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ANYAE MATTHEWS, Individually and as Parent and Natural Guardian of K.B., a minor *Plaintiff,* v. HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, et al. *Defendants.*	COURT OF COMMON PLEAS PHILADELPHIA COUNTY NO. 201201171 DECEMBER TERM, 2020 JURY TRIAL DEMANDED

PLAINTIFF'S MOTION FOR POST-TRIAL RELIEF

Plaintiff, Anyae Matthews, individually and as parent and natural guardian of K.B., a minor, files the instant Motion for Post-Trial Relief pursuant to Pennsylvania Rule of Civil Procedure 227.1, and in support thereof, avers as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. This is a medical malpractice case that was commenced by the filing of a Complaint on December 21, 2020. Plaintiff, Anyae Matthews, initiated this action on her own behalf and on behalf of her minor child, K.B., who is currently six (6) years old.

2. The defendants in the case are Hospital of the University of Pennsylvania ("HUP"), Trustees of the University of Pennsylvania ("Trustees"), Penn Medicine, Danielle Burkland, M.D. ("Dr. Burkland"), and Allison E. Myers, M.D. ("Dr. Myers").

A. Pretrial Proceedings.

3. Plaintiff's complaint alleged that defendants failed to timely deliver minor-plaintiff, K.B., during Ms. Matthews' labor and delivery at HUP which resulted in K.B. suffering a stroke at or around the time of birth. Plaintiff's complaint specifically alleged that the defendants' negligence "increased the risk of harm" to minor-plaintiff, K.B. *See* Compl. ¶ 123, attached as Exhibit "A." In their answer to plaintiff's complaint, defendants averred that Dr. Burkland and Dr. Myers were each employed by defendant Trustees at all times they provided medical care to plaintiff. *See* Def. Answer ¶¶ 9, 11, attached as Exhibit "B."

After the completion of discovery, plaintiff produced various expert reports in support of plaintiff's claims. Plaintiff's causation expert was pediatric neurologist, Tiffani McDonough, M.D. ("Dr. McDonough"). Dr. McDonough completed her residency in pediatric medicine at NYU Medical Center and her residency in pediatric neurology at New York Presbyterian Hospital-Weill Cornell Medical Center. *See* Curriculum Vitae of Dr. McDonough, attached as Exhibit "C." Dr. McDonough began her career as an attending physician at Columbia University Medical Center in New York City where she also worked as an Assistant Professor of Neurology at Columbia University College of Physicians and Surgeons. *Id.* From 2018 through 2022, Dr. McDonough was an attending physician in Epilepsy and Neonatal Neurology at Lurie Children's Hospital of Chicago where she also served as Medical Director of the Infantile Spasms Program and Assistant Professor of Pediatric Neurology at Northwestern University Feinberg School of Medicine. *Id.* Since October 2022, Dr. McDonough has worked simultaneously as an Assistant Clinical Professor in Pediatric Neurology at Tufts University School of Medicine and as an attending physician at Maine Medical Center Barbara Bush Children's Hospital. *Id.*[1]

[1] Following *voir dire* on qualifications at trial, defendants did not object to Dr. McDonough's qualifications as an expert. The Court qualified Dr. McDonough as an expert in the field of pediatric neurology.

Dr. McDonough authored an initial expert report in this case dated May 1, 2023. *See* 5/1/23 Expert Report of Dr. McDonough, attached as Exhibit "D." In her original report, Dr. McDonough opined that minor-plaintiff suffered a neonatal ischemic stroke during plaintiff's prolonged labor at HUP. *Id.* at pp. 1–2. Dr. McDonough explained in her report that there was "a lack of adequate blood flow and resulting brain ischemia to [K.B.] during labor." *Id.* at p. 2. Dr. McDonough further opined that all of minor-plaintiff's problems, including hemiplegia, spastic hemiparesis, developmental delays, neurological deficits, esotropia, and loss of motor functioning, were caused by the delay in performing a C-section which would have prevented the infarction that caused her permanent brain damage. *Id.* at p. 2.

4. Plaintiff also presented the expert report of James Edwards, M.D. ("Dr. Edwards"), for purposes of establishing the defendants' violation of the standard of care. Dr. Edwards is board-certified in both Obstetrics and Gynecology ("OBGYN") as well as Maternal Fetal Medicine ("MFM"). *See* Curriculum Vitae of Dr. Edwards, attached as Exhibit "E." As outlined in Dr. Edwards' expert report, the standard of care required K.B. to be delivered by 9:49 p.m. on December 29, 2017 based on her fetal heart tracing and other factors. *See* Expert Report of Dr. Edwards at p. 7, attached as Exhibit "F." Dr. Edwards explained in his report that there were further deviations from the standard of care when healthcare providers, including Dr. Burkland and Dr. Myers, failed to deliver K.B. by 9:49 p.m. *Id.* at pp. 7–8. Ultimately, K.B. was born at 12:32 a.m. on December 30, 2017—two hours and forty-three minutes after Dr. Edwards opined K.B. should have first been delivered via Cesarean section per the standard of care.[2]

[2] Following *voir dire* on qualifications at trial, defendants did not object to Dr. Edwards' qualifications as a standard-of-care expert. The Court qualified Dr. Edwards as a standard-of-care expert in the fields of OBGYN and MFM.

5. Plaintiff also presented the Life Care Plan expert report of Tamar Fleischer, RN, CRNP, CNLCP, CRRN. *See* Curriculum Vitae of CRNP Fleischer, attached as Exhibit "G." CRNP Fleischer obtained her Bachelor of Science in Nursing ("BSN") from University of Pennsylvania followed by her Master of Science in Nursing ("MSN") from University of Pennsylvania. *Id.* CRNP Fleischer has worked as a pediatric nurse practitioner at St. Christopher's Hospital for Children since 2010. *Id.* She obtained a Nurse Life Care Planner certification ("CNLCP") and certification as a Rehabilitation Registered Nurse ("CRRN"). *Id.* She is a member of the American Associate of Nurse Life Care Planners ("AANLCP"). *Id.* at p. 2.[3]

6. CRNP Fleischer personally examined and assessed minor-plaintiff, K.B. on two separate occasions in person first on January 29, 2023, and then again on December 28, 2023. CRNP Fleischer also reviewed K.B.'s prior care, therapy, surgical history, and all of K.B.'s relevant medical and therapy records. Based on her assessment, CRNP Fleischer devised a Life Care Plan in which she opined that K.B. requires $742,147 in future medical care costs. *See* CRNP Fleischer's Life Care Plan, attached as Exhibit "H." At trial, CRNP Fleischer testified in great detail as to K.B.'s future care needs due to K.B.'s hemiplegia and other disabling injuries. *See* N.T., 2/8/24 (P.M.) at 12:15–37:25, attached as Exhibit "I." For example, CRNP Fleischer testified, as K.B. gets older, "there are going to be things that are just difficult for her or impossible." *Id.* at 34:21–22.

7. Plaintiff's expert actuarial economist, David Hopkins, ASA, MAAA, reviewed CRNP Fleischer's Life Care Plan and, applying principles of inflation, opined that K.B.'s future medical care costs for the remainder of her life expectancy range from $1,158,370 (on the low

[3] Following *voir dire* on qualifications at trial, defendants did not object to CRNP Fleischer's qualifications as a Life Care Planner expert. The Court qualified CRNP Fleischer as an expert Life Care Planner.

end) to $11,396,779 (on the high end). *See* Expert Report of David Hopkins, attached as Exhibit "J." Mr. Hopkins also opined that K.B. had future lost earning capacity ranging from $623,133 (on the low end) to $4,025,998 (on the high end). *Id.*[4] Following the issuance of CRNP Fleischer's Life Care Plan, Dr. McDonough reviewed the Life Care Plan and authored a report on December 19, 2023, opining that the "costs outlined in the Life Care Plan are reasonable and necessary." *See* 12/29/23 Report of Dr. McDonough, attached as Exhibit "K."

B. Trial Testimony and Proceedings.

8. At trial, Dr. Edwards testified that the standard of care required the defendants to effectuate a Cesarean delivery of K.B. at 9:49 p.m. *See* Trial Tr. Dr. Edwards at 28:25–29:18, attached as Exhibit "L." Dr. Edwards went on to testify that there was a continuing violation of the standard of care, on multiple different points in time, between 9:49 p.m. on December 29, 2017 until when minor-plaintiff, K.B., was finally delivered by Cesarean section at 12:32 a.m. on December 30, 2017. *Id.* at 86:12–23, 88:3–12, 89:11–90:1, 93:2–7, 94:3–95:15, 96:2–23, 97:11–98:19, 98:21–99:14, 109:6–110:2, 110:17–113:16, 114:6–11, 115:7–16, 115:24–116:24, 118:5–16, 127:20–23, 128:2–129:17.

