IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

DAJAH HAGANS, as Parent and Natural Guardian of J.H., a minor, individually and in her own right, et al.	:	CIVIL ACTION - LAW
	:	JUNE TERM, 2019
Plaintiffs,	:	NO. 7280
v.	:	JURY TRIAL DEMANDED
HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, et al.	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN OPPOSITION TO THE MOTION FOR POST-TRIAL RELIEF OF DEFENDANT, HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA

Respectfully submitted,

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EXECUTIVE SUMMARY

On April 21, 2023, a duly sworn Philadelphia jury of twelve *unanimously* found the Hospital of the University of Pennsylvania ("HUP") vicariously liable for the negligent acts of its obstetric team: Dr. Kirstin Leitner, Dr. Whitney Bender, Dr. Sarah Gutman, Dr. Julie Suyama, and Nurse Victoria Kroesche. HUP stipulated that these physicians and nurse were employees and agents of the hospital, acting in the course and scope of their employment when they delivered medical care to Dajah Hagans and baby "J.H." The jury also *unanimously* found that this negligence was a factual cause and/or increased the risk of harm to the minor J.H. of catastrophic hypoxic ischemic brain injury. Flowing from these findings of liability against HUP, the jury *unanimously* awarded J.H. damages for past and future non-economic pain and suffering, as well as economic damages for year-over-year future medical expenses and loss of future earning capacity. All of the jury's findings on the verdict slip were well-supported by the evidence at trial.

No legal error or abuse of discretion occurred at trial which would provide any basis to disturb this ***unanimous*** jury verdict. HUP is not entitled to judgment notwithstanding the verdict, nor should HUP get a "do-over." This trial was not a mere dress rehearsal.

There are four separate reasons HUP's Motion for Post-Trial Relief must be denied. (1) HUP's argument that the Court was required to separately list HUP's stipulated agents on the verdict slip is completely debunked by case law directly on point, the facts of the case, and an on-the-record stipulation that HUP now wishes to renege upon. (2) The General Verdict Rule: Plaintiffs advanced two separate theories of liability, both supported by ample expert testimony. Theory one was a failure to deliver earlier based upon the fetal monitoring tracing and clinical scenario. Theory two was that the administration of antibiotics was negligently delayed, which increased the risk of harm that occurred. These independent theories of liability were not separated

by special interrogatories on the verdict slip, nor were special questions requested by defense counsel. The jury's verdict could have been rendered under either theory of liability, or both, thus precluding judgment in HUP's favor or a new trial. (3) Waiver: The vast majority of arguments advanced by HUP were not preserved at trial and are therefore waived. (4) The remainder of HUP's contentions regarding alleged errors this trial court made are baseless, accusatory, and/or harmless. Plaintiffs established every element of their burden of proof on the issues of liability, agency, causation, and damages.

HUP Shockingly Attempted to Throw its Own Doctors Under the Bus by Creating a Non-Existent "Conflict of Interest" for the Sole Purpose of Seeking $1M Contribution from the State's MCARE Coffers.

During Plaintiffs' case-in-chief, HUP stipulated that each of the individual health care providers were its employees and agents. This stipulation of agency was read into the record in front of the jury. Defense counsel agreed that it "was so stipulated." Thereafter, prior to closing argument, Plaintiffs offered to voluntarily dismiss the individual employee/health care providers as HUP was, as a matter of law, vicariously liable for its employees' actions and/or inactions.

As a matter of first impression for the undersigned, HUP strenuously objected to the voluntary dismissal of its employee/health care providers despite the stipulation of agency. The crux of HUP's post-trial argument is that this Court erred and that HUP's stipulated agents were still required to remain individually liable and be individually itemized on the verdict slip.

HUP's arguments are not only misguided but are legally wrong. After three weeks of trial and just before closing arguments, HUP for the *first time* argued that the hospital and its stipulated agents had a "*conflict of interest*." (4/20/23 a.m. Tr. at pp. 19-34) Indeed, at the "eleventh hour," HUP attempted to refute, distinguish, and renege on its stipulation and agreement that members of the obstetrical team were actually HUP's agents. Defense counsel proclaimed:

> MR. YOUNG: "Your Honor, it's apparent – we understand your ruling, but my colleague and I, I think, have a **conflict of interest** in arguing against our individual defendants in terms of the verdict slip. We have talked to the Hospital of the University of Pennsylvania on this issue last evening, basically saying if it's possible for the physicians to not have been found causally negligent, **we can hardly argue in court against that position**."

Yet, HUP would argue this very position, as discussed below, hanging its own physicians and nurse out to dry solely for the purpose of securing a mere $1 million of the State's MCARE funds (which ultimately represents less than a tiny sliver of the jury's award of $182.7 million).

Plaintiffs' counsel questioned the propriety of HUP's alleged *conflict*, as did this trial court:

> MR. BEDIGIAN: "I don't even understand. … I mean, they represented the hospital and these individuals for four years now. And now, all of a sudden, there is a conflict of interest because there is vicarious liability?"
>
> THE COURT (addressing defense counsel): "It does seem like something that should have been straightened out way ahead of time, way before we were ready to charge the jury. *** You knew [vicarious liability] was possible. You stipulated they were the agents, servants, and employees of the hospital. *** Why wouldn't you [expect there to be vicarious liability against the hospital], when you stipulated, you entered into a stipulation that they were the agents, servants, and employees of the hospital at the time of the child's birth? *** In fact, you tried your case with them as a team. In fact, one of the questions to one of the witnesses, one of the doctors or nurse, one of the professionals involved, was, do you believe the team made any mistakes? So now you're coming back and alleging some type of conflict, when clearly this should have been addressed way before now."

Further argument took place in chambers, on the record, where defense counsel conceded this was the first time they had raised conflict. (*Id*.) Defense counsel also conceded he had "never seen this happen before" in terms of the Hospital's position on refusing to dismiss the Hospital's own physicians." (*Id*.) Defense counsel continued: "We have a conflict when it comes to the doctors can't be found individually liable by the jury. We can't oppose that. And also we can't oppose their dismissal. The hospital has a different interest from them in that regard." (*Id*.)

Then, in a moment of brutal honesty, defense counsel finally conceded that the true purpose HUP had raised an alleged conflict was to ensure that it could access the State's MCARE insurance funds through two of the physicians' policies to satisfy any potential verdict. (*Id*., MR. YOUNG: "…there are issues of applicable insurance coverage for each one of them from the MCARE Fund. So those issues are behind the scenes….") Following this admission by defense counsel, a new attorney retained solely by HUP to represent the hospital's interests confirmed that the purported "conflict" was only about insurance. Although this attorney had not filed an entry of appearance, she was nevertheless permitted to speak on HUP's behalf:

> MS. KRAMER: "…The hospital is entitled to apportionment, to see which if any of their agents are negligent. The hospital is entitled to indemnification, if they wanted to do it, which I'm not saying they would, of course, they wouldn't. The insurance structure of where the money comes from is related, the data bank, all of the things the hospital has to do are related…"

(*Id*.) In fact, none of the reasons collectively cited by the defense team were relevant to the evidence introduced to the jury at trial. Rather, the new defense team's argument boiled down to one issue: *insurance money*. The trial court promptly recognized this: "[Insurance] is behind the scenes, but it doesn't really involve the Court. If the verdict is against the hospital in whatever amount, that's your issue. That's not the Court's issue." (*Id*.)

HUP's refusal to dismiss its own stipulated agents was a repugnant attempt to derail Plaintiffs' vicarious liability claim solely for the purpose of ensuring the availability of a mere $1 million of MCARE funds. Plaintiffs' counsel stated: "I have never had an institution tell me, hey, if you want to dismiss our individuals who are our employees, we are going to oppose it. This is a first one for me, where the hospital doesn't want their agents to be relieved and isn't going to stand behind their agents." (*Id*.)

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION FOR POST-TRIAL RELIEF

Plaintiffs, Dajah Hagans and her minor son, J.H. ("Plaintiffs"), by and through their attorneys, file this Brief in Opposition to the Motion for Post-Trial Relief ("Motion") of Defendant, Hospital of the University of Pennsylvania ("HUP"). This motion should be denied in its entirety.

I. INTRODUCTION

A jury had the opportunity to hear and weigh, accept or discard all of the evidence submitted by the parties over three weeks of trial. The jury returned a unanimous verdict in Plaintiffs' favor after deliberating and considering a verdict sheet that was submitted, for the most part, with the approval of HUP's trial counsel.[1] HUP's complaint that the verdict sheet did not specifically itemize the individual healthcare providers who were HUP's own stipulated agents and employees is without merit; there is no legal authority for HUP's suggestion that individual agent-defendants must be identified on a verdict sheet in order to return a verdict on vicarious liability. Plaintiffs never admitted or suggested that they could not prove negligence against any individual Defendant. Plaintiffs ***did not*** dismiss or otherwise resolve their claims against any of the individual healthcare defendants, and therefore HUP's argument that it could not have been held liable as a principal is similarly without merit.

HUP argues throughout the Motion that Pennsylvania law forbids the kind of liability finding that was at issue in this case, where the jury was permitted to find vicarious liability without first expressly finding that specific acts by specific employees were negligent. Pennsylvania law not only does not forbid this scenario, but the law expressly permits it:

> Upon review, we conclude that the trial court erred as a matter of law when it ruled [the plaintiff] could not establish her right to recovery on her vicarious liability claim solely because she did not base that claim on an individual staff member's actions.

[1] HUP is represented by a new team of lawyers for the purposes of this post-trial proceeding. Counsel responsible for HUP's post-trial motion did not appear for and were not in attendance during the trial of this matter.

Sokolsky v. Eidelman, 93 A.3d 858, 865–66 (Pa. Super. 2014).

We will return to the *Sokolsky* opinion for discussion in further detail, but the Court should understand, right up front, that HUP's primary argument for undoing the verdict is absolutely, incontrovertibly wrong. Not surprisingly, HUP did not mention this case in its Brief, preferring trial court and unreported opinions and selective quotations teased out from all necessary context.

Turning to the remainder of the alleged errors supposedly tainting this trial at virtually every stage, the jury was charged with a pattern jury instruction that accurately described long-standing law on causation. No burdens of proof were "lowered." The verdict sheet correctly reflected the causation standards governing cases such as this one. HUP was permitted to introduce the evidence it wanted to introduce about umbilical blood gases. Underneath HUP's rhetoric is a simple relevance objection to a single question asked of <u>one</u> of the individual defendants that was sustained. The question was never reformulated and the witness was excused. The evidence nevertheless came in through other defense witnesses. A single inadvertent reference to informed consent by Plaintiffs' counsel drew a sustained objection, but any error resulting from that reference was harmless because defense counsel chose to place a copy of the hospital's informed consent form on a screen for the jury to read (i.e., "opening the door").

The jury based its damages award on life expectancy testimony and evidence, including evidence admitted in response to defense counsel's questions. The verdict was neither excessive nor shocking; it was the result of the evidence submitted. Finally, with respect to remittitur, HUP is an extremely well-funded institution with robust fundraising and development campaigns and a program of self-insurance. Profits for big health insurance carriers in 2022 were as high as $20.6 billion for United Healthcare. UPHS/Penn Medicine, HUP's parent or affiliate, has reported more

than $160 million in operating profits for this year alone.[2] There is no reason to reject the result of a fair trial, with fair opportunity for submission of evidence and for argument, in favor of post-game rhetoric not based on transcripts, exhibits, or evidence, but on the losing party's indignation.

Next, Plaintiffs turn to the facts underlying another of Defendant's keystone claims. HUP argues that Plaintiffs "admittedly" did not prove negligence against any individual healthcare provider. That argument is false; there is no other way to put it. HUP's citation to the record for this statement is to the afternoon transcript for the proceedings on April 19, 2023, when the parties were discussing preparation of the verdict sheet. Motion at 1-2 (citing Tr. 4/19/23 p.m. at 34) The statement itself is misquoted and taken out of context, as is obvious when the full transcript itself is consulted:

> MR. BEDIGIAN: Briggs Bedigian for purposes of the record. The stipulation in this case applied – they're trying to now say it only applied to Dr. Suyama. Mr. Margulies just read you the stipulation. It applied to the entire team of health care providers, from the attending down to the nurse. So what we have done – I'm happy to add their names into Question 1, but we're suing the hospital for the actions of their employees, who are defendants in the case, but I think you can have a separate sheet for each one and proximate cause is unnecessary. I think we're suing the Hospital of the University of Pennsylvania for the actions or inactions of their employees, and then we can name them or however it is. But the fact of the matter is, just trying to, if you look at it, that's what their writing is, the stipulation only applies to Dr. Suyama. That is not true. The stipulation applied to everybody. Everybody testified on their end, even though they didn't have any memory and really didn't have much documentation that they were all working as a team, so we're suing the team because we can't show which individual did what when because nothing was ever documented and nobody remembers anything.

