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In the Supreme Court of Pennsylvania

No. ________________________

GEORGE POMROY, Individually and as Executor of the Estate of
MARIANN POMROY, Deceased

Petitioner,

v.

HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA and ANTHONY G. ROSATO, Executor of the Estate of ERNEST F. ROSATO, M.D., Deceased

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at No. 2043 EDA 2013, filed November 19, 2014, Petition for Reargument En Banc denied January 29, 2015, Reversing the Order of the Court of Common Pleas of Philadelphia County, Pennsylvania, Civil Division, November Term, 2009, No. 4756, entered June 12, 2013

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Exhibits Attached to Petition for Allowance of Appeal in Accordance with the Pa. Rules of Appellate Procedure

Precedential opinion of the Superior Court of Pennsylvania filed November 19, 2014 reversing the trial court's judgment .... Exhibit A

Order of the Superior Court of Pennsylvania denying rehearing en banc filed January 29, 2015 .... Exhibit B

Trial court's Pa. R. App. P. 1925(a) opinion dated December 6, 2013 .... Exhibit C

Trial court's order dated June 12, 2013 denying defendants' motion for post–trial relief and entering judgment on the jury's verdict .... Exhibit D

I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The published opinion of a three–judge Pa. Superior Court panel reversing the trial court's order upholding the jury's verdict and denying the defendants' post–trial motions is attached hereto as Exhibit A and is reported at 105 A.3d 740 (Pa. Super. Ct. 2014).

The opinion that the Court of Common Pleas of Philadelphia County, Pennsylvania issued pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) on December 6, 2013 furnishing the trial court's reasons for upholding the jury's verdict in plaintiff's favor is attached as Exhibit C.

II. THE ORDER IN QUESTION

The final paragraph of the Superior Court's opinion states:

> Judgment reversed. Jurisdiction relinquished.

See Exhibit A at page 14.

III. QUESTIONS PRESENTED

1. Whether Pennsylvania law recognizes a negligence claim against a physician who performs major open surgery that is significantly more dangerous than an equally effective non–surgical procedure and the patient thereby sustains foreseeable injuries from the surgery, a question as to which the Superior Court's precedents conflict?

2. Whether a patient's decision, after having been informed of the risks involved, to undergo surgery bars a negligence claim against the physician where expert testimony establishes that no reasonable physician would have performed surgery under the circumstances, a question substantially related to the one this Court has agreed to decide in the pending case of *Brady* v. *Urbas*, No. 74 MAP 2014 (argued 11/18/14), and as to which the Superior Court's ruling in this case conflicts with Pa. Supreme Court precedent?

IV. STATEMENT OF THE CASE

Marianne Pomroy, a 55–year–old housewife, died after nearly 20 months of suffering from injuries caused by the unnecessary surgical resection of her colon to remove an indisputably benign polyp[1] performed by defendant Dr. Rosato of defendant Hospital of the University of Pennsylvania (HUP).

Mrs. Pomroy had undergone a colonoscopy that her gastroenterologist, Dr. Fanelli, performed. During the procedure, Dr. Fanelli discovered a large, flat benign polyp. Polyps are routinely removed during colonoscopy procedures, but due to concerns about injuring her colon because of the size and shape of Mrs. Pomroy's polyp, Dr. Fanelli was unable to routinely remove it. An alternative, non–surgical method existed to remove her polyp using a procedure known as saline colonoscopy. The saline colonoscopy is similar to a routine colonoscopy, the only difference being that the polyp is injected at its base with saline to raise the polyp up from the inside colon wall for safe

[1] The Superior Court panel was mistaken when it wrote that the polyp was potentially cancerous. Two different pathologists determined that the polyp was benign before Mrs. Pomroy had surgery, and there was no disagreement at trial regarding whether or not the polyp was benign. Rather, the benign nature of the polyp was uncontested at trial. (R. 164a, R. 110a-11a).

resection and removal of the polyp, with minimal risk of injury to the colon. Dr. Fanelli advised Mr. and Mrs. Pomroy that saline colonoscopy was not a removal option for Mrs. Pomroy because of his erroneous belief that her polyp was too large to be safely removed by colonoscopy due to a risk of perforation. Because Dr. Fanelli was not qualified to perform the surgical resection, he referred the Pomroys to Dr. Rosato, a surgeon, for removal of the polyp via surgery, called a colectomy. A colectomy entails cutting open her abdomen, excising the section of the colon surrounding the benign polyp, and sewing the two ends of her colon back together, which is called an anastomosis.

Dr. Rosato testified that he knew during his initial consultation with the Pomroys that Dr. Fanelli was mistaken and the polyp was not too large to be removed safely by saline colonoscopy. He further stated that she was a candidate for saline colonoscopy because her polyp was benign. According to Dr. Rosato's testimony, removal of the polyp by saline colonoscopy presented only minimal risks that could easily be managed, and Mrs. Pomroy had nothing in her medical history which made her a higher risk than the average patient for perforation during

colonoscopic removal of the polyp. (R. 164a-65a, 171a, 174a).[2] Dr. Rosato also admitted that open surgery to remove Mrs. Pomroy's polyp was especially ill–advised because of her medical history. In addition to the general risks this surgery presented, Dr. Rosato recognized that he might encounter "tremendous adhesions," making surgery difficult or impossible, because of Mrs. Pomroy's prior abdominal surgeries and resulting scar tissue. (R. 114a-15a, 120a, 172a-74a, 177a, 232a).

Dr. Drew, plaintiff's surgical expert witness, testified that Dr. Ginsburg (an expert in saline colonoscopy who worked with Dr. Rosato at HUP) had experienced only two perforations out of 500 saline colonoscopies. This represents a less than one half of one percent risk of perforation. (R. 116a). Dr. Rosato similarly testified that there was only minimal risk of perforation with saline colonoscopy. (R. 164a-65a). The risk of complications from a perforation is minimal because the patient undergoes bowel preparation that eliminates the bowel contents,

[2] Cites herein to "R." followed by a page number refer to the Reproduced Record filed in the Superior Court. In accordance with Pennsylvania Rule of Appellate Procedure 1112(d), petitioner is filing one copy of that Reproduced Record in this Court together with this Petition for Allowance of Appeal.

thereby reducing the risk of contamination in the unlikely event of a bowel perforation

By contrast, Dr. Rosato testified that, in his opinion, the general risk of a leak from an open surgical procedure was more than two percent. (R. 218a). A leak occurs when the ends of the resected colon fail to heal together resulting in leakage of intestinal contents into the abdominal cavity. This occurs at varying times after surgery, when the colon is no longer clear of intestinal content, thus increasing the risk of catastrophic sepsis. Dr. Drew's uncontradicted testimony was that, because of Mrs. Pomroy's medical history, her risk of a leak from the surgical removal was as high as eight percent. (R 116a-18a). Both Dr. Drew and Dr. Rosato testified that saline colonoscopy was the appropriate procedure to remove Mrs. Pomroy's polyp given her other medical conditions. Dr. Rosato testified that he "wholeheartedly" recommended that Mrs. Pomroy have the saline procedure instead of open surgery. (R. 164a, 171a, 174a).

The evidence before the jury conflicted regarding whether Dr. Rosato recommended saline colonoscopy to the Pomroys to remove the polyp. Although Dr. Rosato claimed that he recommended saline

colonoscopy, his records merely referenced that Dr. Fanelli had discussed saline colonoscopy and that Mrs. Pomroy did not want to risk perforation of her colon. Dr. Rosato admitted that because Dr. Fanelli was the referring physician, Dr. Rosato had to be "diplomatic" with the Pomroys about saline colonoscopy (R. 174a). In other words, even though Dr. Rosato knew saline colonoscopy was feasible, safe, and was the proper method for removing the polyp, he did not want to make Dr. Fanelli look bad by contradicting him. Mr. Pomroy, by contrast, testified that Dr. Rosato told the Pomroys that he agreed with Dr. Fanelli that surgery was the only option for removing the polyp.

Whether Dr. Rosato recommended the saline procedure or open surgery has no bearing on the viability of plaintiff's claim that Dr. Rosato was negligent for performing an unnecessary, contraindicated surgery on Mrs. Pomroy. Under Pennsylvania law, as explained below, a patient's consent cannot relieve a physician from the duty to exercise due care, which includes only performing surgery on a patient when the benefits of doing so outweigh the risks and when no safer, non–surgical option exists to produce the medically desired result.

Although the Superior Court panel in its opinion describes the standard of care evidence that plaintiff's surgical expert witness, Dr. Drew, supplied as consisting of several slightly different formulations, the expert's testimony was actually consistent throughout. In fact, the specific standard of care thoroughly explained by Dr. Drew and on which plaintiff relied is well–established under Pennsylvania law — that a physician acts negligently when performing surgery on a patient where the risks of the surgery outweigh its benefits. Dr. Drew defined the standard of care as "what a well–trained average surgeon would do in normal situations." (R. 119a). He testified that this standard required removal of benign polyps in any patient by colonoscopy rather than surgery. (R. 109a). "Polyp should be removed via colonoscopy. We surgeons don't remove benign polyps. You don't remove a colon for a benign polyp." (*Id.*). Colonoscopy and open surgery "were not equal risks," and "you would not do an open procedure for a benign polyp." (R. 119a-20a). Open surgery "is not an appropriate procedure." (R. 132a).

Dr. Drew testified that "in my opinion, by failing to pursue the saline option, he [Dr. Rosato] deviated from accepted standards of care." (R. 119a). "We, as a physician, have the right also to refuse to offer what

they [patients] want if we don't think it's the best procedure." (R. 129a). "Dr. Rosato unequivocally stated he thought that [saline colonoscopy] was the best procedure, that's what should have been done." (R. 129a-30a). "[H]e [Dr. Rosato] should not have done the surgery." (R. 131a). "It [surgery] is not an appropriate procedure." (R. 132a). "In my opinion, he [Dr. Rosato] should have insisted on it [saline endoscopy] or not do what he knew was an incorrect procedure." (R. 132a). "He didn't have to — it was wrong to do a colon resection in this case because you had no cancer. You do not do a colon resection for non–cancer. It's that simple." (R. 133a). Dr. Drew agreed with Dr. Rosato that this surgery was even more risky for Mrs. Pomroy than for the typical person because of her medical history.

Before submitting the negligence claim to the jury, the trial court analyzed whether plaintiff's expert witness surgeon, Dr. Drew, offered a standard of care by which the jury could evaluate the facts in light of the law that the court gave in its instructions. In its Rule 1925(b) opinion, the trial court described plaintiff's applicable standard of care as follows:

> [W]hile couched in various iterations in Dr. Drew's testimony, [the gist of plaintiff's expert witness surgeon's

> standard of care testimony] was the express, unambiguous statement that open surgery on someone in Mrs. Pomroy's circumstances was a breach of that standard.