9. At trial, Dr. McDonough testified that strokes do not occur at "one single moment in time." *See* N.T., 2/12/24 (P.M.) at 53:22–54:6, attached as Exhibit "M." When discussing K.B.'s brain MRI images in front of the jury, Dr. McDonough explained that the stroke was a "process" that was "evolving" and that it "took some time." *Id.* at 53:22–54:5. Dr. McDonough explained that a stroke of "this size" that K.B. had is caused by the "blockage of a blood vessel." *Id.* at 54:6–9.

[4] Following *voir dire* on qualifications at trial, defendants did not object to Mr. Hopkins's qualifications as an expert economist to testify concerning K.B.'s future medical care costs. The Court qualified Mr. Hopkins as an expert economist to testify as to K.B.'s future medical care costs.

10. Dr. McDonough explicitly opined that the delay in performance of K.B.'s Cesarean section caused K.B.'s stroke, which K.B. was at risk for after about 9:45 p.m. to 10:00 p.m. on December 27, 2017. *See* N.T., 2/12/24 (A.M.) at 77:1–11, attached as Exhibit "N." Dr. McDonough specifically confirmed during her trial testimony that the stroke—which is not "one single moment in time"—was occurring around 10:00 p.m. "and on" the night K.B. was born. *See* N.T., 2/12/24 (P.M.) at 53:22–54:9, attached as Exhibit "M." Per Dr. McDonough's testimony, the stroke was a 2.5-hour event that began around 10:00 p.m. and was "all evolving" from 10:00 p.m. until when K.B. was born 2.5 hours later at 12:32 a.m. *See* N.T., 2/13/24 (A.M.) at 81:4–12, attached as Exhibit "O."

11. Dr. McDonough further testified to the "progressive" nature of K.B.'s stroke. Per Dr. McDonough's testimony, there was a "buildup of various chemicals" throughout these several hours that indicated there was "decreased blood flow to the baby." *See* N.T., 2/12/24 (A.M.) at 103:15–20, attached as Exhibit "N." Dr. McDonough further described this damaging process as "persistent" over this period of time. *Id.* at 103:20. During this time period, Dr. McDonough explicitly testified K.B. was at further "risk for brain injury." *Id.* at 103:21–22. Dr. McDonough reiterated her opinion that the damage process to K.B. was "progressive" due to persistent lack of blood flow that placed K.B. "at risk for brain injury." *Id.* at 105:3–13.

12. Dr. McDonough testified in yet more detail about the progressive nature of how exactly the stroke causes more damage the more time that goes on without delivery by Cesarean section. Specifically, Dr. McDonough testified that "the longer [the artery] is blocked," the more the brain tissue dies. *See* N.T., 2/12/24 (P.M.) at 54:10–15, attached as Exhibit "M." Dr. McDonough explained to the jury that, since the artery where K.B. had a stroke—the middle cerebral artery ("MCA")—is "a large artery that supplies a large hemisphere of the brain," without

"reperfusion, meaning restoration of blood flow, **more and more brain area is involved the longer time passes**." *Id.* at 54:10–19 (emphasis added). Dr. McDonough repeatedly testified that, during the 2.5-hour time period when K.B. should have been delivered, K.B. was "at risk" for the stroke and brain damage that K.B. did, in fact, sustain as a result of the delay in delivery. *See* N.T., 2/12/24 (A.M.) at 77:1–10, 103:15–22, 105:3–13, attached as Exhibit "N."

13. At trial, K.B.'s mother, Ms. Matthews, testified that K.B., who was in the courtroom on multiple occasions throughout trial, wears braces on her left leg to assist with her range of motion. *See* N.T., 2/15/24 (A.M.) at 20:1–9, attached as Exhibit "P." Ms. Matthews further testified that K.B. must wear braces at night and that K.B. is "constantly waking up" because her braces hurt her and itch. *Id.* at 20:10–14. Ms. Matthews testified that K.B., despite being 6 years old, "needs help with basically everything." *Id.* at 20:24–25. Ms. Matthews testified that, in the morning, she wakes K.B. up, takes K.B. to the bathroom, washes K.B.'s face, and helps her get dressed. *Id.* at 21:6–13. Per Ms. Matthews, the only thing K.B. can do "is pull her pants up from her thighs to her waist." *Id.* at 21:13–15. When K.B. goes to the bathroom, K.B. is unable to wipe herself without assistance. *Id.* at 21:16–18. K.B. cannot even pick anything up with her left (affected) hand. *Id.* at 21:19–25. Due to her balance and walking issues, Ms. Matthews testified K.B. "falls every day." *Id.* at 24:3–5.

14. After plaintiff presented their case-in-chief and rested, defendants filed a motion for nonsuit on various grounds. *See id.* at 58:11–15. First, defendants moved to dismiss all negligence claims asserted against all individuals other than Dr. Burkland. *Id.* at 63:9–65:9. Second, defendants moved to dismiss plaintiff's claim for negligent infliction of emotional distress ("NIED"). *Id.* at 65:10–66:25. The Court granted defendants' motion as to the NIED claim and dismissed that claim. *Id.* at 71:7–15. The Court denied the defendants' motion to dismiss defendant

Dr. Myers but granted the motion to dismiss all claims against any individuals other than Dr. Myers and Dr. Burkland. *Id.* at 72:8–74:14. Defendants never moved for nonsuit on plaintiff's claim for future medical expenses that had been presented in plaintiff's case-in-chief through CRNP Fleischer (plaintiff's Life Care Planner) and Mr. Hopkins (plaintiff's economist).

C. Charging Conference and the Trial Court's Instructions to the Jury.

1. The trial court refused to provide the "increased risk of harm" jury instruction that is standard in medical malpractice cases.

15. After defendants presented their case and rested, a charging conference was held with counsel and the Court on February 22, 2024. Per the defendants' proposed jury instructions and points for charge, the defendants asked the Court to not instruct the jury on the "increased risk of harm" standard for causation in medical malpractice cases. *See* N.T., 2/22/24 at 24:16–23, attached as Exhibit "Q." In response, plaintiff's counsel stated: "That is the standard charge and that is the law in Pennsylvania, which is that an increased risk of harm is sufficient to establish factual cause." *Id.* at 24:24–25:2.

16. In response to counsel's arguments, the Court expressed an erroneously binary view of the "increased risk of harm" standard. *See id.* at 25:17–22 (expressing the Court's view that "[e]ither they did it wrong and resulted in this thing" or there is no increased risk of harm). During argument, plaintiff's counsel pointed out that Dr. McDonough had, in fact, testified as to K.B.'s risk for stroke/brain injury and that, either way, there "doesn't need to be a magic word" with respect to a causation expert's testimony. *Id.* at 25:9–16, 25:25–26:3, 26:16–17, 26:19–21, 26:25–27:1. At the conclusion of this argument on February 22, 2024, the Court directed counsel to submit briefing on the issue of "increased risk of harm" before ruling on this issue. *Id.* at 26:22–27:9.

17. At 10:52 p.m. on February 22, 2024, the same day of this charging conference, plaintiff filed a Bench Brief Regarding Increased Risk of Harm detailing the robust factual and legal basis for plaintiff's entitlement to a jury instruction on increased risk of harm. *See* Pl. Bench Brief Regarding Increased Risk of Harm, attached as Exhibit "R"; *see also* Email to Court Attaching Plaintiff's Bench Brief Regarding Increased Risk of Harm, attached as Exhibit "S."