(Tr. 4/19/23 p.m. at 33-34)

In response, documenting and reflecting the true nature of the discussion at this point, defense counsel stated:

> MR. MARGULIES: Your Honor. They didn't sue the Hospital of the University of Pennsylvania. They sued all these defendants. The only reason we agreed to the stipulation for

[2] *See* "Big payers ranked by 2022 profit," Becker's Healthcare (retrieved Aug. 25, 2023). Penn Medicine reported an operating profit of $160 million in 2023 as of June. *See* "Penn Medicine reports $160 million in operating profits for fiscal year 2023," The Daily Pennsylvanian (retrieved Aug. 25, 2023).

> Dr. Suyama was because she's six months pregnant and for medical reasons did not want to come out here and we agreed to a stipulation that to have her dismissed formally as a defendant, the hospital would be vicariously liable for her conduct. There was never any discussion about dismissing any other defendants, which is essentially what they're trying to accomplish through this verdict slip.

(Tr. 4/19/23 p.m. at 34-35)

Several things become clear at this stage. First, the parties are discussing how to structure the verdict sheet, not what Plaintiffs did or did not prove during the trial. Plaintiffs' case survived motions for directed verdict[3] at the close of their case. The Court had already found Plaintiffs' evidence legally adequate at this point, because Plaintiffs' evidence *was* legally adequate. It was more than adequate, since Plaintiffs introduced evidence about the whole obstetrical team responsible for Dajah Hagans' care, individually and collectively, when *Sokolsky* says they did not have to. HUP did not renew any motion at the close of the trial.

Second, HUP is seizing upon a phrase plucked from a conversation and taken out of context, that did not include its current attorneys. Defendant's former counsel made clear on the record that the individual defendants had not been dismissed. This is not a "release of the agent also releases the principal" scenario at all. The parties in this portion of the transcript were working out the wording of the verdict sheet given HUP's preference that it name each of the individual healthcare providers, even though those providers were, by stipulation, HUP's employees. (Tr. 4/19/23 p.m. at 34-36) HUP insisted that omitting the individual healthcare providers' names from the verdict sheet was "completely improper," and that there was "no way around" putting each name on the verdict sheet. (Tr. 4/19/23 p.m. at 36) At the time, HUP offered no authority for this claim of impropriety, and it has offered no authority for it now, months after entry of the verdict.

[3] Notably, the standard for directed verdict is the same as the standard for judgment notwithstanding the verdict. *Hall v. Episcopal Long Term Care*, 54 A.3d 381, 395 (Pa. Super. 2012).

If that omission seems telling, that's because *it is*: there is no authority whatsoever for what HUP argues, while there is authority for doing exactly what was done.

In any event, the discussion of the verdict sheet continued, with Plaintiffs' counsel stating, again, that Plaintiffs were suing "the obstetrical team," which was entirely consistent with the defense's position that its healthcare providers were a "team." (Tr. 4/19/23 p.m. at 37-38) Plaintiffs' counsel agreed that the individual providers could be named in the verdict sheet as part of the first question to the jury.[4] (Tr. 4/19/23 p.m. at 38) And then defense counsel indicated that he preferred that the individuals be named because "[e]vidence was introduced as to each of them." (*Id.*) "It was [Plaintiffs'] counsel's decision to name them as defendants, that was not our decision. And they made no attempts to dismiss them, which is essentially what they're trying to do through this verdict slip and have the jury simply focus on the hospital rather than their obligation to determine whether each of these defendants was negligent." (*Id.*) This statement might be accorded some useful effect as a defense admission, it is worth noting. Defense counsel's reasoning at the time was that the individual Defendants should be named on the verdict sheet because Plaintiffs introduced evidence as to each of them. Defendant is taking a wildly different stance now.

II. LEGAL STANDARDS

A. Judgment Notwithstanding the Verdict.

After trial and upon written motion, a party may move for post-trial relief, including that the Court enter a judgment notwithstanding the verdict. Pa.R.C.P. 227.1. Except as provided by Pa.R.E. 103(a), post-trial relief may not be granted unless the party requesting relief preserved its objections during pretrial proceedings or at trial. *Id.* 227.1(b). The motion is to state how each

[4] The first question on the verdict sheet that was submitted to the jury was: "Do you find that the conduct of the Hospital of the of the University of Pennsylvania, acting by and through Dr. Kirstin Leitner, Dr. Whitney Bender, Dr. Sarah Gutman, Dr. Julie Suyuma, and Nurse Victoria Kroesche, fell below the applicable standard of care? In other words, was the Defendant negligent?" *See* Motion, Exhibit 28.

ground for post-trial relief was asserted during pretrial proceedings or at trial. *Id.* Post-trial relief cannot be granted if the basis for the post-trial motion arose during the trial and the party seeking relief did not raise a contemporaneous objection. *Stapas v. Giant Eagle, Inc.*, 198 A.3d 1033, 1041 (Pa. Super. 2018). In order to preserve an issue for appellate purposes, the party must make a timely and specific objection to ensure that the trial court has the opportunity to correct the alleged trial error. *See Shelhamer v. John Crane, Inc*., 58 A.3d 767, 770 (Pa. Super. 2012); *see also* Pa.R.C.P. 227.1(b)(1); Pa.R.A.P. 302(a); *Rancosky v. Washington Nat. Ins. Co.*, 130 A.3d 79, 102 (2015).

A judgment *n.o.v*. can be entered in one of two ways: by establishing that the movant is entitled to judgment as a matter of law; or by establishing that the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. *Gorski v. Smith*, 812 A.2d 683, 698 (2002) (citing *Lanning v. West*, 803 A.2d 753 (Pa. Super. 2002) and quoting *Goldberg v. Isdaner*, 780 A.2d 654 (Pa. Super. 2001)) (en banc)). In the first case, the Court must review the record and conclude that even with all factual inferences decided in the other party's favor, the movant is entitled to a verdict. *Id.* In the second case, the Court must review the evidentiary record and conclude that the evidence was such that a verdict for the movant was beyond "peradventure," or any doubt. *Id.*

In this case, HUP claims it is entitled to judgment because Plaintiffs "admittedly" did not prove that one or more of the individual healthcare providers was negligent. Motion at 3. That claim, however, is false; Plaintiffs admitted no such thing. On the contrary, defense counsel admitted that evidence had been submitted for each individual healthcare provider, and that as a result, each of them should have been identified on the verdict sheet, as they were. (Tr. 4/19/23 p.m. at 38); see also Motion, Exhibit 28 (completed verdict sheet). HUP attempts to transform a

rhetorical theme into a faulty cause of action; but Plaintiffs' cause of action was negligence and negligence was proved. The jury held HUP responsible for its agents' negligence just as juries have for centuries, based on principles of *respondeat superior*. *See Sokolsky*, 93 A.3d at 865; *see also Boring v. Conemaugh Mem. Hosp*., 760 A.2d 860, 861 (Pa. Super. 2000) (holding that jury was properly charged on vicarious liability where plaintiff alleged that nurses, who were not named as individual defendants, were negligent and that hospital was vicariously liable for the negligence of its staff). No wild legal theory was "concocted," whether "on the fly" or "cut out of whole cloth," regardless of the number of metaphors HUP tries on, looks over, and then tosses into a heap. *See* Motion at 3. HUP itself told the jury that its own people acted as a team. It had to, because the medical documentation and the employees' recollections were spotty at best. Plaintiffs made that approach part of their trial strategy, which was perfectly permissible. *See Sokolsky*, 93 A.3d at 865; *Boring*, 760 A.2d at 861.

The jury's verdict was based directly on the evidence and permissible inferences drawn from the evidence introduced at trial. HUP is not entitled to a judgment notwithstanding the verdict based on its own novel theory that cases cannot be proved this way – especially when there is case law that specifically permits it. Nor is it entitled to judgment based on a review of the evidence.

B. New Trial.

Instead of explaining the standard for determining whether a party is entitled to a new trial, HUP accuses Plaintiffs' counsel of "not miss[ing] an opportunity to mislead the Court in creating legal error." Motion at 4. The Court, in HUP's telling, naively "accepted in good faith Plaintiff[s'] counsel's disingenuous argument that the verdict slip should contain a question equating risk of harm to factual causation." Motion at 4-5. Of course, that is not at all how any of this happened, and Defendant's blustering overlooks the Court's active and informed participation in resolving

the competing arguments presented during trial. The ruse aside, HUP claims it is entitled to a new trial mainly because of the second question on the verdict sheet, which reads: "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* Motion at 4-5 and Motion, Exhibit 28. For the reasons that follow, this question accurately reflects long-standing Pennsylvania law on causation and does not require a new trial. *See Monschein v. Phifer*, 771 A.2d 18, 20 (Pa. Super. 2001).[5]

III. FACTS

The pleadings, motions, and other papers filed leading up to the trial of this case are not evidence. Opening statements and closing arguments are not evidence. Things said by attorneys in chambers during a conference to discuss the verdict sheet are not evidence. The evidence adduced at trial over nearly three weeks was extensive, and is capture in the several thousand pages of trial transcripts, testimony, and exhibits that were introduced into evidence.[6] Plaintiffs called experts in OB/GYN and maternal fetal medicine, neonatology, pediatric infectious disease, pediatric neuroradiology, pediatric neurology, life care planning, and economics. Notably, Defendants offered experts in each of these specialties as well.

Plaintiff's evidence established that the physicians and a nurse employed by HUP, who made up the obstetric team, were negligent in caring for Dajah Hagans as she labored and that this negligence resulted in the birth of a child with life-altering brain injuries that are uncurable. Plaintiffs offered several theories of liability. Two theories, in particular, involved claims that

[5] The party seeking a new trial must also show that it objected at trial to any allegedly erroneous evidence, as is the case with any post-trial relief request. *Stapas,* 198 A.3d at 1041. Conflicting testimony is similarly not a basis for ordering a new trial. *Mano v. Madden*, 738 A.2d 493, 495 (Pa. Super. 1999) (en banc).

[6] The facts based on the evidence, testimony, and exhibits offered at trial is extensive. Plaintiffs herein will provide specific factual citations to the official trial transcripts in Plaintiffs' Argument section, as set forth hereinafter.

HUP's obstetric team negligently delayed the delivery of the baby based on fetal distress as reflected on the fetal monitoring strips and clinical scenario; and that HUP's obstetric team negligently delayed the administration of antibiotics to treat Ms. Hagans for chorioamnionitis diagnosed at the time of her admission, and that this delay in antibiotics increased the risk of harm to minor J.H. Defendants introduced evidence to dispute these claims.

At the close of Plaintiffs' case, the Court entertained motions for directed verdict and nonsuit by the defense. The Court granted a motion for nonsuit with respect to the corporate negligence claim, which Plaintiffs did not oppose. (Tr. 4/11/23 a.m. at 20-21) HUP requested a nonsuit as to any claim that the healthcare providers did not properly monitor and respond to Ms. Hagans' elevated blood pressure as she labored, Plaintiffs opposed that motion, and the Court denied it. (*Id.* at 21-22) The Court also denied a motion for nonsuit as to Plaintiffs' claims that Nurse Kroesche failed to properly document fetal heart rate assessments in accordance with hospital policy. (*Id.* at 22-23) Those were the *only* defense motions made at the close of Plaintiffs' evidence. (*Id.* at 23-24)

IV. ARGUMENT

A. Objections and Argument Not Raised and Preserved at Trial Are Waived.

To the extent HUP failed to raise any of the bases set forth in its Motion during trial, those issues are waived. Plaintiffs submit that by failing to raise any objection or sufficiency of the evidence arguments as to the testimony of Plaintiff's liability expert at trial during the testimony or at the directed verdict stage results in complete waiver. Other waiver issues are discussed below.

B. Plaintiffs Established the Negligence of HUP's Stipulated Employees, and HUP is Therefore Vicariously Liable.

HUP's main argument for rejecting this verdict is that the jury was not asked to separately respond "yes" or "no" as to the negligence of each individual healthcare provider, even though

HUP stipulated that all of them were its agents and employees. (Tr. 4/11/23 at 8) Plaintiffs proved a case against HUP's employees individually and collectively as an integrated team. All the jury had to find was that one member of the team was negligent, and if so HUP was 100% responsible as principal for the damages that resulted. Defendants only raised two sufficiency of the evidence arguments at the close of Plaintiffs' case, specifically a motion for nonsuit as to the claim of failure to properly manage Ms. Hagans' blood pressure, and failure of the nurse to perform and document fetal heart rate assessments – Defendants made no other separate motions or argument regarding the sufficiency of the evidence in any respect.[7] In fact, Defendants never raised any sufficiency of the evidence arguments aside from those mentioned above as to any of the individual members of the obstetric team, at any point during trial. Accordingly, such arguments are waived.

