailed; the willingness of physicians and trainees to provide obstetrical services in Philadelphia will be negatively

impacted; and the availability and cost of insurance will leave hospitals and health systems with substantial uninsured exposure. This cannot be disputed.

To put the jury's award into context in terms of its relationship to the delivery of medical care in Philadelphia, this Court should consider the cost associated with Penn Medicine stepping in to continue to provide essential emergency medicine services, inpatient medical services, and inpatient behavioral health services to fill a health care services void in West Philadelphia when Mercy Philadelphia Hospital, a safety net hospital, closed in the midst of the pandemic. Since March 2021, Penn Medicine has invested over $50 million in capital and infrastructure improvements and incurred $41 million in operating losses related to this undertaking. (See Declaration of Keith A. Kasper ("Kasper Dec."), attached hereto as Exhibit 31, at ¶ 8.) The jury's award of $80 million in non-economic damages in this case therefore nearly equates to the cost associated with ensuring that over 80,000 residents of West Philadelphia received essential emergency medical services, that over 7300 were provided with inpatient medical services, and that over 2800 Philadelphia residents had access to inpatient behavioral health services. (Id. at ¶ 9.)

Consequently, the Court should remit this excessive award under 40 P.S. § 1303.501, *et seq.* (commonly referred to as "The MCARE Act.") The MCARE Act "was enacted to abate a malpractice insurance exigency serious enough to require legislative interventions." Hosp. & Health System Ass'n of PA. v. Commonwealth, 77 A.3d 587, 603 (Pa. 2013). The General Assembly specifically declared, in part, that "[e]nsuring the future availability of and access to quality health care is a fundamental responsibility that the

General Assembly must fulfill as a promise to our children, our parents, and our grandchildren." 40 P.S. § 1303.502.

To effectuate this goal, the General Assembly adopted section 515 of the MCARE Act, 40 P.S. § 1303.515, which establishes a legislative standard for remittitur. This provision requires that, "[i]n any case in which a defendant health care provider challenges a verdict on grounds of excessiveness, the trial court shall, in deciding a motion for remittitur, consider evidence of the impact, if any, upon availability or access to health care in the community if the defendant health care provider is required to satisfy the verdict rendered by the jury." 40 P.S. § 1303.515. Here, the availability and access to health care in the Philadelphia area, particularly to underserved communities, will undeniably be affected as a result of the verdict in that (i) access to obstetrical care could potentially be negatively impacted, in the face of an already existing decline in access; (ii) access to additional critical healthcare services, such as emergency medical services and behavioral and mental health services, could potentially be further curtailed; (iii) the recruitment and retention of healthcare providers in obstetrics could also potentially become more difficult, if not impossible, and (iv) professional liability insurance will become increasingly unavailable and costly.

i. The Dwindling Access to Obstetrical Care in Philadelphia

This verdict will have a deleterious impact on the delivery of health care (and obstetrical services in particular) in Philadelphia if not substantially remitted. (Declaration of Elizabeth A. Howell ("Howell Dec."), attached hereto as Exhibit 30, at ¶ 10.) Obstetrical services are not highly compensated by third party payors, nor are they compensated at a level commensurate with the professional liability risk involved. (Id. at ¶ 22; Kasper Dec., at ¶ 3.) Despite these economic realities and challenges, Penn Medicine has been

committed to providing these vital services in the community. (Kasper Dec., at ¶ 4.) However, if required to pay enormous sums to satisfy nuclear medical malpractice verdicts such as that rendered in *Hagans*, Penn Medicine will not be able to sustain its commitment to ensuring the availability of obstetrical services in Philadelphia, and the negative impact will be felt most acutely in underserved communities, especially the Black Community. (Howell Dec., at ¶¶ 11; 23; Kasper Dec., at ¶ 5.)