18. The next morning, before closing arguments, the Court heard additional argument regarding the increased-risk-of-harm jury instruction. *See* N.T., 2/23/24 (A.M.) at 28:20–24, attached as Exhibit "T." At this argument, defendants argued for an application of an improper causation standard that is unrecognized in Pennsylvania. Specifically, defense counsel argued that the increased-risk-of-harm charge should not be given because plaintiff's expert did not "allot a percentage of damages that were attributable" to defendants' delay. *Id.* at 30:3–7. In response, plaintiff's counsel pointed out to the Court that Dr. McDonough repeatedly testified as to K.B.'s "risk" for stroke, and described "in detail that the stroke is progressive and was evolving" over a period of time and, as that time went on, "there was a progression in the damage." *Id.* at 30:14–31:4. Plaintiff's counsel also emphasized that "there is no requirement in the law for an expert to specify the percentage of damage." *Id.* at 32:10–13, 33:2–20. After plaintiff's counsel cited to various portions of the records where Dr. McDonough's trial testimony explicitly established an increased risk of harm, the Court stated: "As I ruled yesterday, it's out." *Id.* at 33:21–42:13.[5]

19. Based on the Court's exclusion of increased risk of harm, the jury was never instructed on increased risk of harm. Instead, the jury was provided an inaccurate and incomplete recitation of the causation standard in a medical malpractice case as follows:

[5] It is unclear what the Court meant by "[a]s I ruled yesterday" since there was no ruling on February 22, 2024—the day prior—that the increased-risk-of-harm standard was "out." On the contrary, on February 22, 2024, the Court allowed the parties an opportunity to brief the issue before ruling on the issue.

> Malpractice, factual cause, causation. In order for the plaintiff to recover in this case, the defendant's negligent conduct must have been a factual cause in bringing about the harm. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. To be a factual cause, the conduct must have been an actual, real factor in causing the harm, even if the result is unusual or unexpected. A factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm. To be a factual cause, defendant's conduct need not be the only factual cause. The fact that some other causes concur with the negligence of the defendants in producing the injury does not relieve the defendant from liability as long as their own negligence is a factual cause of the injury.

See N.T., 2/23/24 (P.M.) at 106:23–107:16, attached as Exhibit "U."

20. Critically missing from this instruction from the Court—which the jury never heard—was the following standard charge on "increased risk of harm":

> 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 absolutely certainty what would have happened under circumstances that the wrongdoer did not allow to come to pass.

See Pa. Suggested Standard Civil Jury Inst. § 14.20 (Civ) Medical Malpractice—Factual Cause.

2. The trial court *sua sponte* dismissed plaintiff's claim for future medical expenses.

21. In addition to refusing to instruct the jury on the issue of increased risk of harm, prior to closing arguments, on its own, the Court *sua sponte* dismissed plaintiff's claim for future medical expenses that had been presented through the qualified expert testimony of CRNP Fleischer (plaintiff's Life Care Planner) and David Hopkins (plaintiff's economist). Without any motion or objection by the defense, on February 22, 2024, the Court summoned all counsel to the

robing room. Once back in the robing room, the Court raised on its own the prospect of dismissing plaintiff's Life Care Planner because the Court had not heard from a physician witness who testified the Life Care Plan was reasonable and necessary. *See* N.T., 2/22/24 at 19:4–20:7, attached as Exhibit "Q." At this juncture, plaintiff's counsel explained to the court—and defense counsel agreed—that the parties had reached a stipulation that plaintiff was not required to present Dr. McDonough's testimony (as reflected in Dr. McDonough's December 19, 2023 report) in which Dr. McDonough testified to the reasonableness and necessity of the Life Care Plan. *Id.* at 20:8–21:2. In fact, defense counsel affirmed to the Court, with respect to Dr. McDonough's endorsement of the life care plan: "I agree with that that. I am not raising that as an issue." *Id.* at 20:25–21:2.

22. Despite this, the Court, for some reason, remained insistent on trying to *sua sponte* dismiss plaintiff's claim for future medical expenses as presented through plaintiff's Life Care Planner (CRNP Fleischer) and expert economist (Mr. Hopkins). At this time, the Court stated: "the reasonable necessariness [sic] of the care is my question." *Id.* at 21:5–6. The Court then instructed the parties to brief this issue: whether a physician needs to state that a Life Care Plan is reasonable and necessary. *Id.* at 21:18–22:5.

23. At 10:11 p.m. that same day, plaintiff filed with the Court a Bench Brief Regarding Plaintiff's Life Care Plan, outlining the factual and legal basis for the admissibility of plaintiff's Life Care Plan and future medical expenses claim. *See* Pl. Bench Brief Regarding Pl. Life Care Plan, attached as Exhibit "V"; *see also* Email Attaching Plaintiff's Bench Brief Regarding Pl. Life Care Plan, attached as Exhibit "W."

24. The next morning, the Court heard additional argument from counsel on the issue the Court had *sua sponte* raised regarding the Life Care Plan. *See* N.T., 2/23/24 (A.M.) at 4:22–5:1, attached as Exhibit "T." During this argument, plaintiff's counsel cited to *Glasgow v. Ducan*,

a trial court decision affirmed by the Superior Court. In *Glasgow*, the trial court held—and Superior Court affirmed—that no physician testimony is required for a nurse life care planner's opinions on future medical expenses to be submitted to a jury in a medical malpractice case. Both the trial court decision and Superior Court decision in *Glasgow* were cited in plaintiff's brief. *See* Pl. Bench Brief Regarding Pl. Life Care Plan at pp. 1–2 (citing *Glasgow v. Ducan,* 65 Pa. D. & C.5th 384, 2017 WL 11653831 (Pa. Com. Pl. 2017), attached as Exhibit "V"; *see also id.* at p. 2 (citing *Glasgow v. Ducan*, 198 A.3d 490, 2018 WL 4572165 (Pa. Super. 2018).

25. The Court inaccurately accused plaintiff's counsel of misrepresenting to the Court that there was a Superior Court opinion affirming the trial court decision in *Glasgow*, despite receiving plaintiff's citations to *Glasgow* (both the trial court opinion and Superior Court opinion) the night prior. *See* N.T., 2/23/24 (A.M.) at 8:12–9:13, attached as Exhibit "T." When plaintiff's counsel insisted to the Court there was, in fact, a Superior Court opinion affirming the trial court's decision, the Court assured plaintiff's counsel: "I'm going to read it, though. Go get it now." *Id.* at 9:15–16. But before plaintiff's counsel could retrieve the hard copy of Superior Court opinion, the Court warned plaintiff's counsel the Court was in a "weakened condition" and was perhaps going "to get angry" with plaintiff's counsel if plaintiff's counsel could not assure the Court that the *Glasgow* case "obviate[s] the need to have a physician." *Id.* at 9:21–10:4. Plaintiff's counsel assured the Court that *Glasgow* did in fact obviate the need to have a physician testify as to a life care plan for the life care plan to be admissible. *Id.* at 10:5.

26. When the Court realized the Court was wrong about this point of law, instead of asking about the reasonableness and necessity of the lifecare plan, the Court asked if the *Glasgow* case spoke to "permanency." *Id.* at 10:6–15. When plaintiff's counsel responded assuring the Court that *Glasgow* addressed the "permanency" issue, the Court cut off plaintiff's counsel while

retreating back to the already-answered question of whether there was a "doctor" in the *Glasgow* case that spoke to the life care plan. *Id.* at 10:16–24. Again, the Court reiterated to plaintiff's counsel to bring a copy of the Superior Court decision in *Glasgow* and the Court's law clerk would read it. *Id.* at 12:14–15.

27. However, moments later, before the Court or the Court's law clerk read the Superior Court opinion itself, the Court heard on-sided argument from defense counsel, ruled in defendants' favor, and dismissed plaintiff's life care plan entirely. *Id.* at 12:14–13:11. The Court reasoned that, "based upon what I know of the law and the basis and what you need, your life care planner is precluded." *Id.* at 14:14–16. In response, plaintiff's counsel emphasized to the Court—with no dispute from the defense—that no case law requires a physician to endorse a life care plan. *Id.* at 14:21–15:7.

3. The trial court's "corrective" charge to the jury.

28. Following the trial court's *sua sponte* dismissal of plaintiff's claim for future medical expenses, the trial court issued a highly prejudicial instruction to the jury immediately before plaintiff's closing argument:

> Now, a lot of things have happened behind the scenes you don't know about. Objections are made and we go in the back and points of law are brought up. So that you get a pristine, unbiased view of the case, many times a judge has to give, what we call, a corrective charge. That means to clarify certain facts or statements that were made that could be misleading to you. So there are – I am going to read two charges to you. Also with a corrective charge when certain legal precedents or issues come up, a judge will make a ruling with regard to these things. And that is a clarification for you too about testimony that you may have heard. . . . During trial, you heard testimony from plaintiff's expert, Nurse Tamar Fleischer; and, economist David Hopkins. There is no longer a claim for future medical expenses. As such, the jury is to disregard the testimony of Nurse Fleischer and Mr. Hopkins. . . .