Trial court's opinion (attached here to as Exhibit C) at 11.

As the trial court's Rule 1925(b) opinion makes clear, plaintiff prevailed on a claim that Dr. Rosato committed negligence by choosing to perform the unnecessary, dangerous open surgery to remove Mrs. Pomroy's benign polyp when the non–surgical saline colonoscopy was available with very minimal risk, which was easily manageable,[3] and was equally capable of producing the exact same desired medical result, polyp removal. Moreover, the trial court also correctly recognized that even if Mrs. Pomroy insisted on surgical removal, her insistence cannot insulate Dr. Rosato from responsibility for his failure to exercise due care, because under Pennsylvania law a patient cannot consent to the performance of a medical procedure that it is negligent for a physician to perform.

The court without objection charged the jury on plaintiff's theory of negligent surgery. The trial court instructed the jury to determine

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[3] In the unlikely event that a perforation occurred while using saline colonoscopy to remove the polyp, Dr. Rosato testified that a surgeon (meaning Dr. Rosato himself) would be available to manage it if necessary. (R. 164a).

whether a reasonable professional in Dr. Rosato's position would have told Mrs. Pomroy that an open surgical procedure was not indicated and would have refused to perform the procedure. By means of its verdict in favor of the plaintiff, the jury in this case rejected the defendants' assertion that surgery was a reasonable option for Mrs. Pomroy and concluded that Dr. Rosato's decision to perform surgery was negligent.

As a result of the surgery and subsequent leak from her bowel, Mrs. Pomroy spent ten months in the hospital, the majority of that time in intensive care. During that time, her husband of 37 years visited her every day. During her initial hospital, stay she suffered from respiratory failure, requiring mechanical ventilation, a tracheotomy and oxygen, which resulted in her inability to speak. She had to be restrained in her bed because she would attempt to pull out the various tubes in her body that were keeping her alive. She suffered from irreversible total kidney failure requiring dialysis for the remainder of her life. Mrs. Pomroy had to be feed through a tube to her stomach, leading to malnutrition resulting in loss of half of her body weight, and she had to have a colostomy, which leaked, resulting in a fistula that leaked fecal matter into her vagina. She had numerous infections, blood

clots, and suffered a stroke. She hallucinated that she was raped. When she was finally discharged, she spent her remaining ten months of life dealing with the medical complications from her surgery.

On appeal to the Superior Court from the jury's $19.5 million verdict in plaintiff's favor, defendants through their new appellate counsel decided to pursue a strategy of questioning the standard of care that plaintiff had established that Dr. Rosato had violated. In ruling for defendants on that issue, setting aside the jury's verdict in favor of plaintiff that the highly experienced trial judge had upheld, the Superior Court panel failed to recognize that long–settled Pennsylvania law allows a plaintiff to pursue a negligence claim where the performance of surgery is contraindicated. In so ruling, as demonstrated below, the Superior Court panel in this case issued a ruling in conflict with prior Pa. Superior Court precedent, which allows a patient to pursue a negligence claim against a physician who has negligently subjected the patient to a surgical procedure that presented unnecessary risks.

Moreover, in granting a reversal, the Superior Court panel also focused repeatedly on the defendants' contention that Mrs. Pomroy

insisted on receiving the dangerous surgery after hearing the risks of that procedure. The Superior Court thereby overlooked that under Pennsylvania law a patient it is not limited to a lack of informed consent claim when the performance of the surgery itself constitutes negligence.[4] This aspect of the Superior Court's ruling directly contradicts this Court's ruling in *Montgomery* v. *Bazaz–Sehgal*, 798 A.2d 742 (Pa. 2002) (holding that informed consent is not a defense to a claim of medical malpractice sounding in negligence), and raises an issue substantially related to the one this Court has agreed to decide in the pending case of *Brady* v. *Urbas*, No. 74 MAP 2014 (argued 11/18/14). This second question presented is thus equally well–deserving of this Court's review on allowance of appeal.

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[4] Even if plaintiff in this case could have succeeded in bringing a lack of informed consent claim, which is highly questionable on these facts, the plaintiff's failure to do so of course has no bearing on the validity of plaintiff's negligence claim. For example, in a products liability action, a plaintiff may have the option of bringing claims sounding either in strict liability or negligence. And in a legal malpractice case, a plaintiff may have the option of making a claim for negligence or breach of contract.

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

A. Introduction

This case presents two important questions that clearly satisfy this Court's well–known standards for review on allowance of appeal.

Granting review on the first question presented is necessary to resolve the conflicting, unsettled area of Pennsylvania law that the Superior Court panel's opinion in this case created concerning whether a physician acts negligently in opting to perform a dangerous medical procedure (in this case, open surgery) on a patient where a readily available, less dangerous procedure (non–surgical polyp removal with saline colonoscopy) with only minimal risks would be equally effective in treating the patient.

The second question presented is similarly suitable for this Court's review, given that that the Superior Court's ruling directly contradicts a precedent of this Court. Moreover, the second question presented also raises an issue that is closely related to the issue that this Court recently agreed to review and decide in the pending case of *Brady* v. *Urbas*, No. 74 MAP 2014 (argued 11/18/14). In *Brady*, the question presented is whether a defendant can introduce into evidence

the plaintiff's consent to medical treatment where the plaintiff claims that the physician was negligent in performing the surgery. Such consent evidence was admitted in *Brady*, resulting in a defense verdict. The Superior Court ruled in *Brady* that evidence of consent is irrelevant in a medical malpractice case. Here, by contrast, it was the Superior Court that improperly relied on the evidence of plaintiff's consent to surgery as a basis for overturning the jury's verdict that the defendant doctor was negligent in performing the surgery.

The Superior Court panel's ruling in this case is especially dangerous because it immunizes surgeons who recommend unnecessary, dangerous procedures so long as they have obtained consent from the patient. The Superior Court has treated a patient's choice of surgery as the equivalent of a consumer's decision to purchase household goods, where the customer is always right and the physician's role does not extend beyond obeying the instructions of a patient who has been fully informed of the risks of selecting among available alternate procedures capable of producing the medically desired result. Just as a physician would not be required to obey a patient's demand for specific prescription drugs that the patient desired

— because a physician must act as the learned intermediary and decide whether the risks of those drugs outweigh their potential benefits to the patient — likewise a surgeon has a duty to refuse to perform a much more dangerous open surgery where a patient's medical issue can be fully resolved via a non–surgical procedure presenting only minimal risks. A patient simply does not have the right or power to compel a physician to deviate from the applicable standard of care and perform an unnecessary and dangerous surgical procedure.

Here, Dr. Rosato of his own free will knowingly opted to perform an unnecessary and dangerous surgery on his patient based on his claim that it was what the patient requested. As the jury found and as the trial court correctly sustained, Dr. Rosato thereby acted negligently, subjecting himself to liability for Mrs. Pomroy's resulting damages. The Superior Court's decision to overturn the jury's verdict and direct the entry of judgment in favor of the defendants reached a dangerously incorrect result that cries out for this Court's resolution.

B. Review should be granted to resolve whether Pennsylvania law recognizes a negligence claim against a physician who performs open surgery that is more dangerous than an equally effective non–surgical procedure and the patient thereby sustains foreseeable injuries from the dangerous surgery, a question as to which the Superior Court's precedents conflict

In *Petrasovits* v. *Kleiner*, 719 A.2d 799, 803 (Pa. Super. Ct. 1998), a unanimous three–judge panel of the Superior Court recognized that a plaintiff in a medical malpractice action was entitled to retain his verdict on a claim that a physician should not have performed surgery for which the patient was not a proper candidate. Then–Judge Eakin was one of the three judges on the Superior Court panel in *Petrasovits*.

The Superior Court has also recognized the validity of this type of negligence claim in rulings that issued before and after *Petrasovits*. For example, in *Bulebosh* v. *Flannery*, 91 A.3d 1241, 1242 (Pa. Super. Ct. 2014), the plaintiffs "alleged that Dr. Flannery was negligent in performing unsuitable surgeries . . . ." Although the Superior Court in *Bulebosh* affirmed the trial court's ruling that the suit was time–barred as filed too late, neither the Superior Court nor the trial court questioned the validity of plaintiff's underlying negligence claim.

And in *Pratt* v. *Stein*, 444 A.2d 674 (Pa. Super. Ct. 1982), the Superior Court upheld a jury's verdict finding that a physician's performance of a laminectomy (a type of spinal surgery) was "inappropriate and misdirected." *Id.* at 681–82. As the Superior Court explained, "In view of these opinions and the other evidence offered in support thereof, the jury could reasonably have concluded that the laminectomy performed on December 31, 1964 by Dr. Stein was inappropriate and thus below the standard of reasonable medical care." *Id.* at 682 (footnote omitted).

Similarly, in this case, plaintiff pursued a negligence claim against Dr. Rosato asserting that Dr. Rosato committed medical malpractice by performing the far more dangerous open surgery to remove Mrs. Pomroy's benign polyp when the far less dangerous saline colonoscopy procedure would have been equally effective in removing the polyp.

Plaintiff's expert witness surgeon clearly and repeatedly testified that Dr. Rosato deviated from the applicable standard of care by performing a medical procedure that was unnecessarily dangerous to accomplish the result the patient sought. Even though Dr. Rosato did

not exacerbate his negligent conduct by committing additional acts of negligence while performing the surgery, the mere fact of choosing to perform open surgery was itself the negligence for which plaintiff sought to hold Dr. Rosato liable and for which the jury found Dr. Rosato liable. Thus, when Mrs. Pomroy sustained the sort of foreseeable injury that resulted from Dr. Rosato's performance on her of unnecessary, dangerous surgery to remove the polyp, Dr. Rosato was liable for failing to exercise due care in choosing to perform this dangerous procedure on Mrs. Pomroy.

Because the evidence introduced at trial demonstrated that the horrific injuries that Mrs. Pomroy sustained as a result of undergoing unnecessary, dangerous open surgery were both foreseeable and a direct consequence thereof, this is not a case in which the jury's verdict is subject to being set aside for lack of causation evidence. The causation element in a negligence claim requires proof that the negligence complained of was a factual and legal cause of the injuries and resulting damages for which recovery is being sought.[5] As the trial

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[5] *See Quinby* v. *Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1070 (Pa. 2006) ("a plaintiff must demonstrate the elements of negligence: a duty owed by the physician to the patient, a breach of that

court recognized in upholding the jury's verdict, the record in this case contains an overabundance of evidence establishing that Dr. Rosato's performance of unnecessary surgery on Mrs. Pomroy caused the horrific injuries and damages at issue here.[6]

It is not unusual for a physician to have more than one medical treatment available to address a plaintiff's ailment. Where a reasonable

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duty by the physician, that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of harm") (internal quotations omitted); *Sharpe* v. *St. Luke's Hosp.*, 821 A.2d 1215, 1218 (Pa. 2003) ("A cause of action in negligence requires allegations that establish the breach of a legally recognized duty or obligation that is causally connected to damages suffered by the complainant.").