HUP and Pennsylvania Hospital are two of the five remaining hospitals that provide obstetrical services in Philadelphia. (Howell Dec., at ¶ 17; Kasper Dec, at ¶ 2.) In the year ending June 30, 2023, approximately 9,000 deliveries were performed at HUP and Pennsylvania Hospital alone. (Howell Dec., at ¶ 21; Kasper Dec., at ¶ 2.) Penn Medicine currently delivers almost 50 percent of all babies born in Philadelphia. (Howell Dec., at ¶ 20.) In the last 25 years, 14 Philadelphia hospitals have discontinued providing obstetrical services or have closed altogether, including Mercy Philadelphia Hospital and Episcopal Hospital, due in large part to their inability to absorb the financial risks associated with the provision of these services. (Kasper Dec., at ¶ 2.)

Penn Medicine participates in various community partnerships in the Philadelphia area to improve maternal morbidity and mortality, especially in underserved communities. Many of these services are provided at no cost or low cost. (Howell Dec., at ¶ 24.) For example, Penn Medicine's Helen O. Dickens Center provides routine and high-risk obstetrical care to pregnant women of all ages, regardless of whether the patient has medical insurance or the ability to pay for services. (Id. at ¶ 25.) The Center provides approximately 27,000 obstetrics and gynecology visits for West Philadelphia and other Philadelphia low-income communities. (Id.) The Center's prenatal team also provides

routine obstetrical care at Health Center #3, which is one of Philadelphia's public health centers. (Id.) In fact, approximately 35 percent of all deliveries of patients living in some of the lowest income communities in Philadelphia occur at Penn Medicine. (Id.)

Additionally, Penn Medicine is part of the Philadelphia OVA (Organized Voices for Action), a multidisciplinary community action team formed to carry out recommendations that come from the Philadelphia Maternal Mortality Review Committee. (Id. at ¶ 26.) This multidisciplinary taskforce is critical to reducing maternal morbidity and mortality and health inequities in Philadelphia. (Id.)

If Penn Medicine and other hospitals and health systems providing low cost and no cost obstetrical care in Philadelphia are required to pay enormous verdicts such as that rendered in *Hagans*, these partnerships that facilitate access to high-quality obstetrical services for women in underserved communities likewise will not be sustainable, and obstetrical providers will not be willing to staff them due to the fear of large medical malpractice verdicts. (Id. at ¶ 27.) Moreover, Penn Medicine has become a model for health systems across the county because of its efforts to address the national public health crisis that is disproportionately impacting the Black community; however, the viability of Penn Medicine's innovative work to improve maternal health, reduce maternal morbidity, and reduce health inequities in the Black community will be threatened if it is required to pay this costly verdict, as these efforts require substantial resources. (Id. at ¶¶ 28-30.)

Finally, the verdict in this case will have a detrimental ripple effect on the quality of obstetrics care in Philadelphia hospitals. (Id. at ¶ 31.) Namely, while professional organizations strongly advocate for the safe reduction of cesarean delivery, this verdict

will cause obstetricians to move to cesarean delivery more quickly, resulting in an increase in potentially unnecessary cesarean deliveries. (Id.) Increases in cesarean deliveries are associated with rising rates of maternal morbidity and mortality in the United States. (Id.) Physicians will choose to proceed with a cesarean delivery because of the risk of litigation for cases where there is no error – only differences in opinion as to the best timing of cesarean delivery to optimize maternal and infant outcomes. (Id.)

ii. The Decreased Access to Additional Critical Healthcare Services

In furtherance of its commitment to ensuring the provision of vital care in Philadelphia, and as stated, *supra*, Penn Medicine stepped in when Mercy Philadelphia Hospital, a safety-net hospital, closed in the midst of the pandemic. (Kasper Dec., at ¶ 6.) Recognizing the imminent loss of critical emergency and behavioral health services in West Philadelphia, Penn Medicine assumed providing these services on the former Mercy campus under the HUP license (HUP-Cedar). (Id. at ¶¶ 6-7.) Through June 2023, Penn Medicine has provided emergency services to 80,537 patients; 7,355 patients requiring in-patient medical admissions; and 2,817 patients needing in-patient behavioral health services. (Id. at ¶ 9.) Importantly, a substantial percentage of the patients served at the HUP Cedar location are low-income patients covered by Medicaid or Managed Medicare programs. (Id. at ¶ 10.) Penn Medicine has invested over $50 million and has sustained operating losses of close to $41 million in connection with this undertaking. (Id. at ¶ 8.)