See N.T., 2/23/24 (P.M.) at 13:13–14:21, attached as Exhibit "U."[6]

4. The trial court refused to give the standard "concurring causes" jury instruction.

29. The trial court also refused to give the standard "concurring causes" jury instruction. *See* Pa. Suggested Standard Jury Inst. § 13.150 (Civ) Concurring Causes. During the charging conference, defense counsel objected to this charge being given, arguing "[t]here's been no evidence of any concurring causes." *See* N.T., 2/22/24 at 35:3–6, attached as Exhibit "Q." In response, plaintiff's counsel stated that the defense had argued to the jury throughout trial that there were other causes of K.B.'s injury, including alleged genetic conditions, polymicrogyria (a congenital brain anomaly), and schizencephaly (another congenital brain anomaly). *Id.* at 35:7–14. In response, defense counsel presented a completely erroneous view of causation by arguing "it's not a combination. It's either or." *Id.* at 35:16–17. The trial court instructed plaintiff's counsel that the trial court would only give instruction § 13.150 *or* instruction § 7.90 (another standard instruction). *Id.* at 36:11–37:20.

5. The trial court dismissed plaintiff's claim for future earnings.

30. The trial court also prevented plaintiff from presenting plaintiff's claim for K.B.'s future lost earnings. *See* N.T., 2/13/24 (A.M.) at 83:1–89:2, attached as Exhibit "O." This claim was factually supportable through the testimony of CRNP Fleischer, plaintiff (K.B.'s mother), Dr. McDonough, the medical records introduced and shown to the jury from plaintiff's treating physicians, and Mr. Hopkins (plaintiff's expert economist). However, the trial court dismissed this claim even before the plaintiff and Mr. Hopkins had testified.

[6] By providing this instruction, the Court necessarily implied that plaintiff's counsel had "misled" the jury by presenting the testimony of Nurse Fleischer and Mr. Hopkins. The Court also prejudicially implied, with this instruction, that "behind the scenes" there may have been a settlement or payout of these future medical expenses that the Court told the jury there was "no longer a claim" for.

D. The Verdict.

31. On February 23, 2024, the jury returned a verdict after several hours of deliberation. The jury found that defendant, Dr. Burkland, was negligent. However, the jury answered "no" to the question of whether Dr. Burkland's negligence was a factual cause of minor-plaintiff's harm. The jury returned a verdict in favor of Dr. Myers, finding that Dr. Myers was not negligent.

II. LEGAL STANDARD

32. Motions for post-trial relief are governed, in the first instance, by Pennsylvania Rule of Civil Procedure 227.1. After trial and upon a motion for post-trial relief, the court may order a new trial as to all or any of the issues. *See* Pa. R. Civ. P. 227.1(a)(1). Upon post-trial motion, the court may also remove a nonsuit. Pa. R. Civ. P. 227.1(a)(3). The trial court may also affirm, modify or change its decision or enter any other appropriate order pursuant to a motion for post-trial relief. Pa. R. Civ. P. 227.1(a)(4)–(5). The purpose of a motion for post-trial relief is "to provide the trial court with an opportunity to review and reconsider its earlier rulings and correct its own error." *Soderberg v. Weisel*, 687 A.2d 839, 845 (Pa. Super. 1997).

III. ARGUMENT

33. The trial court's refusal to instruct the jury on "increased risk of harm" was a monumentally fundamental error which, on its own, necessitates a new trial.

34. Compounding this error was the trial court's refusal to provide the jury the standard "concurring causes" instruction. The trial court's refusal to provide the "concurring causes" instruction was particularly prejudicial in this case, which involved complex medical issues and in which the defense argued, throughout trial, that multiple other causes (*e.g.*, genetics, prenatal infection, a congenital brain malformation) contributed to minor-plaintiff's injury.

35. On top of all this, the trial court's *sua sponte* dismissal of plaintiff's claim for future medical expenses without first reading the Superior Court's *Glasgow* decision—which was equally unusual as it was unfounded—only further prejudiced the plaintiff. This is especially so after the jury had heard the Court qualify plaintiff's experts on this issue only to be told by the Court, immediately before closing arguments, to disregard all of these witnesses' testimony, that there was no longer any claim for future medical expenses, that such a claim was "misleading," and that the claim had been dealt with "behind the scenes."

36. To boot, the trial court's dismissal of plaintiff's claim for future lost earnings was in error.

37. Only a new trial will cure the immense prejudice to the plaintiff, who was stripped of her right to a fair trial because of these reversible errors.

A. A new trial is necessary because the trial court failed to instruct the jury on "increased risk of harm."

38. The trial court erred in refusing to instruct the jury on the "increased risk of harm" causation standard in medical malpractice cases. For this reason alone, a new trial is necessary.

39. "A plaintiff is entitled to an instruction on increased risk where there is competent medical testimony that a defendant's conduct at least increased the risk that the harm sustained by the plaintiff would occur." *Klein v. Aronchik*, 85 A.3d 487, 495 (Pa. Super. 2014), *app. denied*, 104 A.3d 5 (Pa. 2014).

40. Plaintiff is entitled to this instruction on increased risk of harm even if plaintiff's expert "never specifically referred to increased risk of harm in [their] report." *Id.* at 496.

41. Additionally, plaintiff is entitled to this instruction regardless of whether plaintiff's expert uses the words "increased risk of harm." *See id.* at 495–97 (rejecting defendants' argument that plaintiff's expert's report or testimony must expressly mention "increased risk of harm" in

reversing trial court's refusal to allow "increased risk of harm" theory to be presented to the jury because experts are not "required to use the 'magic words' of 'increased the risk'").

42. The seminal case on "increased risk of harm" is *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978).

43. There, the Pennsylvania Supreme Court made clear that "where medical causation is a factor in a case . . . it is not necessary that the plaintiff introduce medical evidence in addition to that already adduced to prove defendant's conduct increased the risk of harm to establish that the negligence asserted resulted in plaintiff's injury." *Hamil*, 392 A.2d at 1288.

44. "Rather," the Pennsylvania Supreme Court continued, "once the jury is apprised of the likelihood that defendant's conduct resulted in plaintiff's harm," it is up to "the jury, and not the medical expert, the task of balancing probabilities." *Id.*

45. In other words, "in cases where the plaintiff has introduced sufficient evidence that the defendant's conduct increased the risk of injury, the defendant will not avoid liability merely because the plaintiff's medical expert was unable to testify with certainty that the defendant's conduct *caused* the actual harm." *K.H. v. Kumar*, 122 A.3d 1080, 1104 (Pa. Super. 2015) (emphasis in original).

46. This "increased risk of harm" standard has sometimes been referred to as a "relaxed" standard of causation. *E.g., Jones v. Montefiore Hosp.*, 431 A.2d 920, 924 (Pa. 1981) (emphasizing that the "increased risk of harm" standard "was designed to relax a plaintiff's burden of proving causation, not to compound it"); *Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys.*, 903 A.2d 540, 563 (Pa. Super. 2006), *app. denied*, 917 A.2d 315 (Pa. 2007).

47. In cases involving increased risk of harm, Pennsylvania courts have made clear that "the question of whether the conduct caused the ultimate injury should be submitted to the jury."

Klein, 85 A.3d 487, 493 (Pa. Super. 2014) (quoting *Billman v. Saylor*, 761 A.2d 1208, 1212 (Pa. Super. 2000)); *see also Munoz v. CHOP*, 265 A.3d 801, 809 (Pa. Super. 2021) ("[O]nce a plaintiff has demonstrated that 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 was in turn a substantial factor in bringing about the resultant harm; the necessary proximate cause will have been made out if the jury sees fit to find cause in fact."); *Mitzelfelt v. Kamrin*, 584 A.2d 888, 894 (Pa. 1990) (holding that once plaintiff's expert testified that the defendant's negligence "*could have* caused the harm . . . it then became a question for the jury whether they believed it caused the harm in this case") (emphasis in original).

48. Although "direct causation" and "increased risk of harm" are two different ways to prove causation, these two avenues are not mutually exclusive. *See Klein*, 85 A.3d at 494 (holding that "a close study of *controlling* precedent reveals that direct causation and increased risk of harm are not mutually exclusive") (emphasis in original).

