In the Supreme Court of Pennsylvania

No. 91 MAL 2011

DANIEL S. and LAURA WHITE, individually and
as parents and guardians of C.W., a minor,

v.

RICHARD BEHLKE, M.D. and OB–GYN CONSULTANTS, LTD. and
COMMUNITY MEDICAL CENTER HEALTH CARE SYSTEMS
d/b/a COMMUNITY MEDICAL CENTER and/or
COMMUNITY MEDICAL CENTER.

Petition of: Richard Behlke, M.D. and OB–GYN Consultants, Ltd.

ANSWER OF PLAINTIFFS/RESPONDENTS IN OPPOSITION TO THE PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at No. 1213 MDA 2009, filed October 12, 2010, Reargument Denied December 27, 2010, Affirming the Judgment of the Court of Common Pleas of Lackawanna County, Pennsylvania, Civil Division, No. 03–CV–2663, entered June 29, 2009 (Hon. Terrence R, Nealon)

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Jeffrey M. Kornblau
Lynn Sare Kornblau
Kornblau & Kornblau, P.C.
610 Harper Avenue
Jenkintown, PA 19046–3207
(215) 576–7200

Counsel for Plaintiffs/Respondents

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I. INTRODUCTION

Defendants/petitioners Richard Behlke, M.D. and OB–GYN Consultants, Ltd. (hereinafter collectively "Dr. Behlke") seek this Court's review of the Superior Court's unanimous, unpublished, non–precedential memorandum opinion issued by a three–judge panel consisting of now–President Judge Correale F. Stevens, Judge John L. Musmanno, and President Judge Emeritus Stephen J. McEwen, Jr. The Superior Court's unpublished decision affirmed the thorough and well–reasoned Rule 1925(a) post–trial opinion that the trial judge, Terrence R. Nealon, issued in this case following a lengthy jury trial and the briefing and oral argument of post–trial motions. After Dr. Behlke filed an application for reargument en banc in the Superior Court, the Superior Court denied en banc review by means of an order which failed to indicate any dissent from any of that court's commissioned judges.

In a petition for allowance of appeal that is rife with typographical and citation errors and full of sound and fury signifying nothing, Dr. Behlke advances the desperate plea that this Court should grant review "to give this case the attention it deserves." Pet. at 11. In actuality, however, Dr. Behlke's petition for allowance of appeal only establishes that the unanimous, unpublished, non–precedential ruling that a three–judge Superior Court panel issued in this case fails to satisfy the criteria for allowance of appeal in any conceivable respect. The manner in which the three–judge Superior Court panel decided this case represents a clear rebuke of the over–the–top rhetoric, lacking any legitimate factual or legal support, that Dr. Behlke's appellate counsel have consistently employed, and

continue to employ, in this case since becoming involved in this matter at the post–trial motions stage.

Dr. Behlke's petition advances two grounds for allowance of appeal. The first ground involves the trial court's decision, in advance of jury deliberations in this case, to replace a juror who had been selected in a manner that was prejudicial to plaintiffs with an alternate juror who had been selected in a manner that was fair to all parties. The three–judge Superior Court panel's memorandum opinion correctly reaches the conclusion that "the trial court did not abuse its discretion in denying Defendants' Motion for a new trial on this basis." Exhibit B to Pet. at 6. If nothing else, Dr. Behlke's petition for allowance of appeal establishes that the juror substitution issue presented in this case is utterly unimportant and of no applicability beyond the confines of this particular case. This Court appropriately reserves the extraordinary remedy of allowance of appeal for important issues of wide–ranging applicability. The juror substitution issue that this case presents is the antithesis of an issue suitable for review on allowance of appeal.

The second and final ground on which Dr. Behlke seeks allowance of appeal involves the doctrine of increased risk of harm in a medical malpractice case. Both the trial judge, the Honorable Terrence R. Nealon, and the unanimous three–judge panel of the Superior Court, consisting of Judges Stevens and Musmanno and President Judge Emeritus McEwen, recognized that this lawsuit represents a quintessential example of an increased risk of harm case. Only by failing to view the facts in the light most favorable to plaintiffs as the verdict–winners — which is the

applicable standard of review on appeal from the denial of a motion for judgment notwithstanding the verdict — is Dr. Behlke able to contend that the increased risk of harm method of proving causation should not apply here.

If either of the two grounds asserted in Dr. Behlke's petition for allowance of appeal actually had merit, the three–judge Superior Court panel that issued the unanimous, unpublished, non–precedential memorandum opinion affirming the trial court's decision and upholding the jury's verdict would have devoted significant attention to those allegations of error in its ruling. The fact that the panel did not do so, followed by the fact that the Superior Court thereafter denied Dr. Behlke's request for reargument en banc without any noted dissent from any of the Superior Court's commissioned judges, vividly demonstrates the meritless nature of Dr. Behlke's request for allowance of appeal.