Additionally, later this summer, Penn Medicine is opening a mental health crisis response center on the HUP Cedar campus to provide emergency psychiatric care to an anticipated 4,000 patients per year, many of whom are low-income patients who will be covered by Medicaid or Managed Medicaid programs. (Id. at ¶¶ 11, 13.) Demand for this type of care has soared due to the pandemic, and a large area of Philadelphia was left

without easy access to a psychiatric emergency room when the mental health crisis response center closed on Mercy's campus in March 2020. (Id. at ¶¶ 11-12.) Penn Medicine will initially invest $5.76 million in this critical service, and anticipates an operating loss of approximately $4 million per year. (Id. at ¶ 14.)

If required to satisfy the *Hagans* verdict as it stands today, the amount will negatively impact Penn Medicine's financial position and the availability of funds for similar endeavors to enhance the availability of, and access to, care in Philadelphia area communities. (Id. at ¶ 15.) As reflected above, supporting access to care for the underprivileged is an important component of Penn Medicine's mission; however, future initiatives of his nature would be directly jeopardized if HUP was required to satisfy the *Hagans* verdict. (Id.)

iii. Impact on Recruitment and Retention of Healthcare Providers in Obstetrics

Retention and recruitment of obstetricians is critical to continuing Penn Medicine's commitment to providing high-quality obstetrical care and reducing health inequities for women in the Philadelphia area. (Howell Dec., at ¶ 19.) The *Hagans* verdict has negatively impacted the willingness of faculty clinicians to continue to practice obstetrics in Philadelphia, or at all. (Id. at ¶ 14.) Additionally, it is expected that this verdict will impair Penn Medicine's ability to recruit new faculty clinicians to provide these essential health care services in Philadelphia. (Id. at ¶ 15.) Indeed, current resident and fellow trainees at Penn Medicine have also shared concerns about practicing obstetrics in Philadelphia in the aftermath of the *Hagans* verdict. (Id. at ¶ 18.) Retaining these physicians following completion of their training is critical to sustaining Penn Medicine's obstetrics program,

as well as the programs at the other Philadelphia hospital and health systems that still offer obstetrical care. (Id.)

iv. The Difficulty of Obtaining Insurance Coverage for Obstetrics in Philadelphia

Penn Medicine already has encountered significant difficulty in securing insurance coverage due to outsized Philadelphia jury verdicts. (Kasper Dec., at ¶ 16.) The *Hagans* verdict and the repercussions of the verdict, along with other outsized medical malpractice verdicts in Philadelphia, have impacted the willingness of the insurance markets to provide medical professional liability insurance coverage for health care providers and health care entities in the Philadelphia region. (Declaration of Benjamin J. Evans, at ¶ 6 ("Evans Dec."), attached hereto as Exhibit 32; Kasper Dec., at ¶ 16.) The insurance companies willing to provide insurance coverage for medical professional liability in Philadelphia have reduced the amount of insurance limits they are willing to extend. (Evans Dec., at ¶ 7.) Moreover, they have insisted on higher attachment points, leaving higher levels of uninsured risk for hospitals, health systems and healthcare providers. (Id.) And, premiums have been dramatically increased. (Id.)

Due in part to the *Hagans* verdict, and also because of the current medical malpractice litigation environment in Philadelphia, Penn Medicine encountered significant difficulty in securing renewal coverage for medical professional liability for the 2023-2024 coverage period. (Id. at ¶ 8.) When Penn Medicine did ultimately secure coverage, the cost was ***63 percent higher*** than the expiring program's premium. (Id.; Kasper Dec., at ¶ 17.) Even more concerning, the availability, attachment requirements and cost of medical professional liability coverage is forecasted to get worse in the coming years, especially if healthcare providers, hospitals and health systems are required to satisfy

verdicts of the magnitude of that in the *Hagans* case. (Evans Dec., at ¶ 9.) If required to satisfy the verdict in this case, there is substantial concern that neither Penn Medicine nor the other area hospitals and health systems will be able to secure insurance coverage, thereby increasing the amount of risk they will need to absorb in their respective operating budgets. (Kasper Dec., at ¶ 18.)