49. As Pennsylvania precedent has consistently held, "increased risk of harm" and "direct causation" are "simply alternative theories of recovery, depending on the facts and the expert testimony" and "may both apply in a given case." *Id.*; *see also id.* at 495 (recognizing that the Pennsylvania Supreme Court does "not view increased risk and direct causation as mutually exclusive" but rather "alternative theories of recovery").

50. Applying these principles, trial courts have routinely been reversed—and new trials have been ordered—when a trial court improperly refuses to instruct the jury on "increased risk of harm." *See Jones*, 431 A.2d at 924 (holding that trial court erred in refusing to give the "increased risk of harm" jury instruction in medical malpractice case and ruling that "the jury should have been instructed to impose liability if it decided that appellees' negligent conduct increased the risk

of harm and that such increased risk was a substantial factor in bringing about the harm actually inflicted upon [plaintiff], whether or not the medical testimony as to causation was expressed in terms of certainty or probability"); *Munoz*, 265 A.3d at 806–09 (reversing trial court's entry of nonsuit and remanding the case for a new trial on the issue of "increased risk of harm" to be decided by the jury even where no magic words were used); *Klein*, 85 A.3d at 490–97 (reversing trial court's refusal to allow "increased risk of harm" to be presented to jury and finding this issue "dispositive" in remanding the case to the trial court for a new trial);[7] *Billman v. Saylor*, 761 A.2d 1208, 1211–15 (Pa. Super. 2000) (holding that medical expert's opinion was sufficient to be presented to the jury on an "increased risk of harm" theory even where the expert did not use these magic words).

51. In the case at bar, plaintiff's standard-of-care medical expert, Dr. Edwards, testified that the standard of care required the defendants to effectuate a delivery of K.B. by way of Cesarean section by 9:49 p.m. on December 29, 2017. *See* Trial Tr. Dr. Edwards at 28:25–29:18, attached as Exhibit "L."

52. Dr. Edwards went on to testify that there were continuing violations of the standard of care, at multiple different points in time, between 9:49 p.m. on December 29, 2017 until when minor-plaintiff, K.B., was finally delivered by Cesarean section at 12:32 a.m. on December 30, 2017. *Id.* at 86:12–23, 88:3–12, 89:11–90:1, 93:2–7, 94:3–95:15, 96:2–23, 97:11–98:19, 98:21–99:14, 109:6–110:2, 110:17–113:16, 114:6–11, 115:7–16, 115:24–116:24, 118:5–16, 127:20–23, 128:2–129:17.

53. Dr. Edwards testified repeatedly to various different points in time from 9:49 p.m. on December 29, 2017 through when K.B. was born at 12:32 a.m. on December 30, 2017 when

[7] Just like the jury in this case, the jury in *Klein* found the defendant doctor negligent but answered "no" to the question of factual cause after the trial court refused to instruct the jury on increased risk of harm.

the defendants deviated from the standard of care by failing to perform a Cesarean section to deliver K.B.

54. Dr. Edwards' testimony, when coupled with the causation testimony of pediatric neurologist, Dr. McDonough, was beyond sufficient to provide for an instruction on increased risk of harm.

55. At trial, Dr. McDonough testified that strokes do not occur at "one single moment in time." *See* N.T., 2/12/24 (P.M.) at 53:22–54:6, attached as Exhibit "M."

56. When discussing K.B.'s brain MRI images in front of the jury, Dr. McDonough explained that the stroke was a "process" that was "evolving" and that it "took some time." *Id.* at 53:22–54:5.

57. Dr. McDonough explained that a stroke of "this size" that K.B. had is caused by the "blockage of a blood vessel." *Id.* at 54:6–9.

58. Dr. McDonough explicitly testified that the delay in performance of K.B.'s Cesarean section caused K.B.'s stroke, which K.B. was at risk for after about 9:45 p.m. to 10:00 p.m. on December 27, 2017. *See* N.T., 2/12/24 (A.M.) at 77:1–11, attached as Exhibit "N."

59. Per Dr. McDonough's testimony, the stroke—which was not "one single moment in time"—was a 2.5-hour event that began around 10:00 p.m. and was "all evolving" from 10:00 p.m. until when K.B. was born 2.5 hours later at 12:32 a.m. *See* N.T., 2/12/24 (P.M.) at 53:22–54:9, attached as Exhibit "M"; *see also* N.T., 2/13/24 (A.M.) at 81:4–12, attached as Exhibit "O."

60. Dr. McDonough further described the "progressive" nature of K.B.'s stroke.

61. As Dr. McDonough testified, there was a "buildup of various chemicals" throughout these several hours the stroke was damaging K.B.'s brain, which indicated there was

"decreased blood flow to the baby." *See* N.T., 2/12/24 (A.M.) at 103:15–20, attached as Exhibit "N."

62. Dr. McDonough further described this damaging process as "persistent" over this period of time from approximately 10 p.m. until K.B.'s birth 2.5 hours later. *Id.* at 103:20.

63. During this time period, Dr. McDonough explicitly testified K.B. was at "**risk for brain injury**." *Id.* at 103:21–22 (emphasis added).

64. Dr. McDonough later reiterated her opinion that the damage caused by this evolving stroke over this time period was "progressive" due to persistent lack of blood flow that placed K.B. "**at risk for brain injury**." *Id.* at 105:3–13 (emphasis added).

65. Dr. McDonough described in yet more detail the progressive nature of how the stroke causes more damage the more time that goes on with a delay in performance of the Cesarean section. Specifically, Dr. McDonough described that, "the longer [the artery] is blocked," the more the fetus's brain tissue is dying. *See* N.T., 2/12/24 (P.M.) at 54:10–15, attached as Exhibit "M."

66. Dr. McDonough explained that because the artery where K.B. had a stroke—the middle cerebral artery ("MCA")—is "a large artery that supplies a large hemisphere of the brain," without "reperfusion, meaning restoration of blood flow, **more and more brain area is involved the longer time passes**." *Id.* at 54:10–19 (emphasis added).

67. Dr. McDonough testified that, due to the circumstances during the 2.5-hour time period when K.B. should have been delivered between approximately 10:00 p.m. and 12:32 a.m. the following day, K.B. was "at risk" on multiple different occasions for the stroke and brain damage that K.B. did, in fact, sustain as a result of the delay in delivery. *See* N.T., 2/12/24 (A.M.) at 77:1–10, 103:15–22, 105:3–13, attached as Exhibit "N."

68. Based on the foregoing, Pennsylvania precedent required the trial court to instruct the jury on the "increased risk of harm" standard.

69. The jury—not the court—was entitled to decide whether K.B.'s increased risk of brain injury and stroke during the 2.5-hour time period when Dr. Edwards testified there were multiple junctures when the standard of care required delivery, did, in fact, cause K.B.'s brain injury.

70. Given Dr. McDonough's crystal clear testimony about the evolving and progressive nature of the stroke that was occurring throughout this 2.5-hour time period, Pennsylvania law required the jury to decide whether the defendants' failure to deliver K.B. by Cesarean section at any one of these junctures caused K.B. harm.

71. The "evolving" and "progressive" nature of the stroke over this 2.5-hour time period, which, per Dr. McDonough, caused more brain damage as time went on, is the exact type of case where an increased-risk-of-harm instruction is warranted.

72. Notably, the trial testimony of Dr. McDonough and Dr. Edwards is far stronger on the issue of increased risk of harm than the testimony of other experts in cases where the Pennsylvania Supreme Court and Pennsylvania Superior Court have reversed trial courts for failing to instruct the jury on increased risk of harm. For example, in *Klein*, the expert never used any such "risk" or "increased risk" language in offering their opinions. In *Mitzenfelt*, the Pennsylvania Supreme Court held that "increased risk of harm" was a "question for the jury" even where "[t]he most any physician could say was that he believed, to a reasonable degree of medical certainty that [defendant's negligence] *could have* caused the harm." 584 A.2d at 894. Similarly, in *Jones*, the Pennsylvania Supreme Court reversed the trial court's decision to refuse to instruct

the jury on increased risk of harm "whether or not the medical testimony as to causation was expressed in terms of certainty or probability." 431 A.2d at 924.

73. Unlike the experts in *Klein*, *Mitzenfelt*, and *Jones*, Dr. McDonough actually did use the "magic words" that the caselaw states are not required.

74. Dr. McDonough repeatedly testified that K.B. was "at risk" for stroke and brain damage during the relevant time period when Dr. Edwards testified that the standard of care required K.B. to be delivered via Cesarean section.