Because this case involves a unanimous, unpublished, non–precedential memorandum opinion, because the matters presented are either unimportant and of no applicability beyond the confines of this particular case (juror substitution) or commonplace and uncontroversial (increased risk of harm), and because the trial judge's lengthy and scholarly opinion unquestionably has reached the correct result on these two issues, Dr. Behlke's petition for allowance of appeal should be denied.

II. COUNTER–STATEMENT OF THE CASE

A. Facts Relevant To The Increased Risk Of Harm Doctrine

On the morning of Saturday, June 30, 2001, Laura White contacted OB–GYN Consultants, Ltd. to report that she was experiencing decreased fetal movement. R.333a–34a.[1] Everything with her pregnancy had been proceeding normally as of her last check–up just two days earlier. R.331a–32a. In response to Mrs. White's phone call, OB–GYN advised Mrs. White to go to the hospital known as Community Medical Center ("CMC") to have her condition evaluated. R.335a. Mrs. White arrived at CMC at around 2:30 p.m. on June 30th and was placed on a fetal monitor at 2:35 p.m. The fetal heart monitor strip showed that the fetus's heart rate was strong at 138, and the fetal heart rate monitor continued to show a fetal heart rate of greater than 130 until sometime after 6 p.m. that day, indicating that the fetus remained stable throughout nearly all of the first four hours that he was under defendants' care. R.228a, 253a–60a (testimony of Curtis Cetrulo, M.D.).

Either on the morning of June 30th or the preceding evening, Mrs. White began to experience a condition known as in utero fetal maternal hemorrhage. R.333a. If left untreated, that condition could be extremely harmful to the fetus, as the condition progressively deprives the fetus of the blood flow and oxygen needed to remain healthy. R.222a–24a. One of plaintiffs' medical expert witnesses, neonatologist Eileen Tyrala, M.D., testified via videotaped deposition at trial that the condition known as in utero fetal maternal hemorrhage had not existed long in

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[1] Cites herein to "R." followed by a page number refer to the Reproduced Record filed in the Superior Court.

advance of Mrs. White's report of decreased fetal movement on the morning of June 30th. R.518a–24a (testimony of Eileen Tyrala, M.D.). According to plaintiffs' maternal fetal medicine and obstetrics and gynecology expert, Curtis Cetrulo, M.D., the hemorrhage was a very slow process. R.272a–73a. Prior to and while Mrs. White was in the hospital on June 30th, the baby was compensating and receiving oxygen with a heart rate in the normal range. *Id.*

At 2:55 p.m., twenty minutes after Mrs. White's arrival at CMC, the nurse communicated to Dr. Behlke that the fetal monitoring strip showed decreased beat–to–beat variability. According to Dr. Cetrulo, this was a sign of possible fetal jeopardy that warranted an immediate C–section to remove the baby. R.226a–29a. According to Dr. Cetrulo, another appropriate course of action was the urgent, immediate performance of a biophysical profile test. R.229a. What actually happened here, however, was that an order from Dr. Behlke for a biophysical profile was not noted until 3:15 p.m. R.1462a. It was not performed as quickly as possible and, in addition, other unnecessary tests were ordered, so the results were not reported to Dr. Behlke until 4:45 p.m. R.230a–35a. The biophysical profile likewise confirmed that the baby was suffering and in potential jeopardy. R.233a–35a. With these findings, according to Dr. Cetrulo's expert testimony, it was "absolutely imperative" to get this baby out as quickly as possible via C–section. R.230a–36a.

Yet it was not until 5:05 p.m. on June 30th that Mrs. White was admitted into CMC. R.242a. Soon thereafter, at 5:15 p.m., Dr. Behlke made the horribly tragic decision to order that Mrs. White's labor be induced using the medication

pitocin, which is well–known to have the side–effect of impairing fetal oxygenation, causing the fetal heart rate to decrease. R.243a, 248a–49a.