Throughout the pretrial proceedings and trial, all Defendants - HUP and its employees - were represented by the same defense counsel. No crossclaims were asserted. The Court will recall, however, that this posture changed once the parties began to negotiate the verdict sheet. On the morning of April 20, 2023, a new attorney, Kate Kramer, Esq., attempted to enter her appearance on the hospital's behalf. (Tr. 4/20/23 a.m. at 20) Ms. Kramer, as well as Mr. Young and Mr. Margulies, advised the Court that a conflict of interest had "developed" because Plaintiffs were proposing to submit the verdict sheet without itemizing each individual Defendant. (*Id.* at 23-34) HUP wanted the individual names on the verdict sheet; through its new counsel, it offered several explanations for this request that appeared that HUP was throwing its employees under a bus. (*Id.*) HUP claimed that individual findings were necessary for the purpose of reporting its doctors to

[7] Defendants were clearly contemplating the sufficiency of the evidence, as they made two motions for nonsuit. However, Defendants never challenged the sufficiency of the expert testimony of Plaintiff's liability expert, Dr. Cardwell. The first challenge to the sufficiency of Dr. Cardwell's testimony was via HUP's instant post-trial motion. As discussed infra, HUP has completely waived this argument for failure to preserve it by objection or motion for directed verdict during trial.

the National Practitioner Databank. It claimed that individual findings were necessary for its own internal credentialing and privileging processes. Each of these claims fell apart under scrutiny. Finally, HUP admitted that "apportionment" of the verdict was necessary to permit it to coordinate meager insurance funds through MCARE.

Ironically, given all the talk of "mic drop" revelations in its Motion, that HUP was taking a position adverse to its own physicians and nurse solely to further its financial interests was a *truly* astonishing admission, one made extremely late in litigation notwithstanding many opportunities to address it before this chambers conference. Set aside for the moment the fact that this alleged conflict should have been foreseen and resolved much earlier, before the attorneys jointly representing the Defendants had acquired confidential information from both sets of clients. Consider first that once the alleged conflict was obvious, HUP resolved it not by "taking one for the team," but by giving each of its employees a shove to the front of the line. HUP made this choice even though there were other options. A claim for contribution is on the table now, post-verdict. *See Mattia v. Sears, Roebuck & Co*., 531 A.2d 789, 791 (Pa. Super. 1987) (stating that statute of limitations on contribution claim does not begin to run until the date a judgment is entered in plaintiff's favor). A claim for indemnity is available as well. HUP did not need to put its employees in such a position on the day the parties were drafting the verdict sheet. A contribution and/or indemnity claim would resolve all HUP's concerns about apportionment and allow it to access any liability coverage available to the individual Defendants. HUP's decision to pursue contribution pre- or post-verdict doesn't dictate what the jury in this case should have been asked to do. The law does that.

HUP gets very, very close to admitting as much. *See* Motion at 20, n.6. "To be clear, Plaintiff could have chosen to bring suit *only* against HUP, pursuant to a claim of vicarious

liability." *Id.* (citing *Mamalis v. Atlas Van Lines, Inc.*, 528 A.2d 198, 200 (Pa. Super. 1987)). But HUP stops just short of recognizing the next logical step: if the individual Defendants didn't have to be sued, then they didn't have to be identified on the verdict sheet; including them would be purely superfluous. If Plaintiff had sued only HUP, then HUP would not have had the benefit of any "apportionment,"[8] and it hasn't been denied any right to apportionment because it can still assert contribution and indemnity claims.

To try to right this sinking ship, HUP plays word games -- Plaintiffs "abandoned" their claims against the individual Defendants; Plaintiffs impliedly "dismissed" the claims. Parties who wish to abandon or dismiss claims don't try cases based on those claims, and Plaintiffs tried all of the Defendants. They introduced evidence against each of the individual member of the obstetric team, and Dr. Cardwell testified that each of them breached the standard of care. (Tr. 4/4/23 a.m. at 66-72, 79; Tr. 4/4/23 p.m. at 7, 9-23, 53). Dr. Cardwell specifically testified to various deviations from the standard of care committed by the obstetric team. (*Id*.) He testified that Drs. Leitner, Bender, Gutman, and Suyama, as well as Nurse Kroesche, deviated from the standards of care, individually and collectively, and caused J.H.'s injuries. (*Id*.) The responsible actors were all HUP's stipulated employees.

Clearly, the facts don't support a judgment *n.o.v.,* so HUP pads its brief with citations to the law. But the law it cites doesn't help either. None of the cases HUP cites is on point, and cannot possibly require or even justify the entry of a judgment notwithstanding the verdict. Rather, the matter at issue was resolved in a case Defendant did not cite. *Sokolsky* concerns a legal malpractice suit filed against a lawyer who missed a medical malpractice statute of limitations. *Sokolsky*, 93

[8] Plaintiffs use the term "apportionment" for convenience because that is how Defendant refers to its claim in the Motion. True apportionment, however, involves assigning liability percentages to individual actors. HUP only wanted other names on the judgment so that it could secure MCARE insurance funds behind closed doors.

A.3d at 860. That means Mrs. Sokolsky had to prove a case within the case, establishing that she would have recovered a verdict in the suit if her attorney had filed it on time. *Id.* at 862. Her former attorney argued, and the trial court accepted, that because she would not have been able to identify any of the specific medical staff who were negligent, she would not have been able to prove the vicarious liability of the facility where she was treated. *Id.* at 863-64.

Mrs. Sokolsky appealed, arguing that "[t]he trial court misapplied the law with respect to vicarious liability claims by concluding that she was required to specifically identify the Manor Care and Lehigh Valley staff who acted negligently to establish her vicarious liability action." *Id.* at 863 (internal quotations omitted). According to the Superior Court, the trial court had done exactly what HUP argues should have been done in this case: "the trial court concluded Sokolsky could not recover under her vicarious liability claim because she failed to specify which staff member of Manor Care or Lehigh Valley breached his/her duty to her." *Id.* at 865. That conclusion was legally erroneous. *Id.*

> Upon review, we conclude that the trial court erred as a matter of law when it ruled Sokolsky could not establish her right to recovery on her vicarious liability claim solely because she did not base that claim on an individual staff member's actions. The trial court's interpretation of vicarious liability rebuffs both the intent and the purpose underlying this theory of recovery. Simply because employees are unnamed within a complaint or referred to as a unit, *i.e.*, the staff, does not preclude one's claim against their employer under vicarious liability if the employees acted negligently during the course and within the scope of their employment. Herein, both Manor Care and Lehigh Valley may be subject to vicarious liability for the negligent acts and omissions of its staff regarding the quality of care it rendered to Sokolsky. This vicarious liability attaches to Manor Care and Lehigh Valley *regardless of Sokolsky's attack of an individual member of either entity's nursing staff.*

Id. at 865-66 (internal citations omitted and emphasis supplied).

As in *Sokolsky*, Plaintiffs herein proved at trial that each of the healthcare providers were negligent in caring for Dajah Hagans as she labored. Plaintiffs proved that as a result of their negligence, Ms. Hagans' child was injured. Plaintiffs proved, by stipulation, that the healthcare

providers were HUP's employees. This case and *Sokolsky* present identical agent-principal liability issues. The resolution in *Sokolsky* compels the resolution that HUP's claim for judgment must be denied.

Separately, it is telling that when advancing this argument that Plaintiffs "abandoned" their claims against the individual healthcare providers, HUP utterly fails to address the record evidence that was admitted at trial in the Motion. If in fact evidence was lacking, HUP should be pointing to the record, not to what counsel said about the evidence in a chambers meeting to discuss the verdict sheet. Indeed, if claims had been dismissed or "abandoned" there would be docket entries to reflect that. There is no docket entry reflecting a dismissal, nonsuit, or an entry of summary judgment, or judgment of any kind, before the verdict.

1. Plaintiffs Proved the Negligence of the Obstetrical Team Made Up of HUP's Stipulated Employees.

HUP injected the "team" theme into this trial from the first day. Defense counsel told the jury in opening statement that each of the providers was "working as a team to take care of Ms. Hagans." (Tr. 4/3/23 a.m. at 70) Dr. Leitner testified that, at HUP, patient care is managed by a "team" made up of a supervising physician, chief resident, second- and third-year residents and an intern. (Tr. 4/11/23 a.m. at 32-33, 42-43, 64-65) Dr. Bender told the jury that her role on the "team" was to supervise the junior residents. (Tr. 4/12/23 a.m. at 21-22) She explained that the decision to perform a C-section was made "with the team," made up of herself, Dr. Gutman, and Dr. Leitner. (*Id*. at 39) Dr. Gutman and Nurse Kroesche also testified about being members of the HUP obstetrical care "team." (*Id.* at 24-26; Tr. 4/13/23 a.m. at 20) Dr. Cardwell's "team" opinions were completely consistent with what defense counsel and the Defendant-providers told the jury.

Even if Plaintiffs' counsel had made the "admission" that HUP claims he made (and the transcript establishes that he did not), the statement was not evidence. The jury did not rely on it

in reaching a verdict. The Court relied on the *evidence* in sustaining Plaintiffs' case at the directed verdict stages and the jury relied on the *evidence* in returning a verdict for Plaintiffs. What HUP claims counsel said about the state of the evidence is something like a rhetorical refrain in a closing argument: potentially catchy, but not proof. This is not a basis for judgment after the verdict.

Further, as in the previous section, the cases Defendant cites are stalled and going nowhere. *Rupell v. Lehigh Valley Hosp., Inc*., No. 2001-C-324V, 2003 WL 25460433 (Pa. Ct. Common Pleas Mar. 7, 2003), is a trial court opinion entered in a case where the plaintiffs failed to meet multiple discovery and expert deadlines before trial, sought and were granted multiple extensions of time to remedy deficiencies, and then still failed to file a necessary expert report. *Id.*[9] When a report was filed, it did not articulate *any* standards of care, "was not critical of the Defendants' care . . . and did not establish the causal connection between the alleged breach and the injuries" at issue in the case. *Id.* The court gave the plaintiffs another chance and they fumbled yet again, failing to timely produce a supplemental report and waiting until *the second day of trial* to ask for a continuance. *Id.* The defendants presented a motion to preclude the expert that same day and the court granted it. *Id.* The supplemental report, by the way, introduced an entirely new theory of liability and *criticized two physicians who were not defendants in the case*. *Id.* That is the authority HUP dug up as support for its claim, here, that Plaintiffs over the course of a three-week trial failed to establish the liability of the individual Defendants. The *Rupell* opinion says nothing about any claim of "team" liability. *Rupell* is legally and factually distinguishable and not on all four corners with the instant matter. This case cannot serve as a basis for judgment *n.o.v.* in favor of HUP.

Next HUP turns to an unreported decision, non-precedential by rule, *Locke v. Fox Chase Cancer Center, et al.*, No. 237 EDA 2019, 2020 WL 4814218 (Pa. Super. Aug. 19, 2020). There

[9] The Westlaw version of this decision does not reflect interior pagination.

was no "team theory" of liability in *Locke* either. Again, HUP cites to a legally and factually distinguishable case, but seeks out non-contextual quotes in search of legal support for its unsupportable arguments. HUP then finds *Miller v. Vanderbilt Univ.*, No. M2015-02223-COA-R3-CV, 2017 WL 4467445 (Tenn. Ct. App. Sept. 29, 2017), an unreported decision from Tennessee. The law on vicarious liability in Tennessee is different from the law in Pennsylvania, but somehow HUP finds *Miller* persuasive. The law in this case is Pennsylvania law. And the law in Pennsylvania is *Sokolsky*.

After reiterating its claim that Plaintiffs proceeded "only against HUP at trial," notwithstanding what the trial record actually shows, HUP again states that the failure to include specific jury questions about each Defendant's negligence worked a "*de facto*" dismissal of those parties. Motion at 26. Plaintiffs have already discussed why these claims are legally and factually wrong but, moreover, Plaintiffs did not dismiss any of the Defendants, "*de facto*" or otherwise. As HUP concedes: "The Court ultimately added the names of the providers into Question number 1, asking the jury to find whether HUP, acting by and through [the individual healthcare providers,] was negligent. 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." Motion at 26 (internal quotations and citation omitted) HUP seems to be saying that the drafting of the verdict slip itself worked a magical dismissal by implication, which if accepted would turn on its head longstanding jurisprudence requiring a court order of some kind to terminate a pending action. If this is HUP's position, it is dead wrong. Plaintiffs were entitled to proceed that way, as *Sokolsky* makes clear. If HUP wanted to proceed differently, it should have asserted crossclaims. Because there were no crossclaims among the Defendants, HUP cannot complain that the jury was not asked to apportion liability among them.