75. Dr. McDonough also testified unequivocally that the delay in performance of the Cesarean section caused K.B.'s stroke. Dr. McDonough also testified, in great detail, regarding the mechanism of injury (*i.e.*, how the passage of time caused the stroke to evolve and progress and thus cause more brain damage as time progressed).

76. If the experts' testimony in *Klein*, *Mitzenfelt*, and *Jones*, was sufficient to present the issue of "increased risk of harm" to the jury, then it goes without saying that Dr. McDonough's testimony was sufficient to warrant the increased risk of harm instruction.

77. In sum, the trial court's refusal to instruct the jury on increased risk of harm was clearly in error. The only remedy for this error is a new trial.

B. The trial court erred by refusing to provide the standard "concurring causes" instruction to the jury.

78. The trial court erred by refusing to provide the jury with the standard "concurring causes" instruction. Although the trial court's refusal to instruct the jury on "increased risk of harm" is independently reversible and remediable only by a new trial, the trial court's refusal to provide the "concurring causes" instruction only further compounded the trial court's error and prejudiced the plaintiff.

79. Pennsylvania's standard jury instruction on "concurring causes" is as follows:

> Sometimes a person's negligent conduct combines with [other circumstances] [other people's conduct] to cause [an injury] [harm]. When a defendant's negligent conduct combines with [other circumstances] [conduct of other persons], the defendant is legally responsible if their negligent conduct was one of the factual causes of the harm. In such a case, [*name of defendant*] is fully responsible for the [harm] [injury] suffered by [*name of plaintiff*] regardless of the extent to which [*name of defendant*]'s conduct contributed to the [harm] [injury].

See Pa. Suggested Standard Jury Inst. § 13.150 (Civ) Concurring Causes.

80. As the Subcommittee Note dictates: "This charge should be given whenever the joint negligence of more than one person is involved." *See id.*, Subcomm. Note.

81. The Subcommittee Note further mandates that this instruction "should be used" whenever "there is an issue of causation involving a defendant whose conduct is negligent and one or more forces generated by an innocent act of another person or of unknown origin or for which no one can be responsible, such as an Act of God." *Id.*

82. A refusal by the trial judge to give the "concurring causes" instruction when warranted constitutes reversible error. *See, e.g., Collins v. Cement Exp., Inc.*, 447 A.2d 987, 991 (Pa. Super. 1982) (reversing trial court that refused to cover the issues of "concurrent cause" in the jury instruction and ordering a new trial).

83. In this case, throughout trial, in opening statements, and in closing statements, the defendants introduced numerous alleged causes of K.B.'s injury.

84. For example, in closing, defense counsel argued that K.B.'s injury was possibly caused by a "genetic" issue. *See* N.T., 2/22/24 at 64:25–65:2, attached as Exhibit "Q."

85. Defense counsel also argued during closing that K.B.'s problems were caused by schizencephaly (a brain anomaly). *Id.* at 66:10–23.

86. Defense counsel also argued during closing and throughout trial that K.B.'s injury was caused by septo-optic dysplasia spectrum, which is another "brain malformation" that occurs "well before the second trimester." *Id.* at 68:12–20.

87. Defense counsel argued during closing that all of K.B.'s alleged "brain malformations" were "not consistent with a stroke happening right at the time of birth." *Id.* at 69:21–70:1.

88. Defense counsel then claimed the cause of K.B.'s harm was unknown. *See id.* at 71:2–3 ("Are we claiming we know why this happened? No.").

89. Defense counsel went on to yet again argue in closing that the cause of K.B.'s injuries "[c]ould be a genetic issue." *Id.* at 71:8.

90. Given the defendants' theory and defense in the case, the standard "concurring causes" jury instruction was required.

91. The trial judge's refusal to give this instruction provided the jury with an inadequate understanding of the law with respect to causation. The "concurring causes" instruction is designed for this exact type of case: where defendants argue that other factors (*e.g.*, genetics, schizencephaly, septo-optic dysplasia spectrum) caused the plaintiff's harm.

92. The fact that the court gave the "other contributing causes" instruction found at Pennsylvania Suggested Standard Civil Jury Instruction § 7.90 does not remedy the trial court's error in refusing to give jury instruction § 13.150 on "concurring causes."

93. Standard instruction § 13.150, which was not given, is the only instruction that informs the jury that the defendant is "fully responsible" for plaintiff's harm "regardless of the extent to which [the defendant]'s conduct contributed to the [harm] [injury]." *See* Pa. Suggested Standard Jury Inst. § 13.150 (Civ) Concurring Causes.

94. This instruction is also the only charge that expressly states that the defendant's negligence need only be "*one of* the factual causes" of the plaintiff's harm for the plaintiff to recover. *Id.* (emphasis added).

95. For these reasons, the trial court's refusal to provide Pennsylvania Suggested Standard Jury Instruction § 13.150 on "concurring causes" was clearly erroneous, and warrants a new trial.

C. The trial court erred by *sua sponte* dismissing plaintiff's claim for future medical expenses as presented through the testimony of plaintiff's expert life care planner and economist.

96. The trial court's *sua sponte* dismissal of plaintiff's claim for future medical expenses was wholly unsupported by Pennsylvania law, erroneous, and in direct disregard of the parties' stipulation on this issue. For this reason, too, a new trial is warranted.

97. In Pennsylvania, when a party claims future medical expenses, they must present "expert witness testimony to prove the medical necessity of the claimed damages and their reasonable cost." *Glasgow v. Ducan*, 65 Pa. D. & C.5th 384, 2017 WL 11653831, at *11 (Pa. Com. Pl. 2017), *aff'd*, 198 A.3d 490, 2018 WL 4572165 (Pa. Super. 2018) (citing *Mendralla v. Weaver Corp.*, 703 A.2d 480, 485 (Pa. Super. 1997)).

98. The Pennsylvania Supreme Court has made clear that nurses are permitted to "diagnose human responses to health problems," and there is a clear distinction between such nursing diagnoses and medical diagnoses. *Glasgow*, 65 Pa. D. & C.5th 384, 2017 WL 11653831, at *12 (quoting *Freed v. Geisinger Med. Ctr.*, 971 A.2d 1202, 1209 (Pa. 2009)). \

99. There is no requirement that a physician "corroborate life-care plan testimony." *Glasgow*, 65 Pa. D. & C.5th 384, 2017 WL 11653831, at *13; *see also Glasgow v. Ducan*, 198 A.3d 490, 2018 WL 4572165, at *7 (affirming testimony of life care planner without any physician

testimony to corroborate the life care plan and rejecting defendant's argument that "future care costs required the expert testimony of a physician, or . . . required approval by a physician"); *Povrzenich v. Ripepi*, 257 A.3d 61, 70–71 (Pa. Super. 2021) (reversing trial court's exclusion of life care planner's testimony and ordering new trial because "[p]laintiff was precluded from offering evidence of, and recovering, substantial future medical expenses"). Pennsylvania precedent has made clear that "**no magic words are required to demonstrate causation**." *Watkins v. Hosp. of Univ. of Pa.*, 737 A.2d 263, 267 (Pa. Sup.er 1999) (emphasis added).

100. Plaintiff presented the testimony of CRNP Fleischer, a certified registered nurse practitioner, as a life care planner in this case.

101. Unlike registered nurses, certified registered nurse practitioners possess the authority to make medical diagnoses and prescribe medical therapeutic and corrective measures. *See* 63 P.S. § 212(1).

102. In front of the jury, the Court found CRNP Fleischer qualified to testify and render opinions as a life care planner. CRNP Fleischer went on to explain to the jury the bases for her opinion that K.B. requires lifetime care and future costs of that care.

103. Defendants never objected to CRNP Fleischer's qualifications or ability to testify as to K.B.'s future care costs.

104. And no physician is required to approve a life care plan.

105. Nevertheless, defendants did stipulate to Dr. McDonough's December 2023 report in which Dr. McDonough opined the life care plan was reasonable and necessary. *See* N.T., 2/22/24 at 19:4–21:2, attached as Exhibit "Q." As such, plaintiff did not waste time presenting this testimony to the jury, though Dr. McDonough did testify that she had reviewed the life care plan. *See* N.T., 2/13/24 (A.M.) at 29:19–22, attached as Exhibit "O."

106. Despite all this, the trial court took the highly unusual step of *sua sponte* dismissing plaintiff's claim for future medical expenses.