According to Mrs. White's labor records, the administration of pitocin began at 6:19 p.m. R.1465a. Soon after pitocin administration began, Mrs. White was taken off of the fetal heart rate monitor to use the bathroom while the intravenous administration of pitocin was continuing. R.256a, 1465a. According to the time on the fetal monitor strip, Mrs. White was taken off the monitor to use the bathroom at 6:13 p.m., so the evidence showed that the pitocin administration actually occurred before 6:13 p.m. R.256a. She remained off the monitor for 14 minutes until 6:27 p.m. R.256a–60a (testimony of Dr. Cetrulo). When the fetal heart rate monitor was reattached, Cody White's heart rate was observed to have plunged into the 90's, exhibiting an ominous pattern known as "sinusoidal," demonstrating that Cody White was no longer receiving adequate blood circulation or the amount of oxygen necessary to preserve the functioning of his brain or other vital organs. R.260a–63a. Before the administration of pitocin, Cody White's heart rate had achieved homeostasis in the 130's, meaning that his brain and other vital organs were coping adequately with the available oxygen and blood supply that his circulatory system had been providing. R.525a–26a (testimony of Dr. Tyrala); *see also* R.272a (testimony of Dr. Cetrulo) (describing the fetus's heart rate as "being in the normal range" prior to administration of pitocin).

The testimony of plaintiffs' medical expert, Dr. Curtis Cetrulo, clearly and unambiguously confirms that as a result of Dr. Behlke's order to administer pitocin

to Mrs. White, Cody White's heart rate "changes dramatically, significantly for the worst and this I believe is a terminal event. This baby is dying at this point. This is a terminal bradycardia, a terminal sinusoidal pattern that indicates this baby is close to death as it can get" as a result of the administration of pitocin. R.262a–63a.[2] The administration of the medication pitocin to Mrs. White, in the words of Dr. Cetrulo, triggered a "catastrophic event" for the fetus. R.272a.

Dr. Cetrulo further testified as follows:

> I think the Pitocin caused another embarrassment to this baby's oxygen supply and the baby reacted to that by further dropping its heart rate and showing a bradycardic event as well as a sinusoidal event that indicated that this baby was being significantly deprived of oxygen.

R.264a.

Later in his testimony, Dr. Cetrulo explained to the jury that in the period immediately before the baby was delivered by C–section:

> This baby is now anoxic. There is zero oxygen being delivered to this baby during a period of time that probably represents as much as six, seven, eight minutes, maybe as much as ten minutes from the time the heart rate drops and looks like it's going out completely until the baby is born. So there is a period of time where there is complete anoxia, complete lack of oxygen of any kind being delivered.

R.269a.

Dr. Cetrulo also testified that Cody White's tragic condition at birth and continuing permanent injuries were caused in part by the severe meconium aspiration that occurred as the result of Dr. Behlke's failure to order a prompt C–

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[2] Earlier in his testimony, Dr. Cetrulo defined "bradycardia" as "a sustained heart beat below 110 for ten minutes." R.217a. He also defined "sinusoidal pattern" to mean "an ominous nonreassuring fetal heart rate pattern." R.218a.

section to remove Cody White from his mother's womb. R.221a, 265a–66a, 274a. Dr. Cetrulo testified that the meconium passed while Mrs. White was at CMC under Dr. Behlke's care. R.266a.

Dr. Cetrulo testified:

> Q. What is the cause or causes of the perinatal asphyxiation?
>
> A. It's partly due to the fetal anemia and it's partly due to the insult from the Oxytocin and Pitocin that we saw at the end of the labor. The other part of the diagnosis is a severe meconium aspiration and that's also a significant finding because again the meconium passage probably happened four hours or less from the time of delivery because of a hypoxic episode and then there was a second hypoxic episode where the baby ingested or breathed in some of that meconium into its lungs, so the meconium aspiration syndrome is a part of that whole idea that this baby was further compromised, if you will, during this labor and delivery process.

R.274a–75a.

Summarizing his opinions, Dr. Cetrulo testified that it was his opinion, to a reasonable degree of medical certainty, as to Dr. Behlke that:

- the failure to perform a prompt C–section over a period of four to four and one–half hours was a deviation from the standard of care (R.275a);
- the failure to perform a prompt C–section "increased the risk of harm and was a factual cause of Cody's brain damage and his neurological impairments" (*id.*);
- the administration of pitocin was a deviation from the standard of care (R.275a–76a);
- the administration of pitocin "definitely increased the risk and was a factual cause of the injuries to Cody, the brain damage and the neurological impairments" (R.276a);
- the meconium aspiration "increased the risk" and was a factual cause of the harm to Cody White (*id.*); and

- "if the caesarian section had been performed soon after the admission and evaluation then there would not have been any passage of meconium nor aspiration of meconium" (*id.*).