[6] The Superior Court panel in this case erroneously focused its causation inquiry instead on whether "Mrs. Pomroy would have changed her mind and pursued saline endoscopy if Dr. Rosato had refused to provide her with the surgical removal option." Pa. Super. Ct. slip op. at 8. That issue is simply irrelevant to the only legally pertinent causation question: what injuries to Mrs. Pomroy resulted from Dr. Rosato's negligent decision to perform unnecessary open surgery on her? Moreover, to the extent defendants might have attempted to defend against plaintiff's claim based on an assertion that Mrs. Pomroy's injuries would have been similar or worse had she instead opted against removing the polyp or pursued removal via the safer saline colonoscopy method, defendants chose not to do so, failing to introduce at trial any evidence in support of such a defense. In fact, defendants are incapable of establishing on this record that any potential harm to Mrs. Pomroy had she opted against removing the polyp or pursued removal via the safer saline colonoscopy method would be anywhere near as substantial as the injuries and damages she actually sustained due to Dr. Rosato's negligence.

physician could opt for either course of treatment, the physician would not face liability under the so–called "two schools of thought" doctrine. *See Passarello* v. *Grumbine*, 87 A.3d 285, 297 (Pa. 2014) ("The 'two schools of thought' doctrine holds that a physician will not be liable for choosing, in the exercise of her or his judgment, one of two or more *accepted* courses of treatment where *competent* medical authority is divided as to the proper course."). Indeed, here Dr. Rosato attempted to mount such a "two schools of thought" defense, which the jury rejected based on the evidence before it.

Although open surgery and a saline colonoscopy were equally effective means of removing Mrs. Pomroy's polyp, open surgery presented a substantial amount of additional, unnecessary risks that saline colonoscopy did not present. In this case, the jury through its finding in favor of the plaintiff necessarily found that Dr. Rosato acted negligently in performing the contraindicated open surgery instead of the far safer saline colonoscopy.

Assume that a patient presents with a pre–cancerous lesion on his hand. Assume further that simply removing the relevant patch of skin would fully address the issue and would be equally as effective as any

more dangerous treatment. Under these circumstances, a physician who elected to amputate the patient's entire hand, even if the patient had consented, would be liable for medical malpractice for subjecting the patient to unnecessary risk and harm.

The Superior Court, in holding as a matter of law in this case that Dr. Rosato was not liable in negligence for choosing to perform the unnecessary, dangerous surgery that no reasonable physician would have chosen to perform under the circumstances, issued a decision directly in conflict with the Superior Court's earlier rulings in *Petrasovits*, *Bulebosh*, and *Pratt*. This Court should grant review here to resolve this very significant conflict.

The defendants no doubt may seek to downplay the importance of this conflict in the hope of retaining their victory in the Superior Court, which relieved defendants from having to pay a $19.5 million verdict that the trial court upheld. But if defendants believe that the Superior Court reached the correct result in this case, then they too should support this Court's granting of review, in order to overrule the Superior Court's earlier conflicting decisions in *Petrasovits*, *Bulebosh*, and *Pratt*, because in the next similar case that comes down the road,

the Superior Court may opt instead to rely on those earlier rulings, which still remain good law, in upholding a plaintiff's verdict. If the defendants' truly believe that Pennsylvania law should not recognize a claim for negligence where a physician performs surgery that is contraindicated, if the patient consents and the physician performs the surgery without committing additional acts of negligence in the process, the only way that defendants can achieve that result is through this Court's granting of review here.

If anything, the size of the jury's verdict in this case only bolsters the suitability of this case for further review. The injuries that Mrs. Pomroy sustained as a result of Dr. Rosato's negligent decision to perform the far more risky open surgery were catastrophic and ultimately resulted in her death after an extended period of pain and suffering. A physician should not be absolved from having inflicted that extreme degree of pain and suffering on an innocent patient merely because the patient — a housewife with no medical training whatsoever — was mistaken concerning which form of treatment presented more risk for her. If anything, a physician's duty to exercise his or her own independent medical judgment in the best interest of a patient is at its

apex where the patient is operating under mistaken assumptions and the physician actually realizes that the patient's preferred course of treatment would subject the patient to serious unnecessary risks. That precisely describes this case.[7]

Because the Superior Court's ruling in this case created a conflict with earlier Superior Court rulings on the first question presented herein, this Court should grant review to consider this question of utmost importance.

C. This Court should also grant review to determine whether a patient's decision to undergo a surgery bars a negligence claim against the physician where expert testimony establishes that no reasonable physician would have performed the surgery under the circumstances

The Superior Court's opinion repeatedly emphasizes defendants' contention that Mrs. Pomroy insisted on receiving contraindicated surgery to remove her polyp after having been warned of the risks that this far more dangerous method of removing the polyp entailed. The jury in this case heard the evidence of Mrs. Pomroy's consent to

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[7] Given that the Superior Court did not address the defendants' challenge to the size of the jury's verdict, once this Court reinstates the jury's liability verdict in favor of plaintiff, the Superior Court would remain free on remand to address that distinct excessiveness challenge.

surgery, and yet the jury nonetheless properly found that it was Dr. Rosato's decision to perform open surgery that was itself negligent under the circumstances.

The Superior Court panel's heavy reliance on the supposed existence of Mrs. Pomroy's informed consent to undergo the contraindicated, dangerous open surgery directly conflicts with this Court's earlier, unanimous ruling in *Montgomery* v. *Bazaz–Sehgal*, 798 A.2d 742 (Pa. 2002). In *Montgomery*, this Court held that the defense of informed consent only applied in the context of a battery claim against a physician for performing surgery to which a plaintiff claims that the patient did not consent. *Id.* at 748–49; *see also Fitzpatrick* v. *Natter*, 961 A.2d 1229, 1241 n.13 (Pa. 2008) (citing *Montgomery* for the proposition that "[a]n informed consent action, of course, sounds in battery rather than in negligence"). Accordingly, the Superior Court panel's rationale in this case — that Mrs. Pomroy's consent to the performance of contraindicated, dangerous open surgery justified the entry of judgment for defendants on that negligence claim — directly conflicts with this Court's holding in *Montgomery* that informed consent is not a defense to a claim sounding in negligence against a physician.

In the currently pending case of *Brady* v. *Urbas*, No. 74 MAP 2014 (argued 11/18/14), this Court granted review to determine whether a defendant can introduce evidence of a patient's consent to a medical procedure where the plaintiff claims that the physician's performance of the procedure constituted negligence. In *Brady*, the Superior Court held that the trial court abused its discretion in admitting evidence of the patient's consent and that the plaintiff was entitled to a new trial, because the evidentiary error likely resulted in the defense verdict obtained in that case. *See Brady* v. *Urbas*, 80 A.3d 480, 483–85 (Pa. Super. Ct. 2013), *alloc. granted*, 96 A.3d 988 (Pa. 2014). The Superior Court panel's ruling in *Brady* was thus consistent with this Court's ruling in *Montgomery*, in recognizing that evidence of a patient's supposed informed consent is not relevant to a negligence claim against a physician.

Here, the Superior Court panel erred in reaching a decision at the opposite extreme from what the Superior Court panel held in *Brady*. In this case, the panel repeatedly emphasized that because Mrs. Pomroy needed to have the polyp removed, because she consented to the contraindicated open surgery after being informed of the risks, and

because Dr. Rosato did not commit any acts of surgical malpractice during the surgical procedure itself, the plaintiff could not recover for the injuries she sustained stemming from Dr. Rosato's negligent decision to perform open surgery on her.

Because the second question presented herein represents an instance where the Superior Court's ruling conflicts both with this Court's longstanding precedents and the Superior Court's own, earlier rulings, this Court should likewise grant allowance of appeal to address and resolve the second question presented.

VI. CONCLUSION

For the reasons set forth above, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: March 2, 2015

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This petition for allowance of appeal complies with the type–volume limitations of Pa. R. App. P. 1115(f) because this petition contains 5,329 words, excluding the parts of the petition exempted by Pa. R. App. P. 1115(g).

This petition complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14–point Century Schoolbook font.

Dated: March 2, 2015

/s/ *Howard J. Bashman*
Howard J. Bashman

Exhibits Attached to Petition for Allowance of Appeal in Accordance with the Pa. Rules of Appellate Procedure

Precedential opinion of the Superior Court of Pennsylvania filed November 19, 2014 reversing the trial court's judgment .... Exhibit A

Order of the Superior Court of Pennsylvania denying rehearing en banc filed January 29, 2015 .... Exhibit B

Trial court's Pa. R. App. P. 1925(a) opinion dated December 6, 2013 .... Exhibit C

Trial court's order dated June 12, 2013 denying defendants' motion for post–trial relief and entering judgment on the jury's verdict .... Exhibit D

EXHIBIT A

2014 PA Super 257

GEORGE POMROY, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARIANN POMROY DECEASED Appellees v. HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA AND ANTHONY G. ROSATO, EXECUTOR OF THE ESTATE OF ERNEST F. ROSATO, M.D., DECEASED Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2043 EDA 2013

Appeal from the Judgment Entered June 12, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): November Term, 2009, No. 4756

BEFORE: GANTMAN, P.J., PANELLA, J., and STABILE, J.

OPINION BY PANELLA, J. Filed: November 9, 2014

Appellants, the Estate of Ernest F. Rosato, M.D., and Hospital of the University of Pennsylvania, appeal from the judgment entered after the denial of their post-trial motions for judgment notwithstanding the verdict ("JNOV"). We conclude that the record is legally insufficient to support the jury's verdict. As a result, the trial court erred in denying Appellants' motions for JNOV and we must reverse.

This appeal arises from a medical malpractice claim against Dr. Rosato. All parties agree that there was no claim that Dr. Rosato failed to secure informed consent from the decedent, Mariann Pomroy, nor is there

any claim that Dr. Rosato committed professional negligence while operating on Mrs. Pomroy. In fact, the greatest difficulty in reviewing this appeal arises from the fact that the standard of care asserted by Appellees at trial varied each time the issue was broached. As discussed below, there were three distinct standards provided to the jury, implicitly or explicitly, by Appellees' expert.

Mrs. Pomroy had a long history of gastrointestinal issues and multiple abdominal surgeries. When her long-time gastroenterologist, Andrew Fanelli, M.D., informed her that she was suffering from a large, possibly cancerous polyp in her colon, he discussed several treatment options with Mrs. Pomroy.[1] Both Mrs. Pomroy and Dr. Fanelli were concerned about the size of the polyp and the risk that removing the polyp during a colonoscopy[2] could leave her colon perforated.[3] A saline colonoscopy or saline endoscopy

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[1] A polyp is a growth from the inside lining of the intestine.