2. HUP Waived All Objections to the Sufficiency of Dr. Cardwell's Expert Testimony, and Regardless of this Waiver, Dr. Cardwell Nevertheless Adequately Testified Concerning the Relevant Standard of Care.

HUP's Brief raises - *for the first time* - a sufficiency of the evidence argument regarding Dr. Cardwell's testimony about the standard of care and deviations committed by the obstetric team. However, as a threshold matter, all of HUP's arguments as to the sufficiency of Dr. Cardwell's testimony have been waived.

HUP did not object on sufficiency grounds when Dr. Cardwell testified or immediately thereafter. HUP failed to move for directed verdict and nonsuit at the close of Plaintiff's case, which is when HUP was required to raise a sufficiency of the evidence argument (but did not). HUP likewise did not make any new motion for judgment at the close of the evidence. Even after HUP filed its Motion for Post-Trial Relief ten days following the verdict, HUP again failed to raise any sufficiency of the evidence challenge pertaining to Dr. Cardwell. Perhaps more telling, defense counsel conceded that they obtained "daily transcripts" of witness testimony during trial, and HUP had, in fact, received a transcript of Dr. Cardwell's testimony on the very day he testified[10] – yet, HUP failed to argue about the sufficiency of his expert testimony until now, over 100 days since the verdict. Having failed to preserve this argument with a timely and valid objection at trial, or motion for nonsuit or directed verdict, HUP has waived this issue both at this post-trial stage and for future appellate purposes.

[10] This Court may recall that HUP was admittedly providing its own expert witnesses with the daily trial testimonies of Plaintiffs' experts, in violation of HUP's own request for expert witness sequestration. Rule 615 of the Pennsylvania Rules of Evidence prevents witnesses from learning of other witnesses' prior testimony. This court confirmed sequestration on the record. (Tr. 4/5/23 a.m. at 5-6) HUP chose to violate its own agreement to sequestration during trial. Plaintiffs' counsel had agreed in good faith with the defense request for sequestration, indicating that while Plaintiffs did not believe it applied to expert witnesses, nonetheless Plaintiffs agreed that, "what's good for the goose is good for the gander." Plaintiffs upheld their end of the agreement and sequestered their expert witnesses, and because Plaintiffs were *not* obtaining "dailies" of trial testimony from the court reporter, Plaintiffs likewise did not violate the attorney agreement regarding sequestration by allowing their experts to learn of prior testimony. (See Tr. 4/17/23 a.m. at 4-14; Tr. 4/19/23 p.m. at 39-54; Tr. 4/20/23 a.m. at 14-15, for all discussion, argument, and the court's rulings regarding HUP's violation of sequestration).

In any event, any such claim regarding the sufficiency of Dr. Cardwell's testimony is questionable at best. When Plaintiffs' counsel informed the court that Plaintiffs wished to enter into evidence HUP's stipulation as to the agency of the physicians and nurse on the obstetric team, Plaintiff's original stipulation only identified the team members as "healthcare providers." Defense counsel then appeared to concede that the requisite expert testimony regarding the obstetric team had been offered, stating: "I think it's appropriate to name these four providers and Dr. Suyama, **who are the ones who the experts have expressed criticism to**. I think it would be appropriate to identify them." (Tr. 4/11/23 a.m. at 6-7). HUP now seeks to about-face, retrospectively, and challenge Dr. Cardwell's testimony that was apparently sufficient during trial, but is not sufficient after the verdict.

"Pennsylvania's waiver rule is strict." *Pressley v. Segars*, 2015 Phila. Ct. Com. Pl. LEXIS 85, *5 (April 22, 2015). The "waiver rule" prevents the trial from becoming "a mere dress rehearsal" and ensures trial counsel is prepared to litigate the case and create an adequate record for appellate review. *Takes v. Metro. Edison Co.*, 695 A.2d 397, 400 (Pa. 1997) (noting that in order to preserve a party's right to seek JNOV, it must move for a non-suit or directed verdict during the trial). See, e.g., *Haan v. Wells*, 103 A.3d 60, 68 (Pa. Super. 2014) (holding that the failure to move for a non-suit or directed verdict results in the waiver to challenge the sufficiency of the evidence). See also, Pa.R.C.P. 227.1(b).

In order to preserve an issue for review, litigants must make precise and specific objections during trial. See *Takes*, 695 A.2d at 400 (Pa. 1997); *Cipriani v. Sun Pipe Line Co.*, 574 A.2d 706, 711 (Pa. Super. 1990). If a specific objection is made, other unstated objections are waived and may not be asserted post-trial for the first time. *Siter v. Maryland Peat & Humus Co.*, 363 A.2d 1221, 1223 (Pa. Super. 1976) (citing *Commonwealth v. Stoltzfus*, 337 A.2d 873 (Pa. 1975);

Commonwealth v. Budd, 278 A.2d 879 (Pa. 1971)). In other words, a party cannot make a vague objection at trial, and then try to mold the objection later to make it fit the appeal and avoid the waiver doctrine. *Cipriani*, 574 A.2d at 711. An objection that is not specific is insufficient. *Commonwealth v. Willis*, 552 A.2d 682, 690 (Pa. Super. 1988) ("[b]ecause counsel failed to assert that specific ground for the objection at trial, the issue is waived").

Here, HUP made no such objection or argument as to the sufficiency of Dr. Cardwell's testimony on issues of liability, including standard of care, deviations therefrom, or obstetrical causation, as it pertained to each of the individual health care providers. HUP likewise failed to raise these issues at the nonsuit stage at the close of Plaintiff's evidence, and failed to raise the issue at the close of all evidence. Accordingly, all argument regarding the sufficiency of Dr. Cardwell's expert testimony has been categorically waived.

Nonetheless, even if this trial court were to somehow construe that HUP has not waived argument as to the sufficiency of Dr. Cardwell's testimony, the record is clear that his testimony is more than sufficient to meet Plaintiffs' burden of proof.

3. Dr. Cardwell's Testimony Regarding the Standard of Care.

Most of Defendant's citations are to cases setting forth general standards and legal principles governing medical malpractice claims. Motion at 26-28. However, none of the cases cited deal specifically with the situation in this case and in *Sokolsky,* and moreover, *Sokolsky* also applies with respect to the sufficiency of expert testimony concerning individual agents and the vicarious liability resulting therefrom. *Sokolsky*, 93 A.3d at 863, 867–68 (finding plaintiff's expert reports sufficiently set forth opinions and evidence from which a fact-finder could render a verdict in favor of Sokolsky in her medical malpractice action). The expert reports in *Sokolsky* sufficiently supported plaintiff's claims even though the reports did not name each individual nurse or provider

responsible for the plaintiff's care. The court held that a jury could rely on them to find that the facility defendants were vicariously liable for their staff's negligence even though the reports did not specify which employee was responsible for which negligent act. *Id.*

Sokolsky requires that the Court reject HUP's argument that Plaintiff's expert, Dr. Michael Cardwell, provided inadequate opinion testimony at trial because his opinions were not broken down by the name of each individual healthcare provider. Motion at 28-30. Indeed, it would be troubling if Defendant's proposed new standard was substituted for the existing one, because based on HUP's standard, hospitals could easily avoid liability for negligence by making chart notations anonymous from now on. Nevertheless, Dr. Cardwell testified at length about deviations from the standard of care committed by the obstetric team, individually and collectively, and such opinions were rendered within a reasonable degree of medical certainty. (Tr. 4/4/23 a.m. at 66-72, 79; Tr. 4/4/23 p.m. at 7, 9-23, 53).[11] Dr. Cardwell's trial testimony must be taken and reviewed as a whole, and it is clear when the totality of his testimony in this case is evaluated, it is more than sufficient to rebut HUP's instantly waived argument.

C. The General Verdict Rule Mandates the Denial of HUP's Request for Judgment and/or a New Trial.

Pursuant to the "general verdict" rule that the Supreme Court of Pennsylvania adopted in *Halper v. Jewish Family & Children's Serv.*, 963 A.2d 1282 (Pa. 2009), reaffirmed in *Shiflett* v. *Lehigh Valley Health Network, Inc.*, 217 A.3d 225 (Pa. 2019), and most recently reaffirmed in *Cowher* v. *Kodali*, 283 A.3d 794 (Pa., Sept. 29, 2022), "when the jury returns a general verdict

[11] To summarize Dr. Cardwell's expert opinions, he testified that the following deviations from the standard of care included: (1) delay in c-section delivery by 1:30; (2) rebutted the defense theory of brain injury due to a "ravaging" infection; (3) failure of an attending physician to see Ms. Hagans for more than 2 hours given the clinical scenario; (4) failure to recognize fetal distress at 1:00 due to a prolonged deceleration and to call for c-section; (5) failing to recognize there was no benefit to continue with labor; (5) failure to timely administer antibiotics; (6) administering Pitocin when it was contraindicated and worsened the fetal distress; that (7) HUP's providers were functioning as a team, and that each of them was individually and collectively negligent. This is just a snippet of the overall sufficiency of Dr. Cardwell's testimony at trial.

involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal."

One of several theories of liability Plaintiffs advanced at trial was that the obstetric team negligently delayed administering antibiotics to Ms. Hagans following the clinical diagnosis of chorioamnionitis on admission at 12:00 p.m. While HUP claimed that the antibiotic, Unasyn, had been given at 12:30 p.m., Plaintiff introduced contrary evidence through an anesthesiology note authored at 2:29 p.m. (nearly 2.5 hours later) which stated:

1429PM "Unasyn infusing enroute to OR"

Plaintiffs' Exhibit P-1, Medical Record Extract – Redacted, at 25.

All agree that the standard of care for chorioamnionitis mandates administration of antibiotics as soon as possible. Plaintiff's liability expert, Dr. Cardwell, testified that if Unasyn was delayed 2.5 hours until the patient was taken to the OR for the c-section, this would represent a deviation from the standard of care. (Tr. 4/4/23 a.m. at 24-38.) Plaintiff's neonatology expert, Dr. Zinkhan, testified that this two-hour delay in antibiotics increased the risk of harm to J.H. (Tr. 4/5/23 p.m. at 25-26). Plaintiff's pediatric infectious disease expert, Dr. Correa, testified that, assuming the truth of the anesthesiology note, "there was a delay in the administration of antibiotics." (Tr. 4/6/23 a.m. at 71-73). Dr. Correa explained the impact of the delayed antibiotics: "Well, it made the chance that Baby [J.H.] was going to be injured greater. We talked about the fire. The antibiotics are the water that is trying to put out the fire. If it was not given in a timely manner, it contributed to the development or severity of this injury." (*Id*. at 73). Dr. Correa testified that if the antibiotics were not started timely, this increased the risk of harm and complications for baby J.H. of hypoxia and ischemia. (*Id*. at 73-74). On this issue, Dr. Correa testified that the

chorioamnionitis made things worse; "made Baby [J.H.] less tolerant to hypoxia, to acidosis, in a way that it ultimately caused his brain injury." (*Id*. at 132).

Defendants did not object to any of the foregoing testimony and evidence during trial. Defendants did not challenge the sufficiency of the evidence supporting this antibiotic theory, nor did Defendants move for nonsuit or directed verdict at the close of Plaintiff's case or the close of the evidence. Although HUP was apparently hyper-focused on the parties to be itemized on the verdict slip, Defendants made no requests for any special jury interrogatories parsing out Plaintiffs' theories of liability. Rather, Question 1 of the verdict slip only discussed "negligence" globally.

The jury rendered its unanimous verdict on April 21, 2023, answering Question 1 "YES". (Tr. 4/21/23 a.m. at 5-6) The jury was polled at the request of Defendants, and all twelve (12) jurors agreed with the verdict. (*Id*. at 15-17) Defendants offered no objection to the verdict after it was rendered, nor did Defendants seek any clarification of the verdict. (*Id*.) In fact, before the jury was discharged, the trial court asked to see counsel at sidebar, providing one last opportunity for Defendants to object or seek clarification of the verdict before the jury was discharged and excused from the courtroom. (*Id*.) However, defense counsel did not object or seek any clarification. (*Id*.)

The moment the jury left the courtroom after the verdict, the finding of liability under Question 1 became a "general verdict." The jury could have found in Plaintiff's favor on the theory that the obstetric team negligently delayed delivery by c-section by 1:30 p.m., or that the obstetric team negligently delayed the administration of antibiotics by 2.5 hours – or both. Now, HUP cannot un-ring the bell. This general verdict, *alone*, is a sufficient basis to deny all of HUP's requested post-trial relief. Notably, HUP's Motion and instant Brief do not challenge Plaintiff's antibiotic theory and contain no discussion whatsoever of the general verdict rule. This is a "death knell" for HUP.