107. When the trial court originally raised an issue as to the life care plan, the only question the court asked counsel to brief was whether a physician is required to approve a nurse's life care plan. *See* N.T., 2/22/24 at 19:4–21:6, 21:18–22:5, attached as Exhibit "Q."

108. However, when plaintiff's counsel presented the *Glasgow* case to the court resolving this issue, the trial court then accused plaintiff's counsel of failing to brief the issue of whether there was sufficient evidence of the "permanency" of the injury. *Id.* at 10:2–15.

109. Nevertheless, as argued, plaintiff's counsel pointed out that the jury had heard ample evidence that K.B.'s cerebral palsy and injury were permanent, including the fact she suffered a stroke, she has not gotten better, the tissue in her brain died, and K.B. is going to need all of the future aide testified to by CRNP Fleischer. *Id.* at 14:21–15:5, 19:3–16, 20:19–21:6, 21:23–22:5.

110. CRNP Fleischer specifically testified that there will be things that will be impossible for K.B. to do for the remainder of her life—hence, the need for a life care plan and future medical care.

111. The standard for a continued disability or injury is not as stringent and narrow as the trial court viewed it. There must merely be "[s]ome evidence" submitted "from which the jury can reasonably infer what the probable future consequences of the injury will be and award damages accordingly." *O'Malley v. Peerless Petroleum, Inc.*, 423 A.2d 1251, 1258 (Pa. Super. 1980). However, as Pennsylvania courts have made clear: "This does not mean that expert medical testimony is required to predict with certainty the exact result expected." *Id.*

112. In this case, the jury was presented with ample evidence from which they could have reasonably inferred the probable future consequences of K.B.'s injury.

113. For starters, the jury saw K.B. in the courtroom on multiple occasions, limping and unable to move normally due to her hemiplegia.

114. The jury also heard the testimony of CRNP Fleischer—who had examined K.B. on multiple occasions—which explained the future lifetime needs of K.B.

115. Obviously, the injury K.B. suffered was permanent if a qualified CRNP life care planner presented unchallenged testimony that K.B.'s injuries would require lifetime assistance and care, including a personal assistant, for the remainder of K.B.'s life.

116. In addition, the jury heard from K.B.'s mother, plaintiff, Anyae Matthews, as to K.B.'s ongoing deficits and issues medically and functionally, in activities of daily living, and at school.

117. Beyond this, the jury heard from Dr. McDonough, who also examined K.B., who testified that K.B. suffered a stroke, and that the stroke killed and damaged a large portion of K.B.'s brain.

118. The jury heard testimony about K.B.'s need for orthotic braces, which K.B. has worn since K.B. was an infant, as well as K.B.'s need for ongoing physical therapy and Botox injections due to muscle spasticity.

119. The jury saw documentary evidence and heard testimony about K.B.'s diagnoses of stroke, brain damage, cerebral palsy, hemiplegia, and hemiparesis.

120. The jury heard no evidence from any expert that K.B.'s condition had improved or would ever improve.

121. None of the cases defendants relied upon in the trial court support defendants' proposition that an expert must use the magic word "permanent" to describe the nature of a plaintiff's injury. Nevertheless, the testimony of plaintiff's expert pediatric neurologist, Dr. McDonough, provided more than a sufficient factual basis for the jury to conclude that K.B.'s stroke, hemiplegia, and injury were permanent. Dr. McDonough's testimony, coupled with the medical records from K.B.'s treating physicians that the jury saw and CRNP Fleischer's testimony and life care plan, provided yet more of a factual basis to allow for the claim to be submitted to the jury.

122. Defendants cite to *Mendralla v. Weaver Corp.*, 703 A.2d 480, 485 (Pa. Super. 1997), for the proposition that "proper testimony" must be submitted to the jury in order for the jury to consider a claim for future medical costs. But *Mendralla* never held that "proper testimony" means a physician must explicitly use the word "permanent." In *Mendralla*, the plaintiff's future medical expenses claim was dismissed simply because there was "no testimony as to the estimated or actual cost" of the plaintiff's future medical care. *Id.* at 485. The court thus concluded: "In the absence of expert testimony as to the reasonable amount of [plaintiff]'s future medical expenses, it was error for the court to permit the issue to be submitted to the jury." *Id.* Unlike *Mendralla*, here, there was highly specific expert testimony, provided through CRNP Fleischer's testimony about K.B.'s life care plan and plaintiff's expert economist, David Hopkins, regarding K.B.'s future medical care needs and costs.

123. In *Baccare v. Mennella*, 369 A.2d 806, 808 (Pa. Super. 1976), another case defendants relied upon before the trial court, the court dismissed plaintiff's claim for future medical expenses because plaintiff's expert was not "able to estimate medical expenses." In fact, in *Baccare*, in response to questioning by the trial judge, the expert confirmed that he was entirely

unable to "prognosticate future medical expenses" for the plaintiff. *Id.* Unlike *Baccare*, this case contained ample expert testimony as to K.B.'s specific future medical needs and costs as presented through the detailed testimony of CRNP Fleischer and Mr. Hopkins.

124. The *Mendralla* case never addressed the purported "permanency" issue. Nor did *Baccare*. Nor did any case cited by defendants. As defendants well know, there is no requirement for causation experts to use "magic words." *Watkins*, 737 A.2d at 267.

125. Based on all the foregoing, the trial court erred in dismissing plaintiff's claim for future medical expenses, warranting a new trial.

D. The trial court erred by making unfairly prejudicial statements to the jury and providing an improper "corrective" instruction.

126. The trial court erred in its instruction to the jury regarding plaintiff's expert life care planner, expert economist, and claim for future medical expenses. This instruction was unclear and tended to mislead and confuse rather than clarify a material issue. Accordingly, a new trial is warranted on this basis.

127. A trial court's jury instruction warrants a new trial when the instruction "as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue." *Gorski v. Smith*, 812 A.2d 683, 697 (Pa. Super. 2002).

128. A charge to the jury can be inadequate when "there is an omission in the charge which amounts to fundamental error." *Id.*

129. A charge is inadequate also when "the issues are not made clear to the jury." *Id.*

130. The trial court's "corrective" instruction to the jury was prejudicial and reversible in a number of ways. For starters, the instruction directly implied that plaintiff or plaintiff's counsel had somehow "misled" the jury by presenting the testimony of a life care planner (CRNP Fleischer) and economist (Mr. Hopkins) on the issue of K.B.'s future medical costs.

131. Such an instruction was highly damaging and improper, particularly when the trial court itself had qualified both of these experts in open court in front of the jury.

132. Surely, the jury was confused that they had heard the trial judge personally qualify two expert witnesses who testified about K.B.'s future medical care needs and costs only to then be told by this same judge that this testimony was "misleading" and should be disregarded.

133. The trial court's instruction was highly prejudicial also because it injected the idea into the jury's consciousness that the defendants had paid the plaintiff (or settled with the plaintiff) the portion of the case accounting for K.B.'s future medical expenses.

134. The court's statement to the jury—that there was "no longer any claim" for these future medical expenses—after the jury had heard two qualified experts testify about these specific costs, sent a clear message to the jury (whether intentional or not) that this portion of the case had been settled and paid by defendants.

135. Injecting this prospect into the jurors' minds allowed for the jury to direct a verdict wherein the plaintiff would not be compensated because the jury presumed the plaintiff had already been paid millions of dollars "behind the scenes" to resolve a previously-presented claim.

136. The trial court's instruction on this point, which was premised upon the improper dismissal of plaintiff's claim for future medical expenses, was clearly erroneous and warrants a new trial.

E. The trial court erred by preventing the plaintiff from presenting a claim for future lost earnings.

137. The trial court erred by preventing plaintiff from presenting plaintiff's claim to the jury for K.B.'s future lost earnings.

138. It has been the law in Pennsylvania, for decades, that "**no expert testimony is required in this jurisdiction to show loss of earning capacity**." *Gillingham v. Consol Energy,*

Inc., 51 A.3d 841, 866 (Pa. Super. 2012) (quoting *Gary v. Mankamyer*, 403 A.2d 87, 90 (Pa. 1979) (emphasis added)); *see also Mecca v. Lukasik*, 530 A.2d 1334, 1339 (Pa. Super. 1987) (emphasizing that "while **expert testimony is not required to show loss of earning capacity**, either party in a negligence action is entitled to introduce expert **or other evidence** to establish or refute actual expected future earning capacity of a particular plaintiff") (citing *Fish v. Gosnell*, 463 A.2d 1042 (Pa. Super. 1983) (emphasis added)). Indeed, the Pennsylvania Suggested Standard Civil Jury Instruction on loss of earnings and earning capacity explicitly reflects that no expert testimony is required. *See* Pa. Sugg. Standard Jury Inst. § 7.40 (noting that "no expert testimony is required in this jurisdiction to show loss of earning capacity").