[2] A colonoscopy is a diagnostic test that looks at the inside of the colon. This is an important test for adults because the inside of the colon is where polyps and tumors originate. A pathologist can examine the growth of a polyp to see if there are signs of dysplasia—that the tissue is not normal and may be on its way to a cancer.

[3] There are different criteria which lead to a decision to remove a polyp, including size and shape. A polyp which protrudes can be removed during a colonoscopy by inserting a snare, a little lasso, through the colonoscope, and then encircling the polyp at its base and tightening the snare, thereby cutting it off. A flat lesion is removed during a piecemeal process that involves shaving it away little by little until the whole polyp is off. A gastroenterologist performs these procedures.

is a colonoscopy procedure whereby saline solution is injected through the colonsoscope into the area beneath the lining of the intestine, thereby increasing the distance between the lining and the outer wall. The saline colonoscopy reduces the risk of perforation.

Because of the size of Mrs. Pomroy's polyp and his concerns over a possible perforation of her colon if the polyp were removed colonoscopically, Dr. Fanelli recommended surgery.[4] The trial testimony of George Pomroy, the decedent's husband, in summarizing Dr. Fanelli's advice, was:

> We went back and he told her it wasn't cancerous and that it was rather large and he's going to recommend us to a surgeon down at the University of Pennsylvania Hospital. And said there's another way to do it, it's with the saline solution, something like that. But he thought in his opinion that it was too large and that there was a risk of perforation because of the size of the polyp.

N.T., Trial, 2/21/13, at 25.

According to Mr. Pomroy, his wife was against having the polyp removed during a colonoscopy: "[M]y wife . . . said she don't want to take a chance of perforating her bowel. So she said to him, [l]et's talk to the doctor." ***Id***. Mr. Pomroy testified that although Dr. Fanelli did not put a specific risk factor on the saline solution procedure, he definitely

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[4] Surgery is another method for the removal of a polyp. After the surgical removal of the part of the colon with the polyp, the two ends of the colon are reattached in a procedure known as anastomosis.

recommended against it, and his wife was unwavering in accepting his advice:

> No, he didn't put a risk factor on it. He just said he thought it was too large and that there was a risk of perforation. He thought the surgery was probably a better idea. He's been her gastrointestinal doctor for 20 years. He's my doctor as well as he's her doctor. He's recommended numerous different doctors for us to do things. The two other surgeries my wife had, he recommended the doctors to do them. As a person you listen to your doctor. I thought so, anyway. She did and she always did.

Id., at 26.

As a result, Dr. Fanelli referred Mrs. Pomroy to Dr. Rosato for surgical removal of the polyp.

The Pomroys met with Dr. Rosato on October 14, 2008. Mr. Pomroy's uncontradicted testimony was that Dr. Rosato went over the possible risks of having the polyp removed surgically:

> He had said there's a risk of all the normal things that I've heard in other cases, in other surgeries with my wife. Risk of bleeding, risk of infection, risk of death, risk of a colostomy bag if it didn't work, and that's pretty much it. To my knowledge, again.

Id., at 31. Mrs. Pomroy insisted upon the surgical option while repeatedly rejecting the colonoscopic option. The uncontradicted testimony of Mr. Pomroy was that his wife feared having the polyp removed during a colonoscopy, even the saline colonoscopy method:

> Well, she said she didn't want to take the chance of having her bowel perforated and then have to have an emergency surgery . . . She said to me that she was afraid because Dr. Fanelli had said that there was a risk of perforation and it was too large to do that, that she really would not want to have that done.

Id., at 32. Consequently, Dr. Rosato performed the operation shortly thereafter. Following the surgery, Mrs. Pomroy suffered a series of complications that resulted in her unfortunate death. George Pomroy filed suit against Appellants, alleging medical malpractice against Dr. Rosato.[5] Pomroy's claims were tried by a jury, and on February 25, 2013, the jury returned a verdict in favor of the George Pomroy. This timely appeal followed.

On appeal, Appellants argue that the trial court erred in not granting their motion for judgment notwithstanding the verdict.[6] We review this issue according to the following standard of review

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[5] While no party to the appeal has discussed or even acknowledged this issue in documents filed with this Court, we note that Pomroy's Amended Complaint contains a cause of action for corporate negligence against the Hospital. While the certified record is not clear on this point, it is apparent that Pomroy abandoned or withdrew this cause of action at some time during the proceedings. Pomroy did not present any evidence which supported this cause of action. Nor did Pomroy object to the trial court's failure to instruct the jury on this cause of action. In fact, Pomroy drafted the verdict slip, which did not include a question addressing a corporate negligence cause of action. Although we can find no explicit discussion of the issue in the certified record, it is clear from all the circumstances that the Hospital's only alleged liability at trial was premised upon its employment of Dr. Rosato. ***See***, ***e.g.***, N.T., Trial, 2/25/13, at 112 (noting that the parties agreed that Dr. Rosato was an employee of the Hospital while discussing a jury instruction on *respondeat superior*). Finally, Pomroy has not filed a cross-appeal from any adverse decision by the trial court on this issue. Thus, Pomroy has abandoned this issue on appeal, if not previously.

[6] Pomroy's Appellee's Brief contains passing arguments that Appellants have waived their right to judgment notwithstanding the verdict by failing to
(Footnote Continued Next Page)

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. In so doing, we must also view this evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact. If any basis exists upon which the jury could have properly made its award, then we must affirm the trial court's denial of the motion for JNOV. A JNOV should be entered only in a clear case.

Griffin v. Univ. of Pittsburgh Med. Center-Braddock Hosp., 950 A.2d 996, 999 (Pa. Super. 2008) (citation omitted).

A claim of medical malpractice can be defined "as the unwarranted departure from generally accepted standards of medical practice resulting in injury to a patient, including all liability-producing conduct arising from the rendition of professional medical services." ***Toogood v. Owen J. Rogal, D.D.S., P.C.***, 824 A.2d 1140, 1145 (Pa. 2003). In order to prevail in a medical malpractice action, a plaintiff must establish (1) a duty owed by the

(Footnote Continued)

preserve the issues presented. To the contrary, Appellants filed both a motion for a non-suit at the close of plaintiff's case, and a motion for directed verdict at the conclusion of the case. The trial court summarily denied both motions. As the issues raised in the post-trial motion and currently before us on appeal address the sufficiency of the evidence to support the verdict, we conclude, under the specific circumstances of this case, that Appellants sufficiently preserved these issues.

physician to the patient, (2) a breach of that duty by the physician, (3) that the breach was the proximate cause of the harm suffered, (4) and the damages suffered were a direct result of the harm. ***See Hightower-Warren v. Silk***, 698 A.2d 52, 54 (Pa. 1997). Because the nature of this cause of action encompasses knowledge and experience not commonly within the ordinary experience and knowledge of laypersons, the plaintiff must present expert testimony in order to establish the physician's applicable standard of care and the causation of the injury. ***See Toogood***, 824 A.2d at 1145.

At the outset, we conclude that there is no evidence of causation to support the jury's verdict. In a negligence action, the plaintiff's burden of causation has two components (1) cause-in-fact and (2) legal or proximate cause. ***See First v. Zem Zem Temple***, 686 A.2d 18, 21 n. 2 (Pa. Super. 1996). In a medical malpractice action, expert testimony is required to establish causation. ***See Toogood***, 824 A.2d at 114. To establish cause-in-fact causation, a plaintiff must prove, through expert testimony, that "but for" the defendant's alleged negligent conduct, the harm suffered by the plaintiff would not have occurred. ***See Whitner v. Von Hintz***, 263 A.2d 889, 894 (Pa. 1970). A jury's verdict must be based upon more than mere speculation on the issue of medical causation. ***See Grossman v. Barke***, 868 A.2d 561, 567 (Pa. Super. 2005).

As stated above, there was no cause of action filed against Dr. Rosato for failing to secure informed consent from Mrs. Pomroy, nor is there any

cause of action that Dr. Rosato performed the surgery in a negligent manner. In his brief to this court, Mr. Pomroy phrases the issue of Dr. Rosato's breach of the standard of care as follows: that Dr. Rosato deviated from an accepted standard of care by not insisting that Mrs. Pomroy undergo the saline colonoscopy, and that when she refused, he should have rejected her request to have the polyp removed surgically.

Appellees had to prove "but for" Dr. Rosato's failure to insist upon the saline method endoscopically, that Mrs. Pomroy would have rejected the surgical option, and rather would have elected the colonoscopic method. After careful review of the record, we agree with Dr. Rosato's position that no evidence was offered to prove that Mrs. Pomroy would have changed her mind and pursued saline endoscopy if Dr. Rosato had refused to provide her with the surgical removal option.

Testimony at trial indicated that Mrs. Pomroy feared colon perforation, a risk that exists as a consequence of the saline endoscopy treatment. ***See*** N.T., Trial, 2/21/12, at 30-31. This risk was acknowledged by all experts at the time of trial. She also knew of the risks associated with the surgical removal of the polyp. There is no cause of action or allegation that she was not properly advised of the risks of both procedures and that she did not give informed consent. After having been advised of the risks independently associated with both of her treatment options and, knowing those risks, Mrs. Pomroy elected to have the surgery. ***See id.***, at 32. Furthermore, she

preferred the surgical method in order to avoid having to undergo emergency surgery should she have elected to choose the colonoscopic method. ***See id***. Appellees correctly summarize the conclusion of Mrs. Pomroy's meeting with Dr. Rosato:

> Mrs. Pomroy repeated she was frightened by the risk of perforation because the polyp was too large for the saline procedure. She agreed to surgery. . . .

Appellees' Brief, at 28 (citations omitted).

There was no evidence whatsoever that Mrs. Pomroy would have ever chosen the saline endoscopy method over the surgical method. The evidence from the Appellees' case-in-chief demonstrated that she was resolute in her fear of a perforation and her acceptance of Dr. Fanelli's advice. Thus, the jury was left to speculate as to whether Mrs. Pomroy would have allowed Dr. Rosato, or any another doctor, to pursue the saline endoscopy option, if Dr. Rosato had refused to perform the surgery. As a result, we conclude that the record cannot support the jury's verdict on medical causation.