D. HUP Is Not Entitled to a New Trial as Its Claims of Error Are Unfounded and It Has Not Shown Any Prejudice.

HUP requests a new trial based on legal errors it claims were made during the trial. For the reasons that follow, these "errors" were actually correctly decided by the Court or did not result in any significant prejudice. In other words, no error exists, but even if they did, they were harmless.

1. The Verdict Sheet Properly Characterizes the Jury's Charge and Pennsylvania Law Regarding Causation.

HUP's claim that the Court incorrectly summarized the law on causation and allowed that error to infect the wording of the verdict sheet is based on two words in *Smith v. Grab*, 705 A.2d 894, 899 (Pa. Super. 2017): "go further."[12] Defendant takes the position that "go further" means a next step, a second step, although it does not explain what that step might be or how the cases cited require it. *See* Motion at 42. HUP is selectively quoting again; the meaning of the phrase is crystal-clear once it is read in context with other opinions. *Smith* ***specifically*** says that the causation standard it discusses, the one applied in this case, is "a reduced standard of certainty," one that is necessitated in some cases because of the facts. *Smith*, 705 A.2d at 899.

After articulating the basic requirement that a plaintiff prove proximate cause, the Court stated:

> We find the reasoning first espoused in *Hamil v. Bashline* to be controlling in the instant case. In *Hamil,* the defendants did not promptly diagnose and treat a patient's heart attack, leading to the patient's death. Whether there was a causal connection between the defendants' delay and the patient's death was not susceptible of proof to a reasonable degree of medical certainty; however, it could be shown to a reasonable degree of medical certainty that the defendants' negligence increased the risk of death. The supreme court ***adopted a reduced standard of certainty*** in such cases:
>
> "Such cases by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable. Nevertheless, in order that an actor is not completely insulated because of uncertainties as to the consequences of his negligent

[12] The "go further" language actually originated in *Hamil v. Bashline*, 392 A.2d 1280, 1288 (1978). *See Smith*, 705 A.2d at 899. HUP relies on *Smith*.

> conduct, Section 323(a) [of the Restatement (Second) of Torts] tacitly acknowledges this difficulty and ***permits the issue to go to the jury upon a less than normal threshold of proof***."
>
> Thus, "once a plaintiff has demonstrated that [a] defendant's acts or omissions ... have increased the risk of harm to another, such evidence furnishes a 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.* (emphases supplied)

Read in this proper context, it is abundantly clear that the court meant that the jury could rely on an expert's testimony that an act or omission "increased the risk of harm" that caused a plaintiff's injury. See also *Mitzelfelt v. Kamrin*, 584 A.2d 888, 895 (1990) (stating that once there is testimony that negligence increased the risk of harm, "then it is a question for the jury whether they believe ... that the acts or omissions of the physician were a substantial factor in bringing about the harm"). That reading is the only reading that is consistent with Pattern Jury Instruction 14.20, which was read to the jury without objection by HUP's defense team. The Instruction reads, in relevant part:

> B. Increased Risk of Harm *[to be read when appropriate]*
>
> When a defendant physician negligently fails to act or negligently delays in taking indicated diagnostic or therapeutic steps, and their negligence is a factual cause of injuries to the plaintiff, that negligent defendant physician is responsible for the injuries caused.
>
> Where the plaintiff presents expert testimony that the failure to act or delay on the part of the defendant physician has increased the risk of harm to the plaintiff, this testimony, if found credible, provides a sufficient basis from which you may find that the negligence was a factual cause of the injuries sustained.
>
> If there has been any significant possibility of avoiding injuries and [*name of defendant*] has destroyed that possibility, [he] [she] [they] may be liable to [*name of plaintiff*].
>
> It is rarely possible to demonstrate to an absolute certainty what would have happened under circumstances that the wrongdoer did not allow to come to pass.

The Subcommittee's Note to Pattern Jury Instruction 14.20 summarizes the history surrounding *Hamil* and its several appeals, culminating in the final 1978 opinion that is referenced

in *Smith*. Courts have struggled with this standard from time to time, and Defendant is trying to make some hay from that struggle in this case, seizing on language it says required the jury to "go further" and perform a second step in determining causation. Motion at 42-43 (citing *Mitzelfelt*). *Mitzelfelt* has since been clarified and limited, however, in cases HUP did not discuss in its Motion. *See Klein v. Aronchick*, 85 A.3d 487 (Pa. Super. 2014) (citing *Brozana v. Flanigan*, 454 A.2d 1125 (Pa. Super. 1982)).[13]

Klein was a medical malpractice case involving a prescription taken for an off-label use, after which the plaintiff developed kidney disease. *Id.* at 489. The trial court did not permit her expert to testify that the prescription increased the risk of harm, and on appeal the Superior Court reversed. *Id.* at 490. The court discussed *Hamil* and the cases decided under it at length. *Id.* at 491-98. The takeaway is this: "increased risk" and "direct causation" are not part of a two-step causation process. *Id.* at 495. The jury is not required, as HUP claims, to "go further" and find factual causation after it determines that a defendant increased the risk of harm. *Id*.; *see* Motion at 41-44.

Rather, as clearly set forth by the Pattern Jury Instruction 14.20, the increased risk of harm portion of the instruction provides the jury with an alternative basis for finding factual cause. The jury was instructed that where the "plaintiff presents expert testimony that the failure to act or delay on the part of the defendant physician has increased the risk of harm to the plaintiff, this testimony, if found credible, *provides a sufficient basis from which you may find that the negligence was a factual cause* of the injuries sustained." (Emphasis supplied). "It is well settled that the jury is presumed to follow the trial court's instructions." *Commonwealth v. Cash*, 137 A.3d 1262, 1280 (Pa. 2016); *Farese v. Robinson*, 222 A.3d 1173 (Pa. Super. 2019). The jury was asked

[13] *Klein* also discusses and clarifies other causation cases Defendant has cited, including *Jones v. Montefiore Hosp*., 431 A.2d 1361 (Pa. Super. 1980).

in Question 2 of the verdict slip whether the Defendant's negligence factually caused and/or increased the risk of harm to the minor-plaintiff J.H. Question 2 was not required to list all the details that make up the jury instruction on increased risk, the same way that Question 1 regarding "negligence" does not have to include a discussion of the details that make up a legal duty and breach thereof. Here, the jury was accurately instructed on causation, and was asked on the verdict slip whether Plaintiffs had proven factual cause under either direct causation or increased risk of harm, consistent with the jury instruction. The jury is presumed to follow the court's instructions. As such, there was no legal error in submitting Question 2 to the jury as phrased with two legally sufficient bases of finding causation.

A plaintiff is entitled to the increased risk instruction when the necessary expert testimony has been admitted, *and* (because the two theories of causation are not mutually exclusive), a plaintiff is also entitled to an instruction on direct causation if requested. A jury can return a verdict based on *either* theory, per *Klein* and *Brozana*. That is how the jury was charged in this case, without objection, and that is what the verdict sheet, Question No. 2, reflects. HUP is wrong on the law again. The verdict sheet, Question 2, is not a basis for ordering a new trial, as it was not erroneous.[14]

2. The Verdict Sheet Was Not Erroneous as the Jury Could Find Vicarious Liability Without Specifying its Findings as to Each Agent.

Here, HUP rehashes arguments about the failure to include each of the healthcare providers' names on the verdict sheet for individual liability findings. Motion at 44-46. For all of the reasons previously stated in this Opposition, it was not necessary to structure the verdict sheet

[14] HUP mentions *Sucharski v. Patel*, No. 12-3298, 2014 WL 80699 (E.D. Pa. Jan. 8, 2014), in passing for the statement that there is "no cause of action in Pennsylvania for an increased risk of harm." Motion at 43. *Sucharski* is unreported and does not mention *Klein*; the district court indicated that it was "predicting" what Pennsylvania courts would say. *Id.* at *2. *Klein* was issued one day after *Sucharski.* The district court did not have the benefit of it at the time it drafted its opinion.

this way. HUP has admitted that Plaintiffs could have pursued this case without ever suing the individual healthcare providers *at all*. What was required was evidence of the standard of care, breach, and causation. Plaintiffs satisfied this burden in every respect.

It was Plaintiffs' option to ask for individual findings on liability as to each employee-Defendant, or for a finding of vicarious liability against HUP based on the jury's determination that one or more of the employees was negligent and that this negligence caused J.H.'s damages. It was not erroneous for the Court to deny HUP's request to further its own financial interests (based on a late-hour alleged conflict) by using the Defendants' proposed verdict form. Once again, HUP's argument is devoid of any relevant legal authority in support of its position. The Motion refers to "*Holmes*," a decision of the Philadelphia Court of Common Pleas, for a holding about causation and vicarious liability, *see* Motion at 45, but the citation is incomplete and there are several trial court opinions from 2007 that could be the referenced case. If HUP is talking about *Holmes v. University of Penn*., No. 0349, 82 Pa. D. & C.4th 363, 2007 WL 2687657 (Phila. Ct. Com. Pl. Mar. 28, 2007), that case concerned a factual dispute about which of several possible institutional entities employed the physicians that the plaintiff sued, as well as a claim by the plaintiff that hospital personnel had conspired against her in making notations to her chart. *Id.* at 368, 376-80. *None of the physicians testified at trial about who their employer was. Id.* at 378. The judge offered to charge the jury on vicarious liability in a way that would apply to a generic "employer," and the physicians were willing to stipulate that if they were found liable their employer would be vicariously liable. *Id.* at 379-80. The plaintiff refused those concessions. *Id.* *Holmes* is not at all on point with the facts of this case.

The verdict sheet appropriately permitted the jury to conclude that HUP was vicariously liable if one or more of HUP's employees breached the standard of care in a way that caused Plaintiffs' injuries. HUP has not established error in this regard.

3. The Court Did Not Err in Sustaining an Objection to a Poorly Phrased Question, and the Evidence About Blood Gases Was Introduced Through Other Defense Witnesses.

HUP repeatedly uses the plural in claiming that the Court refused to allow its "healthcare provider defendants" and "witnesses" to testify about cord blood gas results. *See* Motion at 46-51. However, there was only one, single, discrete instance where a question regarding cord gases was sustained, with respect to one Defendant-witness: Dr. Leitner. (Tr. 4/11/23 p.m. at 51) The objection to the question asked of this witness was sustained not on the grounds that the physician could not testify about her opinions, whether disclosed in discovery or not. It was sustained on relevance grounds based on the context of the questioning. Then, HUP argued to the Court that the Court was wrong to sustain the objection, the Court disagreed, and HUP's counsel neglected or affirmatively chose not to ask the same question of Dr. Bender or any other defendant-witness. Somehow, HUP has elevated its own failure to ask a question to the status of a sustained objection so that it can talk about "witnesses" being precluded instead of one "witness." Again, HUP has skewed and distorted the facts to suit an argument it wishes to make.

Plaintiff agrees that during direct examination, defense counsel ask Dr. Leitner to "look back" and testify, based on what she knows now, whether she should have proceeded to a C-section earlier than she did. (Tr. 4/11/23 p.m. at 44)

> Q Looking back do you think you should have done it earlier?
> A I do not.
> Q Why not?
> A There'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.

(*Id*.) But counsel abandoned that line of questioning and turned back to consideration of what had happened, in real time, as Dr. Leitner was caring for the patient. (*Id.* at 45) This line of questioning continued for some time. Later, he asked: "You mentioned something about a cord gas." (*Id.* at 51-52) This was the question that elicited an objection by Plaintiffs' counsel. There was a sidebar and the Court sustained the objection. (*Id.*)

"The admission of evidence is committed to the sound discretion of the trial court[.]" *Commonwealth v. Bardo*, 709 A.2d 871, 877 (Pa.), *cert. denied*, 525 U.S. 936 (1998). "Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact." *Commonwealth v. Lilliock*, 740 A.2d 237, 244 (Pa. Super. 1999) (quotation marks and citations omitted), *appeal denied,* 795 A.2d 972 (2000). Even relevant information may be rejected if its probative value is outweighed by the danger of unfair prejudice or confusion. *Sprague v. Walter*, 656 A.2d 890, 909 (Pa. Super. 1995) (citing *Whistler Sportswear, Inc. v. Rullo*, 433 A.2d 40 (1981)).