Accordingly, for all of the reasons set forth above, the Court should substantially remit the entire verdict to a level that is commensurate with the evidence actually presented, is reasonable, and will not negatively impact the availability of health care in the community. In the alternative to a remittitur, the Court should vacate the verdict because it is against the weight of the evidence and order a new trial on damages.

b. HUP Requests a Hearing Pursuant to Section 515 of the MCARE Act

Through section 515, the General Assembly imposed an ***express obligation*** on trial courts to consider and evaluate evidence regarding the impact of a medical malpractice verdict on the availability or access to health care, in situations where a defendant health care provider challenges the verdict on the grounds of excessiveness. *See id.* § 1303.515(b) ("A trial court denying a motion for remittitur shall specifically set forth the factors and evidence it considered with respect to the impact of the verdict upon availability or access to health care in the community."). In fact, the General Assembly specifically noted that it is an abuse of discretion for a trial court to deny a remittitur motion without adequately considering this type of evidence. See id. § 1303.515(c).

A defendant health care provider properly introduces evidence about these issues for the first time in support of a motion for post-trial relief because section 515 of the MCARE Act directs the trial court to consider this evidence *after* trial, in response to "a

motion for remittitur" and in light of "the verdict rendered by the jury." 40 P.S. § 1303.515. Moreover, evidence relevant to the section 515 analysis could not be introduced earlier because it is not relevant to the jury's determination. Instead, in section 515, the General Assembly directs the *trial court*, not the jury, to consider evidence of the verdict's impact on the availability and access to health care in the community. That analysis necessarily occurs only after the jury renders a verdict for the plaintiff.

It is also well within this Court's authority to hold an evidentiary hearing at the post-trial motion phase to consider this section 515 evidence. Pennsylvania Rule of Civil Procedure 227.1(a)(5) empowers trial courts to enter any "appropriate order" in response to motions for post-trial relief, including an order for an evidentiary hearing when needed to receive evidence that was properly not submitted earlier in the case. *See* Claudio v. Dean Machine Co., 831 A.2d 140, 146 (Pa. 2003). In this case, the need for an evidentiary hearing is clear to the extent the parties dispute essential facts about how the verdict will impact the availability and access to health care.

D. PENNSYLVANIA LAW REQUIRES FUTURE MEDICAL EXPENSES TO BE REDUCED TO PRESENT VALUE

In the event that this Court does not grant judgment notwithstanding the verdict or a new trial, Defendant respectfully requests that this Court set a hearing before such a judgment is entered to give Defendant the opportunity to present evidence to 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. [14]

To the extent that judgment is entered against Defendant HUP, HUP therefore also requests a hearing prior to such a judgment on the reduction of future medical and related expenses to present value.

VI. CONCLUSION

For all of the foregoing reasons, Defendant, Hospital of the University of Pennsylvania, respectfully requests that this Honorable Court grant its 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

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[14] 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). This is in contrast to the requirement that the amounts to be awarded for future lost earnings or earning capacity and non-economic loss are to be determined "in a lump sum." Id. at (a)(2)(ii)-(iii). 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). 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). 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).

requested, HUP requests that this Court schedule an evidentiary hearing on the reduction of future medical and related expenses to present value.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania, Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: August 1, 2023

/s/ Joe H. Tucker, Jr.
Joe H. Tucker, Jr., Esquire

CERTIFICATE OF SERVICE

I, Joe H. Tucker, Jr., Esquire, hereby certify that I served a true and correct copy of the foregoing pleading via the Philadelphia Courts Civil E-Filing System and E-Mail pursuant to Pa. R.C.P.205.4(g)(2)(ii) upon all counsel of record.

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