We conclude that the record is deficient in another important aspect. Our review leads to the conclusion that Appellees failed to establish a valid standard of care for a medical malpractice claim. "A breach of a legal duty is a condition precedent to a finding of negligence . . . ." ***Shaw v. Kirschbaum***, 653 A.2d 12, 15 (Pa. Super. 1994). The legal duty imposed under the doctrine of informed consent must be carefully distinguished from that imposed under the doctrine of medical malpractice. ***See Montgomery***

v. Bazaz-Sehgal, 798 A.2d 742, 748-749 (Pa. 2002). The doctrine of informed consent requires physicians to provide patients with "material information necessary to determine whether to proceed with the surgical or operative procedure to remain in the present condition." ***Sinclair by Sinclair v. Block***, 633 A.2d 1137, 1140 (Pa. 1993). The physician must give the patient:

> [a] true understanding of the nature of the operation to be performed, the seriousness of it, the organs of the body involved, the disease or incapacity sought to be cured, and the possible results. Thus, a physician must advise the patient of those material facts, risks, complications and alternatives to surgery that a reasonable person in the patient's situation would consider significant in deciding whether to have the operation.

Montgomery, 798 A.2d at 748 (citations and internal quotation marks omitted). "Lack of informed consent is the legal equivalent to no consent[.]" ***Gouse v. Cassel***, 615 A.2d 331, 334 (Pa. 1992). Thus, a claim that a physician failed to obtain the patient's informed consent sounds in battery, not negligence. ***See Montgomery***, 798 A.2d at 748-749. There is no cause of action in Pennsylvania for negligent failure to gain informed consent. ***See Kelly v. Methodist Hospital***, 664 A.2d 148, 150 (Pa. Super. 1995).

The crux of the issue before us is the standard of care required of Dr. Rosato as established at trial. More specifically, what was Dr. Rosato required to do with respect to the alternative treatment method, the saline endoscopy. During trial, Appellees' expert, Michael Drew, M.D., testified to the applicable standard of care:

> [Pomroy's Counsel]: Doctor, could you please tell the jury what the standard of care would be for a general surgeon in determining how to remove a non-cancerous polyp in an individual such as Mrs. Pomroy who had medical history that we just discussed?
>
> . . .
>
> [Dr. Drew]: The standard of care—Dr. Rosato, his advice, his opinion was that the best procedure was the saline method endoscopically. The standard of care, in my opinion, is that [the saline method endoscopically] should have been what he offered Ms. Pomroy.

N.T., Trial, 2/20/13, at 130-31. Dr. Drew later testified, "so in my opinion, by failing to pursue the saline option, he deviated from accepted standards of care." ***Id***., at 132. Still later in his testimony, Dr. Drew summarized his opinion as follows:

> He [Dr. Rosato] knew that it was not the right procedure. He knew it. He told her that it wasn't the right procedure. He told her he should not have done the surgery. That's my only opinion. He had absolutely – she has every right to say what she wants to do. He has every right to say, "You know what? I don't agree with that, I'd like you to see another doctor, have another surgeon do this." We don't have to do something we don't believe is correct; that's my only point.

Id., at 178-179. This is yet a third standard of care put forth by Dr. Drew, that Dr. Rosato, despite having gained Mrs. Pomroy's informed consent, should have rejected her choice for the surgery.

Initially, we highlight the incongruous phrasing between Dr. Drew's statement of the standard of care and his descriptions of Dr. Rosato's alleged breach of the standard of care. In stating the standard of care, Dr. Drew opined that Dr. Rosato was required to offer saline endoscopy as a

treatment alternative. As noted above, however, this standard of care is properly addressed in a claim for battery due to lack of informed consent, which was not pled in this case. What is more, this is the only explicitly stated standard of care offered by Dr. Drew. All other possible standards of care require drawing inferences from Dr. Drew's testimony on the manner in which he believed Dr. Rosato breached the standard of care.

Perhaps Dr. Drew became aware of the dangerous legal waters his standard of care testimony was sailing into, as the implicit standard of care at issue morphed each time he opined on how Dr. Rosato breached it. After Dr. Drew had explained that the standard of care required Dr. Rosato to "offer" the saline option, when first questioned about *how* Dr. Rosato breached the standard of care, Dr. Drew opined that Dr. Rosato had failed to "pursue" the saline option. In essence, this standard of care required Dr. Rosato to perform the saline endoscopy over the surgical removal.[7] Thus, this implicit standard of care is legally distinct from that which Dr. Drew explicitly offered earlier in his testimony. In contrast to the explicit standard of care discussed above, this standard of care sounds in negligence, not battery.

Finally, upon being questioned about whether Mrs. Pomroy had the option of choosing any of the treatment methods, Dr. Drew offered yet

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[7] We note that this version of the standard of care most closely aligns with that set forth in Dr. Drew's written expert report dated July 5, 2011.

another iteration of the alleged breach: Dr. Rosato breached the standard of care by not refusing to perform the surgical removal. This statement is equivalent to a statement that Dr. Rosato was required to reject Mrs. Pomroy's request to have surgery and only perform the saline endoscopy option. The only significant addition provided by this version of the standard of care is that if Mrs. Pomroy refused the saline endoscopy option despite all advice, Dr. Rosato was required to simply refuse treating her at all.

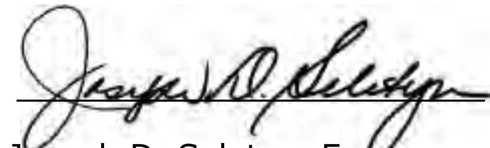
We conclude, however, that these versions of the standard of care are untenable. Dr. Drew testified that polyps such as Mrs. Pomroy's should be removed, because there is no guarantee that even a currently benign polyp will not metastasize in the future. ***See*** N.T., Trial, 2/20/13, at 165-166. Accordingly, Dr. Drew's implicitly proffered standard of care in these circumstances would leave a treating physician in a no-win situation. The physician could refuse to treat the patient according to the patient's wishes, leaving that patient at an increased risk of developing cancer, but apparently insulating the physician from malpractice claims. In the alternative, the physician could treat the patient according to the patient's expressed preferences following an informed consent, but then be exposed to malpractice claims even though there are no criticisms of the surgery itself. We decline to create such a trap for medical professionals, and we find no precedent in Pennsylvania law to support this standard.

Pomroy contends that there was a triable issue over whether Dr. Rosato properly discussed saline endoscopy with Mrs. Pomroy and advised her appropriately. However, this argument fails for the same reason. If the jury found that Dr. Rosato did not properly advise Mrs. Pomroy on the issue of saline endoscopy, such a finding would be relevant only to a battery claim, not a professional negligence claim. As we have said numerous times, there was no cause of action for lack of informed consent in this case.

As we conclude that the record cannot support the verdict on either liability or causation, Appellants' claims on appeal merit relief. We therefore reverse the trial court. The remaining issues are moot.

Judgment reversed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/19/2014

EXHIBIT B

Filed 01/29/2015

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

GEORGE POMROY, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARIANN POMROY DECEASED v. HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA AND ANTHONY G. ROSATO, EXECUTOR OF THE ESTATE OF ERNEST F. ROSATO, M.D., DEACEASED Appellant	No. 2043 EDA 2013

ORDER

IT IS HEREBY ORDERED:

THAT the application filed December 3, 2014, requesting reargument of the decision dated November 19, 2014, is DENIED.

PER CURIAM

EXHIBIT C

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL SECTION

GEORGE POMROY, individually and as Executor of the Estate of MARIANN POMROY Deceased,	:	**NOVEMBER TERM, 2009**
Plaintiff	:	**No. 4756**
v.	:	
HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA and ANTHONY G. ROSATO, Executor of the Estate of ERNEST F. ROSATO, M.D., Deceased,	:	**1925b OPINION**
Defendants	:	

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OPINION

Colins, J. **December, 2013**

On February 25, 2013, a jury rendered a verdict against defendants and awarded plaintiff $19.5 million on his actions for wrongful death and survival arising out of claims of medical malpractice in connection with his wife's abdominal surgery and death. Defendants filed a timely a motion for post-trial relief that this court denied on June 13, 2013. Defendants appeal.

ISSUES RAISED ON APPEAL

Defendants contend that they are entitled to judgment notwithstanding the verdict or, in the alternative, remittitur, or a new trial because:

> A) The plaintiff's expert failed to articulate an objective duty of care that the defendants breached when testifying that the defendant's duty was to "suggest," "pursue" or "do more" to persuade his patient to opt for a less risky surgical procedure, or to refuse to perform the procedure she preferred.

Pomroy Etal Vs Hospital Of The University Of-OPFLD

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B) The verdict of $10.5 million on plaintiff's wrongful death claim was against the weight of the evidence because he presented no evidence of a pecuniary loss of family, household or other services, and the verdict of $9 million on the survival action was unsupported by sufficient evidence of pain and suffering during the 20 months she lived post-surgery and, in any event, and was grossly excessive, conscience-shocking and based on sympathy, grief or punishment;

C) The jury disregarded evidence that entitled defendant to an absolute defense under the "two schools of thought" doctrine where there was evidence that either of two procedures were appropriate.

D) The court improperly allowed plaintiff's expert to introduce statistical evidence that did not fall within the fair scope of his report and to opine about colonoscopies even though he was not an expert in colonoscopic or endoscopic procedures.

BACKGROUND

Plaintiff George Pomroy (Pomroy) brought claims under the *Survival Act*, 42 Pa.C.S. § 8302, and the *Wrongful Death Act*, 42 Pa.C.S. § 8301(b). Plaintiff Pomroy, widower of Mariann Pomroy (Mrs. Pomroy) and executor of her estate, claims that Mrs. Pomroy died on August 12, 2010, as a result of the negligence of Ernest Rosato, M.D. (Dr. Rosato), a general surgeon who operated on her on October 22, 2008, at the Hospital of the University of Pennsylvania (HUP) to remove a benign polyp in her colon. Defendant Anthony Rosato represented the estate of Dr. Rosato.[1] The case was tried before a jury in this court between February 20 and February 25, 2013. The jury rendered a verdict in favor of the plaintiff in the amount of $9 million in the survival action and $10.5 million in the wrongful death action.

Plaintiff's evidence consisted of his own testimony (N.T., 02.21.2013, at 5 *et seq.*) and that of his expert, Michael Drew, M.D. (N.T., 02.20.2013, at 61, *et se.q.*), a general surgeon. Testifying on behalf of the defendant were John E. Meilahn, M.D. (N.T., 02.22.2013, at 7, *et seq.*), also a general surgeon, and Jeffrey Adam Drebin, M.D. Dr. Drebin testified by videotape and from the

[1] Although Dr. Rosato's estate is represented by Anthony Rosato, the court in this opinion will refer to Dr. Rosato as the defendant.

stand. Transcript of the 02.14.2011 Video Deposition of Adam Drebin, M.D. (Drebin Dep.); N.T., 02.22.2013, at 93, *et seq.*) Decedent Dr. Rosato testified by videotape played to the jury on the second day of trial. Transcript of the 09/23/10 Video Deposition of Dr. Ernest F. Rosato (Rosato Dep.). The plaintiff also presented, without objection, a day-in-the-life video depicting Mrs. Pomroy's life at home with her husband after she was discharged from the hospital. N.T., 02.21.2013, at 78-82.