139. Pennsylvania courts have long recognized that "future earnings cannot be calculated with mathematical precision and exactness" and have held that all that is required is "a reasonable basis to support such an award." *Helpin v. Trustees of Univ. of Pa.*, 10 A.3d 267, 270 (Pa. 2010).

140. When "the evidence discloses the age, physical and mental conditions, and habits of the injured person, a determination of future earning capacity may be made by the fact-finder in reliance upon the knowledge and common sense acquired through the experiences of life." *Marinelli v. Montour R. Co.*, 420 A.2d 603, 611 (Pa. Super. 1980).

141. At trial, CRNP Fleischer's testimony, coupled with plaintiff's expert economist's testimony, provided a reasonable basis for an award of future loss of earning capacity.

142. CRNP Fleischer (who personally examined K.B.) described K.B.'s physical shortcomings and what K.B. is unable to do as a result of her injuries now and into the future.

143. Plaintiff also presented the testimony of Dr. Tiffani McDonough, a pediatric neurologist, who testified that K.B. suffered brain damage, death of brain tissue, and hemiplegia as a result of her stroke which has left her with various deficits.

144. Dr. McDonough described the various impacts this has had on K.B.

145. Separate and apart from Dr. McDonough and CRNP Fleischer, the medical records that were admitted into evidence and shown to the jury provided yet more foundation for an award of loss of future earning capacity.

146. Plaintiff, Anyae Matthews, K.B.'s mother, testified as to the daily struggles and limitations K.B. has as a result of her injuries.

147. Plaintiff specifically testified as to various activities of daily living that K.B. is unable to do, including dressing herself, eating, drinking with a cup, picking things up, and going to the bathroom. *See* N.T., 2/15/24 (A.M.) at 19:15 (testifying she has "at least two doctors' appointments a week" for K.B.), 19:16 (testifying she is currently "trying to get an IEP for school" for K.B.); 19:16–17 (testifying K.B. is "not doing well in school"); 19:17–18 (testifying she knows "it's going to be hard for [K.B.] when she gets older"); 20:1–9 (testifying K.B. wears braces on her left leg to "keep the range of motion in her foot"); 20:15–16 (testifying K.B. is six years old currently); 21:9–15 (testifying she "pretty much do[es] everything for K.B." including taking K.B. to the bathroom, washing K.B.'s face, and helping K.B. get dressed); 21:16–18 (testifying K.B. is unable to wipe herself when she goes to the bathroom); 21:24–25 (testifying K.B. cannot pick things up with her left hand); 23:13–18 (testifying K.B. "can't walk anymore" after a certain amount of time because "her legs hurt"); 23:19–23 (testifying K.B. has always had a limp that has never gone away); 24:3–11 (testifying K.B. "falls every day"); 25:3–17 (testifying she "pretty much can't keep a job" due to K.B.'s ongoing medical needs); 28:1–2 (testifying she hopes K.B.

"doesn't let her disability hold her back"), attached as Exhibit "P." Because the court dismissed plaintiff's claim for future earnings prior to plaintiff's testimony, plaintiff was never allowed to seek these damages from the jury.

148. Defendants repeatedly represented to the trial court that plaintiff should not have been permitted to submit the issue of future loss of earning capacity to the jury because plaintiff had not retained a "vocational" expert.

149. As seen in the caselaw cited *supra*, defendants were and are wrong. Not only is a "vocational" expert not required to submit this claim to the jury, but, in fact, *no* expert testimony is required. *Gillingham*, 51 A.3d at 866; *Gary*, 403 A.2d at 90; *Mecca*, 530 A.2d at 1339; *Fish*, 463 A.2d 1042; Pa. Sugg. Standard Jury Inst. § 7.40.

150. Unable to refute the longstanding line of Pennsylvania cases holding that expert testimony is *not* required to present a future loss-of-earnings claim to the jury, defendants hung their hat on *Kearns v. Riddle Memorial Hospital*, 493 A.2d 1358 (Pa. Super 1985).

151. But a close examination of *Kearns* reveals *Kearns* is nothing like this case. *Kearns* was a medical malpractice case where an adult woman claimed that she was prohibited from working in the future due to the fact that she had lost a kidney.

152. Her lost kidney was her only claimed injury. In fact, she had returned to work five years prior to the trial, making the same amount of money she had made before the surgery. *Kearns*, 493 A.2d at 1363.

153. In *Kearns*, there was "no medical **or** lay evidence that [this woman's] future earning capacity would be impaired in any way." *Id.* (emphasis added). In addition, the plaintiff in *Kearns* provided an interrogatory response with respect to lost earning capacity which stated: "Unknown, no future loss anticipated." *Id.* n. 2.

154. This case is nothing like *Kearns*. We do not have an adult here who lost one kidney and returned to work at the same pay rate as before the injury. We have a six-year-old child who has been diagnosed with cerebral palsy and hemiplegia, indisputably disabled, who the jury has seen walks with a visible limb, who has muscle contractures and spasticity requiring daily braces, and who is significantly impaired in her speech. Defendants' comparison of K.B.'s injuries to the injuries of the plaintiff in *Kearns* is not only wrong, it is insulting. Also unlike *Kearns*, here, plaintiff has presented both medical—though not required—and lay testimony concerning K.B.'s impairments. It is up to a jury to decide whether and to what extent K.B.'s impairments will prevent her from working in the future.

155. The evidence plaintiff presented at trial was beyond sufficient to meet the standard for submission of a future-earnings claim to the jury as espoused in *Marinelli*. The trial evidence disclosed K.B.'s age, her physical and mental conditions, and her habits and daily deficits.

156. The trial evidence also disclosed, through CRNP Fleischer and the stipulated approval of Dr. McDonough, K.B.'s future care needs.

157. With this factual foundation, the jury should have been permitted to "rel[y] upon the[ir] knowledge and common sense acquired through the experiences of life" in determining the extent, if any, of K.B.'s future lost earnings. *See Marinelli*, 420 A.2d at 611.

158. The trial court erred by employing an erroneous standard to plaintiff's claim for future lost earnings in improperly preventing plaintiff from presenting this claim to the jury.

IV. CONCLUSION

159. For all the foregoing reasons, the Court should grant plaintiff's motion for post-trial relief and order a new trial on all issues.

Respectfully submitted,

BOSWORTH LAW, LLC

*/s/ Thomas E. Bosworth*_____
THOMAS E. BOSWORTH, ESQ.
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Date: 3/4/24

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ANYAE MATTHEWS, Individually and as Parent and Natural Guardian of K.B., a minor *Plaintiff,* v. HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, et al. *Defendants.*	COURT OF COMMON PLEAS PHILADELPHIA COUNTY NO. 201201171 DECEMBER TERM, 2020 JURY TRIAL DEMANDED

PLAINTIFF'S REQUEST FOR TRANSCRIPT OF TRIAL TESTIMONY

Pursuant to Pennsylvania Rule of Civil Procedure 227.3, plaintiff hereby designates the entire trial in this matter for transcription by the official court reporter(s), beginning from jury selection and pretrial motions hearings which began on February 1, 2024, through the verdict of the jury rendered on February 23, 2024. The official court reporter(s) is/are hereby ordered to produce, certify and file the entire transcript of record in conformity with Pa.R.A.P. 1922 and Pa.R.J.A. 50001., *et seq*.

Date: 3/4/24

/s/ Thomas E. Bosworth
THOMAS E. BOSWORTH, ESQ.
Counsel for Plaintiff

CERTIFICATION OF SERVICE

Plaintiff, by and through her counsel, Thomas E. Bosworth, Esq. of Bosworth Law LLC, certifies that plaintiff's motion for post-trial relief, accompanying memorandum of law, and exhibits, were served on this day on all parties through counsel of record via electronic mail and e-notification by the Court.

*/s/ Thomas E. Bosworth*_____
THOMAS E. BOSWORTH, ESQ.
Counsel for Plaintiff

Date: 3/4/24