HUP's counsel failed, once the objection was sustained, to make a specific offer of proof of what the witness would have said. (Tr. 4/11/23 p.m. at 81-82) More importantly, Plaintiffs' counsel correctly described the objection as one of relevance, that the witness would not have had the cord gas results during the time period she was testifying about. (*Id.* at 82) If counsel wanted Dr. Leitner to express an opinion about the cord gas results, it was necessary for him to (re)formulate a proper question but he did not. Counsel failed to make clear or signal for the jury that he was turning from a discussion of what the doctor knew at the time of the C-section to what she might know or believe now. Ultimately, HUP introduced evidence of the umbilical cord gas through multiple liability and causation witnesses, see, e.g., testimony of Drs. Goetzl, Schutzman,

Mintz, and Eppes. Defense counsel discussed the cord gas results in opening statement and closing argument. Therefore, any perceived error is harmless.

4. The Court Did Not Err in Permitting Questions About the Providers' Discussions with Dajah Hagans About her Care Before Delivery.

HUP claims the trial court erred in permitting evidence concerning whether Ms. Hagans was offered the possibility of a C-section before the time of the actual birth. Motion at 52. It argues that this evidence was irrelevant because Plaintiffs' informed consent was dismissed before trial. *Id.* Here are each of the statements Defendant claims should not have been allowed into evidence:

> Dr. Cardwell
> (Tr. 4/4/23 p.m. at 45-46)
>
> Q. What's that discussion like at 1:00, what do you tell mom?
> A. You tell mom that you have a non-reassuring heart rate tracing now, it's getting worse in spite of our efforts to try and improve it. And with this prolonged deceleration, it's safer for the baby to be delivered by a timely Cesarean section.
> Q. Was she ever given that choice?
> A. No.
> Q. Should she have been?
> A. Yes.
> Q. Whose decision is it when a woman wants a C-section or doesn't want a C-section, can you force her as a doctor to go the way you want?
> A. No. You have to make the recommendation, give her the risks and benefits and then the alternatives. But also make a recommendation and under the circumstances of this case to recommended delivery by Cesarean section.
> Q. Was there any benefit in not recommending a Cesarean section at 1:00? Did it do anything good for this family?
> A. No.
> Q. Did it do anything bad?
> A. Yes, it delayed the delivery of the baby. And in the interim the baby suffered from decreased oxygen and was born in a very depressed manner.
> Q. That's something called informed consent, correct?
> A. Yes.
> Q. Do you believe in this case they actually gave her informed consent?
> MR. MARGULIES: Objection.
> THE COURT: Sustained.

By the time defense counsel objected, the witness had already testified about the options made available to Ms. Hagans for her birth, whether she or her physician was to make that decision,

and whether the failure to recommend a C-section at 1:00 had a damaging effect. The Court sustained an objection to the final question and no answer to it was given.

Dr. Bender
(Tr. 4/12/23 p.m. at 96)

Q. So exactly whose plan was it to decide to augment this labor using Pitocin, known to be a high-risk medication?
A. That would have been our team's plan. And I mentioned our team at that point was Dr. Gutman, myself, and Dr. Leitner.
[. . .]
Q. How did Ms. Hagans factor into her own plan of care?
A. I don't have a specific recollection of that conversation, as you mentioned. But I would certainly have involved her in that discussion at the time of the bedside assessment.

(Tr. 4/12/23 p.m. at 98)

Q. At any time during this plan, when you were talking to Ms. Hagans about administering this drug Pitocin, was there ever an offer of, we don't need to do that, we can deliver you right now by C-section. Was that ever offered?
A. Again, I don't have a specific recollection of this conversation as we have stated, but it is possible that that was discussed. I can't speak for certain. I would be speculating if I offered that.

(Tr. 4/12/23 p.m. at 100)

Q. Did you ever tell Ms. Hagans that this medication was going to make her contractions stronger, more frequent, more painful?
A. I think that's what I just said, yes.
Q. Did you ever tell Ms. Hagans there is a risk of this medication causing her to contract too frequently and there could be an adverse impact on the child?
A. As I mentioned, those stronger or more frequent contractions caused by Pitocin can result in a change in the heart rate tracing, and the antidote to that would be to stop that medication.

No objections were lodged to Dr. Bender's testimony therefore any objection is waived.

Plaintiff Dajah Hagans
(Tr. 4/10/23 p.m. 29)

Q. If the records say the C-section was ordered at about 2:11 to 2:15, were you ever offered the option of having a Cesarean section before that time?
A. 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 if that was ever given to me, I would take that option of having a C-section.

No objections were lodged to Ms. Hagans' testimony therefore any objection is waived.

On April 12th, defense counsel called Dr. Sarah Gutman, one of the Defendant physicians, to the stand. (Tr. 4/12/23 p.m. 4) He questioned Dr. Gutman about the patient's consent and even put up on the screen, thereby publishing to the jury, a general consent form. (*Id.* at 8-9) He asked Dr. Gutman about a reference in the consent form to the use of Pitocin to stimulate labor. (*Id.* at 10) At this point, HUP voluntarily "opened the door" to testimony about informed consent, just by asking its own witness about it and introducing a consent form to the jury.

Then HUP changed its mind when Plaintiffs' counsel cross-examined Dr. Gutman. He asked whether, if Ms. Hagans had wanted a C-section, the hospital would have been obligated to perform it. (*Id.* at 38) An objection at that point was made. (*Id.*) There was a sidebar. (*Id.*) As a result of the sidebar, the Court sustained the objection and counsel rephrased his question. (*Id.*) There was no objection to the rephrased question, which was, "At 1:00 p.m. when you went in and saw my client, was she offered a Cesarean section at that time?" (*Id*. at 38-39) Counsel asked a few more questions about when Ms. Hagans was told about the option to have a C-section. (*Id.* at 39-40) The Court sustained an objection to a question asking if it was Ms. Hagans' right to elect to have a C-section. (*Id.* at 39) The Court overruled an objection to a question about the timing of any conversation during which she was told that she had the option. (*Id.*)

It is important to keep in mind that timing questions of this kind were indeed relevant in this case. The discussions between the obstetric team and Ms. Hagans were directly relevant to not only the timing of treatment, but also the state of mind of the physicians – what treatment plans the obstetric team was or was not thinking about. The chart was woefully lacking in specific documentation of who did what, when. It is next to impossible to tell from the chart when the decisions to administer medications such as Unasyn and Pitocin were being made. Asking the

witnesses about when they recalled having conversations with the patient, for example, was one way of eliciting evidence about when things were done and who did them. So it is *not* correct, as HUP claims, that this kind of evidence was relevant only with respect to informed consent. Motion at 52. Defense counsel understood this, given his failure to object most of the time (i.e., waiver).

On the morning of April 13, 2023, defense counsel asked the Court for a curative instruction. (Tr. 4/13/23 a.m. at 4, 8-9) Plaintiffs' counsel noted that defense counsel had asked informed consent questions with his own witness. (*Id.* at 9-10) The Court agreed, stating that counsel had opened the door to informed consent evidence. (*Id.* at 12) The Court, in the exercise of its discretion, believed that as some objections had been sustained and as the parties had discussed the state of the medical records "ad nauseum," a curative instruction was not appropriate. (*Id.*) *See Commonwealth v. Moore*, 633 A.2d 1119, 1127 (Pa. 1993) (stating that it is within the trial court's sound discretion to determine whether to give a curative instruction). Moreover, curative instructions are not always necessary or even desirable. *Commonwealth v. Sanchez*, 82 A.3d 943, 982 (2013). When the subject matter is fleeting and limited, it is not an abuse of discretion to refuse a curative instruction, especially if the instruction would only draw attention to and exaggerate the importance of the comments. *Id*.

5. The Weight of the Evidence Does Not Require a New Trial.

A weight of the evidence challenge to a verdict is to be granted in only the most exceptional cases, where the verdict "shocks the conscience." *Armbruster*, 813 A.2d at 703.

a. The failure to list the individual names of the healthcare providers on the verdict sheet has nothing to do with the weight of the evidence.

Disputes about the evidence and contradictory testimony are not grounds for granting a new trial. *Fanning v. Davne*, 795 A.2d 388, 393 (Pa. Super. 2002). HUP asks the Court to compare the testimony of Plaintiffs' experts against the testimony of HUP's "well-qualified experts,"

snidely implying that Plaintiffs' witnesses were not well-qualified. *Id.* at 54-57. HUP concludes by claiming, in all seriousness, that "none of the evidence in this case, *aside from the conclusory opinions of Plaintiffs' experts*, supported a finding that an acute catastrophic event occurred to J.H. in the last minutes prior to his delivery." Motion at 57. But, Plaintiffs' experts' opinions were not conclusory, no matter how many times HUP tries to claim as much. An expert opinion is not conclusory because HUP doesn't agree with it. It is telling that HUP did not cite to any of the "conclusory" opinions in arguing that the weight of the evidence requires a new trial. Ordinarily, if you want to weigh two things to see which is "weightier," you have to examine both things. This verdict was not against the weight of the evidence and certainly does not "shock" ones conscious.

b. The Jury's Verdict for Future Medical Damages and Noneconomic Pain and Suffering Damages is Based Directly on Evidence and Testimony Presented at Trial as to Life Expectancy.

There is no dispute regarding the severity of J.H.'s injuries. HUP itself told the jury in its opening statement: "We agree this is a tragic, tragic case. [J.H.], as I will call him as well, has very severe injuries" (N.T. 4/3/2023 a.m. at 66.) J.H. suffers from severe motor, developmental, cognitive, and intellectual deficits. He cannot walk or stand, he is fed via a gastrostomy tube, and he cannot speak. He will require substantial medical care for the rest of his life.

HUP now argues, contrary to the position it adopted at trial in front of the jury, that the jury's verdict is against the weight of the evidence and so contrary to the evidence as to "shock one's sense of justice." Motion at 57. HUP makes this claim by ignoring the evidence admitted at trial. A weight of the evidence challenge, again, requires an assessment of all of the evidence, not just Defendant's evidence. The verdict is not "grossly excessive" when the evidence is weighed.

c. The Jury's Verdict for Year-Over-Year Future Medical Expenses Is Consistent with the Direct Evidence and Testimony Admitted at Trial.

HUP incorrectly claims that there was no evidence that would permit an award of medical expenses based on J.H. living to be seventy years old. Motion at 57. Even the most cursory review of the trial record reveals that this representation is patently untrue.

HUP called its expert, Dr. Mintz, to testify by video deposition. Dr. Mintz claimed that J.H. is "minimally conscious, immobile" and therefore has a reduced life expectancy. (See D-100, Mintz Dep. at 98-100, 101-107) Dr. Mintz pessimistically believes that J.H. might live between an additional three to eight years or, if he survives to the age of fifteen, he might live to the age of twenty-nine. (*Id.*) On this basis HUP claims that the jury's verdict was excessive because it awarded money for medical expenses through 2088, at which time J.H. will be seventy.

The jury's verdict, however, is entirely consistent with the testimony of Plaintiff's expert, Dr. Katz, who categorically rebutted Dr. Mintz's opinion that J.H. is minimally conscious. Dr. Katz testified he examined J.H. in-person twice, and "strongly disagrees" that he is in a vegetative or minimally conscious state for a number of reasons. (4/10/23 a.m. Tr. at 89-93). He testified that J.H. is responsive, laughs and smiles, can be startled, and that he "connected pretty quickly" with stimulation in the environment. (*Id.*) J.H. responds to his mother, his younger brother, and family members. (*Id.*) Dr. Katz directly rebutted Dr. Mintz's testimony.

Dr. Katz also testified that he helped prepare and reviewed Plaintiffs' life care plan, that he agreed with the care needs outlined in the plan, that the plan was necessary to optimize J.H.'s health, function, and quality of life, and that J.H. would require such care for the duration of his life. (Tr. 4/10/23 a.m. at 100-105) Dr. Katz and the life care planner relied on the "U.S. Life Tables" to provide an average statistical life expectancy for a five-year-old like J.H. (*Id.*) The U.S. Life Tables for 2019 and 2020 were accepted into evidence as Plaintiffs' trial exhibit P-50 without objection. (Tr. 4/11/23 a.m. at 17-18)

Importantly, on cross-exam, Dr. Katz testified that it would be reasonable to decrease J.H.'s life expectancy by five to ten years due to his non-ambulatory status. (Tr. 4/10/23 a.m. at 110-111, 114-115). The jury credited Dr. Katz's testimony as discussed below.

The Court charged the jury on life expectancy. (Tr. 4/20/23 p.m. at 38-39.)

> If you find that the minor plaintiff JH's injuries will endure into the future, you must decide the life expectancy of plaintiff JH. According to the statistics compiled by the United States Department of Health and Human Services, the average remaining life expectancy of all persons of plaintiff JH's gender and age is 72 years. This statistic is only a guideline, and you are not bound to accept it if you believe that plaintiff JH will live longer or less than the average individual in his category. In reaching this decision, you must determine how long he will live considering his health and circumstances and other factors you find will affect the duration of his life. You may also consider expert testimony regarding reduction in life expectancy that was presented in this case.[15]

The jury makes its own determination based on all the factors that affect the duration of life. *See*, *e.g.*, *Pauza v. Lehigh Valley Coal Co.*, 80 A. 1126, 1127 (Pa. 1911).