Mariann Pomroy was 55 years old when she presented to Dr. Rosato on Oct. 14, 2008, with a benign polyp in her colon. N.T., 02.20.2013, at 89-97, 99, 109, 140 (Drew). She was referred to Dr. Rosato by Dr. Andrew Fanelli who had found the polyp by means a colonoscopy. *Id.* at 103, 109. On October 22, 2008, Mariann Pomroy was admitted to HUP to have the mass removed from her right colon by open surgery. *Id.* at 111-12, 153-54. Due to extensive pre-existing adhesions in her bowel the surgery was difficult, resulting in removal of 30 centimeters (34 ½ inches) of ilium and loss of blood. *Id.* at 89, 134-38; Rosato Dep. at 75. Post-surgery complications included further loss of an unusual amount of blood, acute pain, and sepsis or infection. N.T., 02.20.2013, at 141-45. She suffered altered mental status, tachycardia, low urine output (indicating acute renal failure), pain levels ranging from 8 out of 10, lung collapse, and low blood oxygen. *Id.* at 142-44. Her heart rate was elevated and her blood pressure was high. *Id.* Her abdomen became distended. Abscess fluid extracted from her abdomen was feculent; a drain was inserted. *Id.* at 146-47.

On November 2, 2008, Jeffery A. Drebin, M.D., performed a second operation because her condition had deteriorated; she had suffered ventilator-dependent respiratory failure and had lost up to 20% of her blood. N.T., 02.20.2013 (Drew), at 151; Drebin Dep. at 3. The purpose of this surgery was to address intra-abdominal sepsis and gastrointestinal bleeding. N.T., 02.20.2013, at

45-46. Dr. Drebin sealed her abdominal cavity with a surgical mesh which was removed on December 8, 2008, when the symptoms of edema and swelling of her bowel had eased and the abdomen could be closed. *Id.* at 12-16, 151-52 (Drew); N.T., 02.21.2013, at 44-45, 49 (Pomroy); Rosato Dep. at 171-72. She received a tracheotomy for breathing, an ileostomy (with a colostomy bag), and a feeding tube in her stomach. N.T., 02.20.2013, at 151, 153-54 (Drew). Her chronic kidney disease progressed to acute (end stage) renal failure necessitating dialysis. *Id.* at 155-57. She was put on a ventilator. *Id.* at 44. Her abdominal infection had spread to her heart. She had a rectovaginal fistula and developed a urinary tract infection. *Id.* at 157. On March 26, 2009, she was transferred to a long-term care facility, but returned to the hospital on April 6, 2009, because of continued bleeding from her stomach; she remained there for another six months. *Id.* at 155-56, 159-60. Mrs. Pomroy was hospitalized for a total of 305 days. *Id.* at 146-58. She was on a ventilator for ten months and on oxygen when she returned home. N.T., 02.21.2013, at 46 (Pomroy).

Dr. Drew was offered and accepted without objection as plaintiff's expert "in general surgery and the care and treatment of the polyp lesions in the gastrointestinal tract." N.T., 02.20.2013, at 61-72. He explained that there are two ways to remove a polyp.[2] The first is endoscopic removal through colonoscopy which, according to Dr. Drew, is minimally invasive and is the least risky method because it does not require opening the abdominal wall; he said that "you would not do an open procedure for a benign polyp." *Id.* at 117-18, 120, 133, 184-85. The second is open surgery (opening the abdominal wall), which is the surgery that Dr. Rosato performed.

[2] Dr. Drew also identified a third method of polyp removal – laparoscopy -- which he said is not advised where, as in Mrs. Pomroy's case, the patient has pre-existing legions or hypertension. N.T., 02.20.2013, at 122-24, 126 (Drew); N.T., 02.22.2013, at 35 (Meilahn) Neither party proposed that Mrs. Pomroy was a candidate for laparoscopy.

Open surgery, Dr. Drew explained, poses a greater risk of leak, bleeding, infection and further surgery. *Id.* at 123-24, 146. Endoscopic surgery was indicated for Mrs. Pomroy because: (a) the polyp that Dr. Fanelli found with not unusually large and was benign; and (b) as Dr. Rosato knew from her medical records, Mrs. Pomroy had had prior abdominal surgeries resulting in adhesions (scarring tissue that binds together parts of the intestines) that make "any future abdominal surgery a much greater risk." *Id.* at 92-93, 100, 110-12, 116, 123-24 (Drew).

Regarding the question whether Dr. Rosato's actions fell below the standard of care, Dr. Drew said that open surgery was not appropriate for Mrs. Pomroy. *Id.* at 174. Specifically, he said:

> " . . . my opinion is that he did not meet the standard of care. He knew what the procedure entailed. He knew that the risks [of the endoscopic saline method] were minimal. He knew that the risks of an open surgery were by his own numbers two percent. So he knows that what he was offering was, in fact, riskier than what Ms. Pomroy was afraid of. So in my opinion, by failing to pursue the saline option, he deviated from accepted standards of care. . . . If a patient is not willing to take our best advice, then we have the option of not doing anything and asking him or her to get another opinion or going elsewhere. There's no reason that because a patient refuses a procedure that you have to do the other option when they are not equal."

N.T., 02.20.2013, at 132.

> They [open surgery and endoscopy] were not equal risks and they were – you would not do an open procedure for a benign polyp."

Id. at 133.

Dr. Drew also offered his opinion that the complications that Mrs. Pomroy suffered during her 305 days hospitalization were caused by Dr. Rosato's negligence in choosing to perform open surgery. *Id.* at 87-89, 137-38, 156-158. Finally, he opined that as a result of Dr. Rosato's negligence, Mrs. Pomroy's life was "substantially shortened." *Id.* at 161.

The court overruled the defendant's objection to Dr. Drew's testimony on the probability of complications. Dr. Drew said that colonoscopy endoscopic removal presents a 1% percent risk of injury.[3] N.T., 02.20.2013, at 120. On the other hand, he said, that the risk of perforation in endoscopic surgery is four times less than that in open surgery. *Id.* at 120-21. Further, the risk of leaks in open surgery resulting from the presence of adhesions from prior surgeries (the parties agreed that Mrs. Pomroy had pre-existing adhesions) is double the risk in endoscopic surgery in which the presence of adhesions has a negligible effect. *Id.* Dr. Rosato and defendant's expert, Dr. Meilahn both also testified about the risk of removing a polyp by endoscopy. Pages 26-28, transcript of the 09/23/10 Video Deposition of Dr. Ernest F. Rosato (Rosato Dep.); N.T., 02.21.2013, 25-26, 29-34, 74-78 (Meilahn).

Defendant's expert, Johnny Meilahn, M.D., said that Mrs. Pomroy's case presented two options: endoscopic removal and open surgery. N.T., 02.22.2013, at 26-27. He said that Dr. Rosato told Mrs. Pomroy about the endoscopic procedure and offered to be present at surgery that could be performed by a colleague specializing in that method. *Id.* at 26-27, 29. He also opined that even though Dr. Rosato himself believed that the endoscopic method was preferable, the doctor was obliged to accede to his patient's preference for the open surgery that he ultimately performed. *Id.* at 38. It was Dr. Meilahn's opinion that the open surgery and endoscopic procedure were equally acceptable options and that Dr. Rosato's refusal to perform the open surgery that Mrs. Pomroy preferred would have amounted to an improper "abandonment of care." *Id.*

The evidence regarding discussions between the Pomroys and Dr. Rosato about the endoscopic method is conflicting. Dr. Rosato, who said that he believed the risk of perforation in

[3] Dr. Drew obtained this figure from the writings of Dr. Ginsburg, the gastroenterologist that Dr. Rosato said in his deposition he recommended to Mrs. Pomroy. N.T., 02.20.13, at 120.

the endoscopic method was "minimal," testified that he recommended endoscopy to Mrs. Pomroy and told her that she should consult with Dr. Ginsburg, a colleague and expert in endoscopy. Rosato Dep. at pgs. 26, 27-28, 45, 54. Mr. Pomroy, who was present at all meetings with Dr. Rosato, said that when he told Dr. Rosato that Dr. Fanelli had said that the polyp was too big to be removed endoscopically, Dr. Rosato "kind of agreed." N.T., 02.21.2013, 27-30, 32, 77 (Pomroy). He denied that Dr. Rosato recommended endoscopy to Mrs. Pomroy. *Id.* at 28, 31-32, 77. On this subject, the record includes a letter from Dr. Rosato to Dr. Fanelli about Dr. Fanelli's own endoscopy discussion with the Pomroys, but is silent about any discussion that Dr. Rosato may have had with them. *Id.* In their closings, counsel for both parties argued that Dr. Rosato's letter supported their respective positions. Dr. Rosato claimed that letter to Dr. Fanelli refers to his own endoscopy discussion with the Pomroys. The plaintiff argued, however, that the letter alludes only to Dr. Fanelli's discussion with the Pomroys. The fact that the medical record does not mention the matter and the fact that Mr. Pomroy denied that the discussion occurred, plaintiff said, only reinforces the conclusion that Dr. Rosato never actually discussed endoscopy with the Pomroys. N.T., 02.20.2013, at 108-09 (Drew).

The Pomroys were married in 1971 just after Mrs. Pomroy's 18th birthday. N.T., 02.21.2013, at 7 (Pomroy). Together they raised two children; their son works with Mr. Pomroy in his auto repair business. *Id.* at 8-9. There are four grandchildren. *Id.* The Pomroys lived quiet lives, staying home during the week and on weekends they would go their vacation trailer in Maryland; a couple of times a year, they visited Florida. *Id.* at 23. Mrs. Pomroy enjoyed cooking and reading. *Id.* Prior to 2008, Mrs. Pomroy had experienced several abdominal surgeries and one back surgery. *Id.* at 9-18, 21. After these surgeries, back pain was the only persistent problem. *Id.*

at 24. Sometime in 2004 or 2005 blood tests showed increased creatinine levels implicating kidney problems, but she was asymptomatic and had been instructed only to watch her diet. *Id.* at 17. Despite Mrs. Pomroy's prior medical procedures, she was medically stable when Dr. Rosato operated in October of 2008. N.T., 02.20.2013, at 100-01, 161-62, (Drew); N.T., 02.21.2013, at 22-24 (Pomroy); Rosato Dep. at 27-28.

When she developed the abdominal infection a tube inserted in her belly to drain "red puffy stuff" into a bag; she seemed disoriented. *Id.* at 40. Mr. Pomroy received an unexpected call saying that his wife had been put on a ventilator and would have to have surgery again. *Id.* After Mrs. Pomroy's second surgery in November, Mr. Pomroy was informed that her entire body was infected, that the surgeon could not close the incision, and that "it was going to be touch and go for a long time." *Id.* at 45.

Mrs. Pomroy was on the ventilator for ten months. *Id.* at 46. She had a drain in her abdomen and a feeding tube in her nose that had to be secured so that she would not pull it out. *Id.* at 51-52. Her colostomy bag, which she had until June of 2009, leaked because the affected skin was beginning to die; Mr. Pomroy said that until surgery in June of 2009 to reconnect her bowel, she had no control of her bowel material and suffered great embarrassment. *Id.* at 55-56, 69. "It was running out, it was horrible." *Id.* at 56. When they removed the colostomy bag, she had "[n]o control whatsoever." *Id.* at. 69. Her mental status was poor and she was often confused. *Id.* at 41-42.

It took from late December to early January before she "started to wake up and she could understand what I was saying." *Id.* at 48. She did not start to "make sense" or "become herself"

until about May of 2009 and was not always conscious. N.T., 02.21.2013, at 47, 73-74 (Pomroy). In March or April Mrs. Pomroy was fully conscious but could communicate only with difficulty because she had a tracheotomy in her throat. *Id.* at 60, 73. She had to be restrained. *Id.* at 68. The tracheotomy tube was not removed until just before her discharge in August of 2009; it left a hole in her throat that would not close. *Id.* at 60, 69-70. During this time, she also experienced delusions, including a belief that she had been raped. *Id.* at 63-65. Some time before her discharge, Mr. Pomroy and his daughter watched while Mrs. Pomroy suffered seizures; ultimately, she had a stroke. N.T., 02.21.2013, at 72. During her hospitalization she weight dropped from about 148 pounds to as low as 78; she was 90 pounds upon discharge. *Id.* at 54-55.

Mr. Pomroy visited Mrs. Pomroy every day during the 305 days she was hospitalized, driving 60 miles round trip. N.T., 02.21.2013, at 49 (Pomroy). When Mrs. Pomroy finally returned to her homr in August of 2009, she was confined to the first floor of her house, where she slept in a hospital bed, and could move about only with a walker. N.T., 02.21.2013, at 75. From the time of her discharge until her death – approximately a year – she received dialysis three times a week. *Id.* at 75-79; N.T., 02.20.2013, at 154-55 (Drew). Mr. Pomroy estimated that Mrs. Pomroy spent about six months of her final year in additional hospital visits ranging from a few days to a month long. *Id.* at 76.

DISCUSSION

Dr. Rosato claims that this court's errors warranted granting his motion for judgment notwithstanding the verdict (JNOV). First, he says that the plaintiff's expert failed to articulate an objective duty of care for the jury's consideration and, therefore, could not state

how that duty was breached. Second, he says that neither the evidence nor the law supports the large verdict. Third, he contends that the jury must have disregarded a clear instruction on the "two schools of thought doctrine" because it failed to apply it as an absolute bar to plaintiff's claims. Finally, he challenges this court's evidentiary rulings allowing plaintiff's expert to offer his opinion about the relative risks of the two surgical procedures in dispute.

JNOV can be entered after viewing the evidence in the light most favorable to the verdict winner upon two bases only: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) where the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. *Scampone v. Grane Healthcare Co.*, 11 A.3d 967, 978-79 (Pa. Super. Ct. 2010), *aff'd in part on other grounds sub nom. Scampone v. Highland Park Care Ctr., LLC*, 57 A.3d 582 (Pa. 2012). If there is sufficient competent evidence to sustain the verdict, JNOV is inappropriate. *Birth Center v. St. Paul Companies, Inc.*, 567 Pa. 386, 787 A.2d 376, 383 (2001). "Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact. If any basis exists upon which the jury could have properly made its award, then we must affirm.... A JNOV should be entered only in a clear case." *Scampone, supra. at* 978-79. For the reasons set for the below, the court finds that Dr. Rosato has failed to meet his burden to show that this was a "clear case" warranting setting aside the verdict and urges that judgment be affirmed.

A. ***Standard of Care and Causation***

Dr. Rosato complains that testimony of the plaintiff's expert that the defendant was obligated to "suggest," "pursue" or "do more" to persuade his patient to opt for a less risky surgical

procedure is vague and does not state a cognizable duty of care. Dr. Rosato challenges Dr. Drew's opinion that only endoscopic surgery was indicated for Mrs. Pomroy and that performing open surgery was medically negligent. Dr. Rosato says that this standard is ambiguous and incapable of application. In any event, says Dr. Rosato, he *did* recommend the endoscopic procedure to Mrs. Pomroy, but he had no choice but to accede to her wish to have open surgery because refusal to perform that procedure would have been an "abandonment" of a patient, a contention that Drew testified has limits when the procedures are not equivalent. N.T., 02.20.2013, at 130-34 (Drew).

What Dr. Rosato and the Pomroys said to each other in their meeting on October 14 or whether he affirmatively recommended the endoscopic procedure were fact questions subject to credibility determinations exclusively within the province of the jury. *Lykes v. Yates*, 77 A.3d 27, 31 (Pa. Super. 2013 (stating credibility determinations, including those related to expert testimony, are exclusively for the jury). The only question for the court is whether Dr. Drew offered a standard of care by which the jury could evaluate the facts in light of the law that the court gave in its instructions. That standard, while couched in various iterations in Dr. Drew's testimony, was the express, unambiguous statement that open surgery was not appropriate for the removal of a benign polyp, especially where the patients' prior surgeries likely produced lesions that complicate open surgery, and that performing open surgery on someone in Mrs. Pomroy's circumstances was a breach of that standard. N.T., 02.20.2013, at 29-30 (Drew). The jury was charged with determining whether the standard as articulated by Dr. Drew was the "generally accepted standard" of medical practice and whether a reasonable professional in Dr. Rosato's position would have told Mrs. Pomroy that open surgery not indicated and would have refused to perform the procedure. *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 254 A.2d 1140, 1145 (Pa. 2003) (stating jury must hear

expert testimony concerning the applicable standard of care). The views of the respective experts were distinct and presented the jury with a clear choice. It acted properly within its domain to accept Dr. Drew's opinion and to reject Dr. Meilahn's view that Dr. Rosato had no professional choice but to perform the surgery that Mrs. Pomroy wanted. Defendant cites no authority for the proposition that this court should have rejected the jury's finding on that issue.

The jury's finding on causation similarly is supported by the evidence of record. The jury heard Dr. Drew's opinion that Mrs. Pomroy's complications were the very risks that are expected with open surgery on someone with extensive adhesions and whose renal insufficiency would impair healing. *Id.* at 120-26. They heard his opinion, buttressed by Dr. Rosato's own testimony, that the risk of perforation in endoscopic surgery is negligible. They heard Mr. Pomroy's testimony that the couple really did not know of the comparative risks associated with open surgery and endoscopy and that had they known, Mrs. Pomroy would have made a different decision. From this evidence, it was entirely within the jury's province to conclude that Dr. Rosato should not have performed open surgery on Mrs. Pomroy and that if he had not done so, she would not have suffered the injuries that attended the operation. It does not matter whether or not this court or another jury would have reached a different conclusion. It matters only that the jury was properly instructed on the law and that the evidence was sufficient to enable them to apply that law to the facts.

Dr. Rosato's weight-of-the evidence argument is barely developed and muddy. Pages 18-20, *Brief of Defendants Hospital of the University of Pennsylvania and Anthony G. Rosato, Executor for the Estate of Ernest F. Rosato, M.D., in Support of their Motion for Post-Trial Relief (Defendants' Brief).* Without explaining why, the defendant contends that this court should have

accepted his expert's rendering of the applicable standard of care and, in turn, should have found that the plaintiff failed to make a case. He says that "Dr. Meilhan's testimony [that the surgical procedures are equivalent, that Mrs. Pomroy had a choice, and that Dr. Rosato was bound by that choice] provides additional support for Defendants' contention that the Plaintiff failed to prove negligence in this case." *Id.* at 19. This circular argument is premised on two assumptions that, as discussed, the court did not accept, namely (a) that the plaintiff's expert did not articulate a standard of care and (b) that the defendant successfully showed that he was protected from liability by application of the two schools of thought doctrine.[4] The court rejected these assumptions and found that having heard the opposing views of both experts, it properly gave the negligence question to the jury. Accordingly, defendant's weight-of-the-evidence claim has no basis.

B. The size of the verdict.

Dr. Rosato argues that the verdict of $9 million on the survival action was unsupported by sufficient evidence of pain and suffering during the 20 months she lived post-surgery and, in any event, and was grossly excessive, conscience-shocking and based on sympathy, grief or punishment. Dr. Rosato argues further that the verdict of $10.5 million on plaintiff's wrongful death claim was against the weight of the evidence because Mr. Pomroy did not show that he suffered pecuniary loss of family, household or other services

The decision to grant or deny a new trial or remittitur on the grounds that the verdict is excessive rests in the sound discretion of the court. *Rettger v. UPMC Shadyside*, 991 A.2d 915, 932 (Pa. Super. 2010), *allocator denied*, 698 a.3d 491 (2011); *Whitaker v. Frankford Hosp. of the City of Philadelphia*, 984 A.2d 512, 523-24 (Pa. Super. 2009). The trial court

[4] *See also* Section C, below.

generally will not disturb even a large verdict unless it is "so grossly excessive as to shock [the] conscience." *Id.* Necessarily, determinations about the propriety of damages for pain and suffering are fact specific and cannot be reduced to formulae. *Renna v. Schadt*, 64 A.3d 658, 670 (Pa. Super. Ct. 2013); *Whitaker, supra.* (observing that "[e]ach 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 a verdict is excessive").

Damages in a survival action are those that the decedent would had sought on her own behalf had she not died. 42 Pa. C.S.A. § 8302. The decedent's non-economic losses include pain and suffering, embarrassment and humiliation, loss of enjoyment of life and disfigurement. Rule 223.3, Pa. R. C. P. A jury's deliberations take into consideration (1) the age of the plaintiff; (2) the severity of the injuries; (3) whether the injuries are temporary or permanent; (4) the extent to which the injuries affect the ability of the plaintiff to perform basic activities of daily living; (5) the duration and nature of the medical treatment; (6) the duration and extent of the physical pain and mental anguish; (7) the health and physical condition of the plaintiff prior to the injuries; and (8) in case of disfigurement, the nature of the disfigurement and the consequences for the plaintiff. *Id.*

This court cannot say on the facts of this case that the verdict in the survival action was unsupported by evidence of pain and suffering or that it shocks the conscience. Mrs. Pomroy was in her mid-50's when she presented to Dr. Rosato for removal of a benign polyp. Although she had certain pre-existing conditions, she was asymptomatic and medically stable when she was admitted to the hospital. She expected to be discharged within a week of the surgery but ended up spending a staggering 305 days in the hospital. The surgery was dramatically more complicated than anticipated and resulted in a substantial loss of blood and the removal of more than 34 inches of her

bowel. Almost immediately she began to have post-surgery complications that included systemic infection, loss of blood, acute pain, confusion and change in mental status; a drain was inserted in her abdomen to siphon of leakage of intestinal contents, including feces. She could not be discharged and, ultimately, she underwent another operation on November 2, 2008, because of the post-October surgery developments. In that second operation she was fitted with an ileostomy bag that remained in place for eight months. When that bag was removed on June 22, 2009, after her intestine was reconnected, she suffered incontinence of bowel and severe and embarrassing diarrhea. All her nutrition came through a stomach tube.