Here, the jury made a unanimous factual finding that J.H. has an additional sixty-five years of life expectancy through 2088, at which time J.H. will be seventy years old. Clearly, the jury accepted Dr. Katz's opinions and rejected Dr. Mintz's opinions. The verdict reflects the jury's decision to reduce the child's life expectancy from seventy-two years, which is the statistical average per the charge, to sixty-five years, which is an age that falls squarely within the range that Dr. Katz testified would be reasonable based on J.H.'s non-ambulatory status.

Likewise, HUP's claim that the jury's award for J.H.'s future pain and suffering over the next sixty-five years must likewise be rejected. HUP again argues that the jury's award is excessive because the jury made a factual finding that J.H. will live to be seventy. But, the jury was allowed to make this factual finding based on the record evidence at trial. Disputed evidence is not a reason for a new trial. *See Carroll v. Avallone*, 939 A.2d 872, 874 (Pa. 2007) (it is for the jury to evaluate

[15] The last sentence is not part of the standard jury instruction on life expectancy. Defense counsel requested that the Court identify expert testimony as a factor the jury could consider when determining life expectancy.

and weigh the credibility of the evidence, including expert testimony, and to assess the worth of the testimony presented). The jury may believe all, some or none of the witness testimony presented at trial. *Id*. Questions of credibility and conflicts in evidence are for the factfinder to resolve. *Com. v. Patton*, 686 A.2d 1302 (Pa. 1997); *Miller v. Brass Rail Tavern, Inc.*, 702 A.2d 1072 (Pa. Super. 1997).

Plaintiffs' life care planner, Nurse Jody Masterson, testified regarding J.H.'s severe neurologic injuries and complications, as well as the future medical and rehabilitative care and treatment he will need now and moving forward throughout his life. (Tr. 4/3/23 p.m. at 29-38, 49, 51-52, 60; see also Tr. 4/4/23 a.m. at 36, 63-64). Plaintiffs called Thomas Borzilleri, Ph.D., an expert economist, to testify about the economic value of the future medical costs set forth in the life care plan. (Tr. 4/10/23 a.m. at 29, 47-56.) Dr. Borzilleri's chart and testimony discussed how the jury would be able to calculate the year-by-year future medical expenses for J.H. at any given life expectancy it determined was appropriate. (*Id.*)

The jury was charged that if it found in Plaintiffs' favor, they should consider an award of future medical expenses that would fairly compensate J.H. for each year of his life expectancy. (Tr. 4/20/23 p.m. at 30-31). At 4:10 p.m. on April 20th, the jury submitted its one and only note. (Tr. 4/20/23 p.m. at 45-46.) The jurors requested the "[l]ife care plans/economic charts, both defendant and plaintiff." (*Id*.) Both Plaintiffs' chart and HUP's chart regarding the year-over-year future medical expenses were sent back to the jury, without objection. (*Id*.)

The following day, April 21, 2023, the jury advised that it had reached a unanimous verdict in Plaintiffs' favor on all issues. (Tr. 4/21/23 a.m. at 4-20.) The jury completed the verdict slip as instructed, and utilized the very same year-over-year future medical costs projections listed in Dr. Borzilleri's chart through calendar year 2088. The verdict slip is proof-positive that jury credited

Plaintiffs' evidence and rejected HUP's evidence. J.H.'s future medical care expenses were proven at trial, and the jury properly awarded these damages based on the evidence and law.

d. The Jury's Verdict for Noneconomic Pain and Suffering Damages is Consistent with the Evidence and Testimony at Trial.

HUP devotes only two-pages of its seventy-nine-page brief to argue there is "no evidence" of J.H.'s pain and suffering. Motion at 60-61. HUP apparently relies on the all-knowing Dr. Mintz, who testified that J.H. is incapable of interpreting his pain. Motion at 60. Therefore, HUP argues, the jury should not have awarded J.H. any damages for pain and suffering and this portion of the award should be vacated. Motion at 61-62. This argument is tragically tone-deaf. The Court and the jury saw J.H. in person. It is difficult to accept Dr. Mintz's testimony has any value, even subjectively. Regardless, it is again clear that the jury rejected Dr. Mintz's testimony wholesale. Even worse, HUP actually argues that Plaintiffs failed to offer any evidence of J.H.'s pain and suffering or loss of life's pleasures. That argument is asserted without discussion of the evidence.

Plaintiffs offered substantial, meaningful evidence of J.H.'s injuries, pain and suffering, embarrassment and humiliation, loss of life's pleasures, and disfigurement. The trial court is required to give due weight to all of the evidence offered, recognizing that the jury is entitled to believe all of the plaintiff's evidence and none of the defendant's evidence. *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022, 1028 (Pa. Super. 2005). The amount of damages to be awarded for pain and suffering is primarily a jury question. *Krysmalski by Krysmalski v. Tarasovich*, 622 A.2d 298, 312 (Pa. Super. 1993); *see also Tillery v. Children's Hosp. of Phila*., 156 A.3d 1233 (Pa. Super. 2017) (affirming trial court's refusal to remit $7.5 million verdict); *Gurley v Janssen Pharms. Inc*., 113 A.3d 283, 294-95 (Pa. Super. 2015) (trial court did not abuse its discretion in failing to remit a $10.6 million verdict for a cleft lip injury that did not prevent the plaintiff from attending school and developing normal relationships with his peers).

Our Supreme Court has discussed the importance of allowing a jury to assess damages:

> There is no magic formula for determining what is the exact amount a disabled person is entitled to receive for what has been tortiously taken away from him. But, despite all the theories and speculations as to what can be done by technical experts and mechanical comptometers for computing the price of pain, the fact remains that **the jury is the best agency equipped to confront practical problems in court and practically resolve them**. Twelve persons chosen from many walks of life, knowledgeable in the ways and manner of everyday people, enter a courtroom, study the injured person, listen to what he says and what others have to say, accept the guidance offered to them by the judge, and then decide what the wronged, injured person should receive ….

DiChiacchio v. Rockcraft Stone Prods. Co., 225 A.2d 913, 917 (Pa. 1967) (emphasis added).

There is no requirement that the plaintiff present expert testimony to establish pain and suffering. *Reist v. Manwiller*, 332 A.2d 518 (Pa. Super. 1974). In some cases, the plaintiff 's injury by itself is sufficient proof that pain and suffering followed from it. *Yacabonis v. Gilvickas*, 101 A.2d 690 (Pa. 1954). There is no precise legal standard for evaluating a claim for pain and suffering. *DiChiacchio*, 225 A.2d at 917. In fact, under Pennsylvania law, a plaintiff does not need to be able to verbalize awareness of his or her loss in order to recover for it. *Wagner v. York Hosp.*, 608 A.2d 496, 501 (Pa. Super. 1992). A jury may award damages for loss of life's pleasures for as long as an injured person remains alive and subject to impairment. *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 627 (Pa. Super. 1999).

The trial court gave the jury the specific instructions regarding how to arrive at a fair figure for non-economic pain and suffering damages. (Tr. 4/20/23 p.m. at 33-36). It is presumed that the jury followed the Court's instruction and based its award on the factors the Court discussed. *See Commonwealth v. Dixon*, 115 A.2d 811, 815 (Pa. 1955) (it is presumed that a jury follows the court's instructions). The verdict is supported by evidence, and therefore it must be permitted to stand where there is nothing to suggest that the jury was in any way guided by partiality, prejudice, mistake or corruption. *Stoughton v. Kinzey*, 445 A.2d 1240 (Pa. Super. 1982).

HUP urges this Court to reject all of the evidence that was submitted about J.H.'s condition and his experience of daily life, including direct observations of J.H. with his mother, based solely on Dr. Mintz's testimony (this is the same expert whose reduced life expectancy opinions *we know* were entirely rejected by the jury). Here, the jury evaluated the evidence, and made a finding supported by the evidence. HUP wishes to set the verdict aside based on the weight of the evidence when the weight clearly and objectively lies with Plaintiffs. HUP's request must be denied.

E. There is No Basis for Remittitur or a New Trial on Damages as the Verdict is Not Excessive and Will Not Impact the Community.

Under Pennsylvania law, the Court may grant a remittitur if "the award of compensatory damages lies beyond the uncertain limits of fair and reasonable compensation," or "the verdict so shocks the conscience as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption." *Brown v. End Zone, Inc.*, 259 A.3d 473, 486 (Pa. Super. 2021) (quoting *Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1285-86 (Pa. Super. 2018)). This standard is highly deferential, because the trial judge serves not as finder of fact, but as impartial courtroom authority with an obligation to give great respect to the jury's function. *Id*.

Each personal injury case "is unique and dependent on its own special circumstances." *Id.* Noneconomic loss must be measured by experience rather than any mathematical formula. *Id.*; *see also Martin v. Soblotney*, 466 A.2d 1022, 1025 (Pa. 1983) ("it is immediately apparent that there is no logical or experiential correlation between the monetary value of medical services required to treat a given injury and the quantum of pain and suffering endured as a result of that injury"). "The law entrusts jurors, as the impartial acting voice of the community, to quantify noneconomic loss and compensation." *Brown*, 259 A.3d at 486 (quoting *Hammons*, 190 A.3d at 1285-86).

It is well-settled that the large size of a verdict in and of itself is not evidence of excessiveness. *Layman v. Doernte,* 175 A.2d 530, 534 (1962); *Sprague*, 656 A.2d at 924. "The duty

of assessing damages is within the province of the jury and should not be interfered with by the court, unless it clearly appears that the amount awarded resulted from caprice, prejudice, partiality, corruption or some other improper influence." *Helpin v. Trustees of the Univ. of Penn.*, 969 A.2d 601, 616 n.9 (Pa. 2009) (citing *Ferrer v. Trustees of the Univ. of Penn.*, 825 A.2d 591, 611 (2002)).The factors the court may be considered when evaluating whether a verdict is excessive:

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

Kemp v. Philadelphia Transportation Company, 361 A.2d 362, 364-366 (Pa. 1976).

Notably, if the verdict bears a reasonable resemblance to the damages, it is not the function of the court to substitute its judgment for the jury's. *Kiser v. Schulte,* 648 A.2d 1, 4 (Pa. 1994).

1. The Jury's Verdict Was Based on the Evidence (Not "Improper Assumptions").

a. The Jury's Verdict Was Based on Evidence of Life Expectancy.

Plaintiffs have already set forth evidence from which the jury could find J.H.'s life expectancy is an additional 65 years to age 70. Plaintiffs incorporate all prior arguments herein.

b. The Jury's Verdict for Future Medical Expenses Was Rendered Consistently with MCARE Section 509.

HUP argues that "substantial" remittitur is required because Plaintiff's economist, Dr. Borzilleri, testified regarding cumulative totals at ten-year increments for the year-over-year future medical costs, and Plaintiffs' counsel referenced these cumulative totals during closing argument. Motion at 63. HUP claims that this conflicts with Section 509 of the MCARE Act, 40 PA. STAT. §1303.509, which provides that any award for future medical expenses must be separately itemized

each year. HUP claims it suffered "prejudice" by permitting discussion of the ten-year cumulative totals. This argument is without merit and must be rejected.

First, Dr. Borzilleri testified that his chart calculating J.H.'s expenses would allow the jury, for any possible life expectancy, to determine the year-by-year medical expenses over the course of his lifetime. (Tr. 4/10/23 a.m. at 49; Plaintiffs' Exhibit P-99) Second, the chart only reflected the year-over-year costs from 2023 through 2094 and did not contain any cumulative ten-year totals. HUP objected to a column showing ten-year incremental totals, and the trial court instructed Plaintiffs to remove them; however, the court permitted counsel to ask questions about the incremental totals and to argue them in closing as a guide. (Tr. 4/10/23 a.m. at 13, 68-69)

Thus, the chart shown to the jury and accepted into evidence fully complied with MCARE section 509. Plaintiff asked Dr. Borzilleri to explain the chart, and how the jury could use it as a guide based upon its determination of life expectancy. (Tr. 4/10/23 a.m. at 47-56; Exhibit P-99) Plaintiff only asked Dr. Borzilleri about the cumulative totals at ten-year increments to give the jury some context and a global view regarding the future medical costs. (*Id*.) Plaintiff then moved Exhibit P-99 into evidence without objection. (4/11/23 a.m. Tr. at 57; 4/12/23 a.m. Tr. at 18)

It was neither legal error nor an abuse of discretion to permit testimony about future medical costs at ten-year increments, and it was certainly fair commentary on the evidence during closing arguments. More importantly, the jury was properly charged to award future medical expenses by year for the duration of what it determined to be J.H.'s life expectancy, and not in a lump sum or by ten-year incremental totals. The verdict slip, again, was formatted for entry of the medical expense by year from 2023 to 2094 (even HUP's proposed verdict slip listed all years out to 2094), and the jury followed these instructions as the verdict sheet demonstrates. Accordingly, even if there was any error – which Plaintiffs deny – then the error was harmless. HUP fails to

articulate any "prejudice" resulting from discussion of cumulative ten-year totals, as the jury did not make its factual findings based on ten-year totals, but complied with the Court's instructions and Section 509 by calculating damages on a year-by-year basis from 2023 to 2088.