After the November operation, her abdomen was so swollen that the surgeon left the surgical wound open, covering it with mesh; closing this wound necessitated a third surgery on December 8, 2009, a month later. She was put on a mechanical ventilator because her lungs collapsed. A tracheotomy made it difficult for her to communicate. A drain was placed in her chest to drain lung fluid. She suffered a recto-vaginal fistula, resulting in leakage of fecal matter into her vagina. She did not come off the ventilator until a couple of weeks prior to discharge, or about ten months later. She suffered fluctuating mental status and was at times put in restraints; she experienced delusions, agitation and anxiety. She suffered kidney failure and end stage renal disease requiring dialysis three times a week, a routine that continued until she died. She suffered seizures and stroke. She weighed 148 pounds when she entered the hospital; she weighed about 90 when discharged. Finally, as the jury could see from the plaintiff's day-in-the-life video, from the time of Mrs. Pomroy's discharge in June of 2009 until her death in August of 2010, she lived on the first floor of her house where she was confined to a hospital bed, except for the thrice-weekly, three-hour long dialysis sessions. She endured multiple re-hospitalizations. If the jury credited the

plaintiff's claim that the surgery that Dr. Rosato performed on October 22, 2008, was not necessary and caused the catastrophic consequences in the history just described, it was entitled to make its award for pain and suffering. *Krysmalski by Krysmalski v. Tarasovich,* 622 A.2d 298, 312 (Pa. Super. 1993). The verdict in the survival action is supported by the record and this court cannot say that it so outrageous as to shock the conscience.

In a wrongful death claim damages are premised on the value of the decedent's life to the family, including the value of his or her services, society and comfort. 52 Pa. C.S.A. § 8301; *Hatwood v. Hosp. of the Univ. of Pa.*, 55 A.3d 1229, 1235-36 (Pa. Super. 2012). A jury is not limited to awarding pecuniary losses. It is free to attach a monetary value to society, companionship and "profound emotional and psychological loss." *Rettger, supra.* at 933. There is no evidence that Mrs. Pomroy was anything but an important and treasured family member. Mr. Pomroy's daily visits to the hospital throughout the 305 day of her stay, particularly in light of her dismal experience the whole time she was there, is testament to how important to him she was. The day-in-the-life video conveys the Pomroys' strong bond and their mutual devotion for the year that Mr. Pomroy nursed her at home before her death. N.T., 02.21.2013, at 78-82. The record contains testimonial and visual evidence to support the jury's finding of the damages awarded for both the wrongful death and survivor's actions.

C. "__Two Schools of Thought__"

Dr. Rosato maintains that the "two schools of thought" doctrine should have been an absolute bar to liability on the facts of the case. The doctrine provides that:

> Where competent medical authority is divided, a physician will not be held responsible if in the exercise of his judgment he followed a course of treatment

> advocated by a considerable number of recognized and respected professionals in his given area of expertise.

Jones v. Chidester, 610 A.2d 964, 969 (Pa. 1992). The defendant bears the burden of presenting sufficient evidence of two schools of thought in order to present the factual question to the jury. *Id.* "It then becomes a question for the jury to determine if they believe that there are two legitimate schools of thought such that the defendant should be insulated from liability." *Id.*

Dr. Rosato does not claim that the jury was improperly instructed, nor could he because the court *granted* his request for the standard "two schools of thought" instruction even though Dr. Meilahn offered scant evidence that his proposed standard was of a school of thought "advocated by a considerable number of recognized and respected professionals in his given area of expertise." *Bonavitacola v. Cluver,* 619 A.2d 1363, 1369-70 (Pa. Super. 1993) (observing that "two schools of thought" theory must be supported by evidence of advocacy in the pertinent medical field); N.T., 02.22.2013, at 115-18. He claims, nevertheless, that the evidence so overwhelmingly favored application of the doctrine that the jury must have disregarded the instruction. There is no basis for this argument because the record contains ample evidence to support the verdict. Dr. Drew said that open surgery was contraindicated in Mrs. Pomroy's case and explained why. Dr. Meilahn said that the two procedures were equivalent, all the while conceding that Dr. Rosato himself testified that he preferred and "recommended" the less invasive procedure. Viewing the evidence in favor of the verdict winner, this court cannot find any basis for second-guessing the jury's decision to reject Dr. Meilahn's opinion as unreliable and to find that the doctrine did not apply to the facts of this case. No legal authority requires a different result. *Moure v. Raeuchle*, 604 A.1d 1003, 1007 (Pa.

92) (a verdict will be set aside only if no two reasonable minds could disagree that the evidence required a different outcome).

D. *Expert Evidence*

Dr. Rosato challenges two evidentiary decisions regarding the testimony of Dr. Drew. First, he contends that Dr. Drew, a general surgeon, was unqualified to opine about the relative risks or other matters associated with endoscopy because he was not an expert in colonoscopies or endoscopies. The plaintiff responds, and the court agrees, that the defendant waived the issue because he did not object when court qualified Dr. Drew "as an expert in general surgery and the care and treatment of polyp lesions in the gastrointestinal tract." N.T., 02.20.2013, at 71.

Matters of expert qualification rests firmly in the discretion of the court and the defendant has pointed to no abuse of that discretion or error of law that now requires that the verdict be set aside. *Rettger v. UPMC Shadyside,* 991 A.2d 915, 930 (Pa. Super. 2010) (stating that a trial court's decision to admit expert testimony will not be disturbed absent a clear abuse of discretion). Dr. Drew did not claim to be an expert in the performance of either of the disputed procedures, namely endoscopy or open surgery, nor was he asked to give his opinion on the manner in which Dr. Rosato performed the operation. He did demonstrate amply, however, that based on his training and experience he was qualified to testify about which surgical procedure was the standard for removing benign polyps. The law is quite clear: an expert need not be board-certified in the same discipline as the defendant, so long as he demonstrates to the court that he has the appropriate professional experience and education to render an opinion on the generally accepted standard of care with regard to the specific act of negligence claimed which, in this case, was whether Dr. Rosato performed the

right operation. 40 P.S. § 1303.512(c) (requiring that an expert be "substantially familiar with the applicable standard of care and practices in a subspecialty with a substantially similar standard of care for the specific care at issue); *Vicari, supra.* at 391 (stating that question whether an expert is qualified is informed by whether he or she has sufficient training and experience related to the specific care at issue). The defendant has failed to show that the court abused its discretion in qualifying Dr. Drew to testify as to the applicable standard of care for the treatment of polyps.

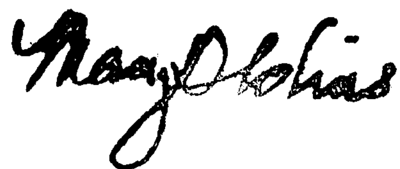
Second, Dr. Rosato claims that Dr. Drew's opinion about the relative risks of endoscopic and open surgery nevertheless should have been precluded because it fell outside the fair scope of his report in contravention of Rule 4003.5(c), Pa.R.C.P. ("the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of . . . report . . . "). Application of this rule is yet another matter vested in the sound discretion of the court. *Rettger v. UPMC Shadyside,* 991 A.2d 915, 930 (PS 10) (stating that admission of expert testimony is a matter of the trial court's discretion). In this case the court finds that the defendant's position is groundless. At the heart of plaintiff's claim is the contention that Dr. Rosato was negligent in choosing to perform a procedure that was unacceptably risky for someone in Mrs. Pomroy's circumstances. The evidence about the applicable duty of care was deeply rooted in risk analysis. Defendant's expert, Dr. Meilahn, addressed this risk in his testimony. N.T., 02.22.2013, at 29-34, 74-78 (Meilahn). More important, Dr. Rosato himself testified about relative risks. Rosato Dep., at 26-28, 33-39, 48-53, 78-79, 168. The assertion that Dr. Drew should have been precluded from testifying about what was plainly in the records he reviewed or that his testimony was a surprise or prejudicial simply rings hollow. *Schaaf v. Kaufman,* 850 A.2d 655, 667 (Pa. Super. 2003) (stating that it is not an

abuse of discretion to admit evidence arguably "outside the scope" of an expert's report if together discovery, the report and testimony affords the opponent of the opportunity to fashion a reasonable response).

CONCLUSION

First, defendant has failed to show that record contained no basis for a jury finding that the only proper surgical procedure in Mrs. Pomroy's case was endoscopy and that by performing open surgery, Dr. Rosato breached the applicable standard of care. Second, defendant cannot show that the jury erred in declining to apply the two-schools-of-thought doctrine in his favor. Third, taking into consideration all the facts and circumstances of the extent and duration of Mrs. Pomroy's injuries, this court will not find that the jury's large verdict was unlawful. Finally, defendant cannot show that the plaintiff's expertise and training did not qualify him to offer his opinion on the proper treatment option for someone in the plaintiff's experts. For these and reasons explained above, the verdict should stand.

BY THE COURT:



Colins, J.

Date: 12/06/2013

EXHIBIT D

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL SECTION

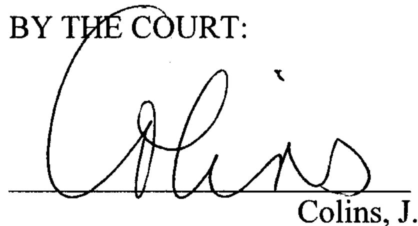
GEORGE POMROY, individually and as Executor of the Estate of MARIANN POMROY, deceased,	:	**NOVEMBER TERM, 2009**
Plaintiff	:	
v.	:	**No. 4756**
HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA and ANTHONY G. ROSATO, M.D., deceased,	:	
Defendants	:	**CONTROL NO. 13030914**

DOCKETED
JUN 12 2013
F. CLARK
DAY FORWARD

ORDER

AND NOW, this 12 day of June, 2013, upon consideration of the *motion for post-trial relief* of defendants Hospital of the University of Pennsylvania and Anthony G. Rosato, Executor of the Estate of Ernest F. Rosato, M.D., and any response thereto, it is **ORDERED** that the *motion* is **DENIED. Judgment is entered**.

BY THE COURT:



Colins, J.

Pomroy Etal Vs Hospital-ORDER

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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