Similarly, it was not erroneous to permit Plaintiffs' counsel to discuss the cumulative totals of the future medical care during closing argument. This was fair commentary on the evidence. Separately, HUP raised no objection during or after Plaintiffs' closing arguments, and therefore any objection is waived.

2. Plaintiffs' Counsel's Closing Arguments Were Fair Commentary on the Evidence and the Inferences to be Drawn from the Evidence; Plaintiffs' Counsel Did Not Argue for a Punitive Damages Award.

HUP next argues that Plaintiffs' counsel made "inflammatory" statements during closing argument that were akin to seeking "punitive damages." This argument is waived. Because HUP failed to preserve the issue, HUP now raises it to claim a supposedly inflated verdict. Even if not waived, Plaintiffs' counsel never argued that Defendant's conduct, or the conduct of its employees, was anything other than negligence. Plaintiff did not argue or suggest that HUP's actions were outrageous, willful or wanton, demonstrated a reckless indifference to safety, or any other standard of conduct that would give rise to punitive damages. Plaintiffs never argued that the jury should "punish" HUP, or "send a message" to HUP. Plaintiffs' closing contained arguments and commentary on the evidence presented during trial, nothing more.

Counsel has great latitude in making closing arguments and is permitted to advance spirited arguments to support the client's cause. *Commonwealth v. Ogrod,* 839 A.2d 294, 339-40 (Pa. 2003). As long as no liberties are taken with the evidence, a "lawyer is free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to

advance his cause and win a verdict in the jury box." *Contractors Lumber & Supply Co. v. Ouinette,* 126 A.2d 442, 444 (Pa. 1956).

There was no punitive damages claim; the jury was not instructed on punitive damages; there was no line on the verdict slip for punitive damages. This court specifically instructed the jury that it must not let sympathy or prejudice play a role in their deliberations. (Tr. 4/20/23 p.m. at 39). "It is well settled that the jury is presumed to follow the trial court's instructions." *Commonwealth v. Cash*, 137 A.3d 1262, 1280 (Pa. 2016); *Farese v. Robinson*, 222 A.3d 1173 (Pa. Super. 2019). HUP's arguments are nothing more than a gratuitous attempt to demean the jury's unanimous verdict by suggesting that it was not the product careful deliberations. If Plaintiffs' counsel's arguments were so inflammatory and prejudicial, then an objection to same was warranted at the time of trial. HUP did not object and therefore this issue is waived.

3. This Trial Court Should Not Compare This Jury's Verdict to Other Verdicts in Different Cases.

"Each case is unique and dependent on its own special circumstances and a court should apply only those factors which it finds to be relevant in determining whether or not the verdict is excessive." *Tindall v. Friedman*, 970 A.2d 1159, 1177 (Pa. Super. 2009). *Hyrcza v. West Penn Allegheny Health System*, 978 A.2d 961, 981 (Pa. Super. 2009) (Superior Court cautioned against considering other verdicts when considering remittitur).

Here, HUP improperly compares the unanimous jury verdict in this case to other verdicts in cases involving different causes of action; different facts and circumstances; different injuries, damages, and harms; verdicts that were rendered at different times and during different phases of the economy; and in different jurisdictions and venues. This case rests on its own facts, circumstances, and evidence, and this Court's only task is to evaluate whether there was sufficient evidence to support the jury's damages verdict – and there was sufficient evidence.

By way of example, the very first allegedly "comparable" verdict described in HUP's Motion is the *Ocampo* case – a products liability case; tried in the Northern District of Illinois; over eighteen years ago; involving an adult plaintiff; who suffered injuries to her scalp and ear when she became entangled in a machine at work. Plaintiffs cannot think of a more dissimilar verdict, yet this is the one HUP led with in its brief; the facts don't line up even remotely. If this one case HUP chose isn't comparable, there is no reason to expect any of the others will be.

But if the trial court is inclined to compare this verdict with others, Plaintiffs would refer the Court to jury verdicts and awards that were not reduced on remittitur and involved injuries far less devastating than those suffered by J.H. Consider, for example, the verdict in *A.Y. v. Janssen Pharms. Inc.*, 224 A.3d 1 (Pa. Super. 2019). There, the Superior Court affirmed a Philadelphia jury's award of *$70 million* for "psychological and emotional non-economic damages" to a seven-year old boy that developed gynecomastia from using a medication. *Id.* at 30. This case was purely one for pain and suffering, with no evidence of economic damages for lost earnings or future medical care. The trial court refused remittitur and, on appeal, the Superior Court rejected the defendant's argument that the verdict was "grossly disproportionate" to the child's injuries, noting that the evidence demonstrated the child had been bullied at school and work, teased, and never went outside without a shirt on. In contrast, here, the jury had identifiable and proven economic damages exceeding $100 million, and also, separately, there was substantial evidence of J.H.'s pain and suffering. The jury's verdict, herein, in this case, is reflective of the evidence at trial. There is a reasonable resemblance between the damages evidence at trial and this jury's verdict, and as a result, this trial court should not substitute its judgment for that of the jury (in whose hands we place these factual determinations).

4. HUP Has Failed to Establish Any Impact on Access to Healthcare in the Community (Much Less a Negative Impact).

When "a defendant health care provider challenges a verdict on grounds of excessiveness," the MCARE Act requires only that the Court "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 PA. STAT. ANN. § 1303.515. Section 515 does not require a hearing, nor does it set forth any applicable standards.

Here, this verdict will have no impact – zero – on the Philadelphia community's access to healthcare. Moreover, HUP has failed to demonstrate with any viable facts and evidence that satisfaction of this verdict will result in adverse consequences to the citizens of Philadelphia and elsewhere. Instead, HUP offers self-serving and anecdotal certifications (not affidavits), which are speculative and nebulous at best, that are more directed to HUP's ability to secure insurance coverage, as well as unsupportable claims that this verdict will impact its "operations."

In fact, HUP doesn't even dispute its ability to fully satisfy and pay the instant verdict. While HUP suggests it will have difficulties with insurance renewals (don't we all?), this has no bearing on access to care. Moreover, HUP has been silent and has not even disclosed the liability insurance coverage structure applicable and available for this case, and whether HUP would even be required to pay the difference from its own operating revenues.

Insurance issues aside, according to HUP's own publicly available website, the University of Pennsylvania has a $20.7 billion endowment as of June 30, 2022 (see: https://investments.upenn.edu/about-us), of which **$4.6 billion** represents assets to support the University of Pennsylvania Health System ("UPHS"). Furthermore, according to the University of Pennsylvania's Fiscal Year 2022 Consolidated Financial Statements, UPHS in 2022 generated net patient service revenue of over $8.1 billion, and had total net assets in excess of $14.4 billion. (See:

Penn-Division-of-Finance-FY22-Annual-Report.pdf (upenn.edu) at 17). As UPHS' total liabilities were $5.7 billion, this results in total net assets of over **$8.6 billion**. *Id*.

UPHS's financial documents also describe "Medical Professional Liability Claims," stating that the University "is insured for medical professional liability claims through a combination of the Medical Care Availability and Reduction of Error Fund (MCARE), various commercial insurance companies and risk retention programs." (*Id* at 19.) Yet again, as noted above, HUP has not disclosed the detail of the applicable insurance structure for this verdict. Importantly, the UPHS FY22 Consolidated Financial Statement provides:

> Various lawsuits, claims and other contingent liabilities arise in the ordinary course of the University's education and health care activities. Based upon information currently available, **management believes that any liability resulting therefrom will not materially affect the financial position or operations of the University**.

(*Id*. at 27.) HUP has not explained in its Motion why it takes a different view of its ability to meet its liabilities now.[16] The certifications attached as "evidence" to HUP's Motion, signed by risk managers, do not explain what factors and evaluations went into HUP's liability projections for *this case*. If HUP properly reserved, it should have adequate funds to pay this verdict without impacting care at all and it will have been earning interest on the reserve. But, HUP's own documents show this verdict will not materially affect its financial position or operations anyway.

HUP cannot avoid or ignore these admissions of such financial stability, into the billions of dollars, that this verdict could not possibly negatively impact HUP to such a degree that it would deny Philadelphians access to medical care. These financial statements reveal that HUP's claims

[16] HUP has tried this argument before, and even though its request to remit was rejected, HUP remained in business and the people of Philadelphia continued to receive care. *See Bugieda v. Hospital of the University of Pennsylvania*, 2007 WL 954045 (2007) (rejecting remittitur, finding that the verdict was against "one of the largest and most well-endowed health care systems in this Commonwealth, if not the nation" and that the verdict would not negatively impact the public's access to care).

– that it will be unable to offer healthcare going forward if it is required to satisfy this verdict – are wholly without merit. There will be no impact on HUP's provision of health care services and likewise no impact on the availability and accessibility of health care to the Philadelphia community. MCARE section 515 does not require an evidentiary hearing on the issue of impact evidence, and HUP's Motion does not state a basis for holding one. HUP has supplied its "evidence" for the impact of this verdict and the evidence is wholly inadequate.

F. The Jury's Verdict for Future Medical Expenses Should Not to be Reduced to Present Value.

HUP's request to reduce the jury's verdict for future medical expenses to present value is contrary to the law and must be rejected. This issue has been squarely addressed by the Pennsylvania Superior Court in *Tillery v. Children's Hospital of Philadelphia*, 156 A.3d 1233 (Pa. Super. 2017), *app. denied*, 643 Pa. 119, 172 A.3d 592 (2017), which found that Section 509 of the MCARE Act requires future medical expenses to be reduced to present value "only to determine the amount of attorney's fees." *Tillery*, 156 A.3d at 1248 (citing *Sayler v. Skutches*, 40 A3d 125 (Pa. Super. 2012), *app. denied*, 54 A.3d 349 (Pa. 2012)). The law is clear and unequivocal. *Tillery* is controlling. Accordingly, HUP's instant request for a reduction to present value must be denied.

V. PLAINTIFFS' OPPOSITION TO THE POST-TRIAL FILING OF THE INDIVIDUAL HEALTHCARE PROVIDERS

The individual healthcare defendants who made up the obstetric team, Drs. Leitner, Bender, Gutman, Suyama, and Nurse Kroesche, filed a joinder of sorts to HUP's motion and brief, adopting the same arguments raised by Defendant. Plaintiffs' respond to these healthcare providers' filing, based on the same arguments set forth herein, incorporated by reference.

VI. CONCLUSION / RELIEF REQUESTED

HUP's motion for post-trial relief must be denied, in its entirety. There is no legal authority, nor factual basis in the evidence, to permit the jury's unanimous verdict to be disturbed. HUP has failed to demonstrate entitlement to judgment n.o.v. in its favor. HUP has failed to demonstrate any legal error or abuse of discretion which was so prejudicial as to warrant another 3-week trial. To the extent there were any alleged trial errors, they are harmless. HUP sought to create a conflict with its own stipulated employees and agents in an effort to block Plaintiffs' legally supported claim of vicarious liability. When the dust settles, HUP's true motivation for creating conflict was laid bare – it was concerned about a mere $1 million of insurance through MCARE. Insurance is not the Plaintiffs' problem. Insurance is not the Court's problem. HUP should not be rewarded with judgment in its favor or a new trial on any issue to protect and insulate itself from its own litigation strategy, decision making, and risk management on this case.

For all of the reasons set forth herein and previously, all of the post-trial relief requested in HUP's motion should be denied.

Respectfully submitted,

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Dated: September 1, 2023

CERTIFICATE OF COMPLIANCE

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

GILMAN & BEDIGIAN, LLC

By: */s/ H. Briggs Bedigian*
/s/ E. Merritt Lentz

Dated: September 1, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, Plaintiffs' Brief in Support of Opposition to Defendant HUP's Motion for Post-Trial Relief was electronically filed with the Court, and was serve electronically on all counsel of record for defendants via the Court's e-filing system as well as via email:

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In addition, Plaintiff's Brief in Opposition was also provided via email and will be hand delivered to the trial court as follows:

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