Summarizing her causation opinions, Dr. Tyrala testified that it was her opinion, to a reasonable degree of medical certainty, that:

- "with each passing minute that this baby was — remained in utero from the time she presented to the triage area of the obstetrics unit of Community Medical Center," Cody White faced an increased risk of harm (R.535a);

- the administration of pitocin "absolutely [caused] increased harm and risk to Cody" due to the resulting oxygen deprivation to his brain (R.537a–38a); and

- "Cody's condition was made worse by the lack of a performance of a timely cesarean section, because of his exposure to ongoing risk, which created a situation of ever increasing harm to him" (R.541a).

Due to the oxygen deprivation to his brain, Cody White's primary medical diagnosis is hypoxic encephalopathy, which his primary care physician defined in his testimony at trial as: "It means that for a period of time he went without oxygen to his brain." R.151a. The testimony of Dr. Paul Tomcykoski about Cody White's condition at the time of trial in November 2008, when Cody was seven years of age, continued as follows:

> Cody has spastic quadriplegic, he has tightening of his arms and legs, stiffness because of brain damage. He suffers from failure to thrive because of difficulty with eating and maintaining his weight. He has problems with gastroesophageal reflux disease, and I believe that's tied in to his brain damage and constipation as well because of both brain damage and probably immobility and because of his health problems. He's had surgery for dislocated hips and that's associated with his spacticity, so he suffers from musculoskelotal problems as well. He has cortical blindness also because of brain damage.

R.152a. Dr. Tomcykoski also testified that Cody White has some hearing impairment. *Id.*

In short, due to the oxygen deprivation that he experienced while in defendants' care on June 30, 2001, Cody White is totally blind, he cannot walk around or move from place to place without the assistance of others, he cannot feed himself or go to the bathroom without the assistance of others, and he will not be able to work in any job or earn any income as an adult. On top of that, Cody White's treating physician testified that Cody nevertheless has a normal life expectancy if he receives proper care. *See* R.175a; Ex. E to Pet. (trial court's opinion) at 57 ("Dr. Tomcykoski further opined that Cody White will live a normal life expectancy since his heart and kidney functions are normal and he has a strong immune system.").

According to the opinion that Judge Nealon issued adjudicating defendants' post–trial motions:

> Cody White suffers from hypoxic encephalopathy, spastic quadriplegia, cortical blindness, spastic torticollis causing extreme neck pain and consecutive days of sleeplessness, cerebral palsy, a seizure disorder, gastroesophageal disease and hearing impairment. He is unable to walk, talk, or eat, and even though he is 7 years old, he has the intelligence level of an infant less than 1 year of age. He has undergone multiple surgical procedures, been hospitalized extensively, and received continuous physical and occupational therapy, and requires 24 hour care for his permanent injuries.[6]
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> [6] Richard Bonfiglio, M.D. performed a medical examination of Cody White on behalf of the defense and concluded that Cody White's "brain was profoundly injured" and that he has "significant neurological problems" which make him unable to hold his head up, crawl, stand or sit independently.

Exhibit E to Pet. (trial court's opinion) at 11 (citations omitted).

Plaintiffs' life care planner, Mona Yudkoff, calculated the future cost of Cody White's health care needs as totaling $11.7 million. *Id.* at 11. Plaintiffs' economic expert, Andrew Verzilli, calculated Cody White's net loss earning capacity as ranging from $1,462,700 to $2,317,300 if he were a high school graduate and ranging from $2,196,000 to $3,508,000 if he were a college graduate. *Id.* at 11–12.

The jury, by a margin of 11–1, found that Dr. Behlke and his employer, OB–GYN Consultants, were causally negligent and apportioned 60 percent of the liability against these defendants, the appellants herein. R.1101a–02a, 1172a.[3] The jury also found that CMC was causally negligent and apportioned 40 percent of the liability against CMC. R.1172a. The jury awarded $2 million to Cody White's parents for Cody's reasonable and necessary medical expenses during his minority. *Id.* The jury awarded no damages to Cody's parents for the loss of his services. *Id.* The jury awarded $10 million in future health care costs to cover the time between when Cody reaches the age of majority and his remaining life expectancy. R.1173a. The jury awarded $3.5 million for net loss of future earning capacity. *Id.* Finally, the jury awarded $2.5 million for past pain and suffering and $2.5 million for future pain and suffering. *Id.* [4]

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[3] In one of its many errors, Dr. Behlke's petition for allowance of appeal inaccurately contends that the jury's "verdict, as rendered, was 10–2." Pet. at 13. In fact, the jury's verdict as rendered was 11–1, as the trial transcript and the trial court's Rule 1925(a) opinion both accurately reflect. R.1102a (trial transcript); Ex. E to Pet. at 12 (trial court's opinion explains that "[a] post–verdict polling of the jury indicated that 11 of the 12 jurors voted in favor of the jury's announced verdict").

[4] Although Dr. Behlke repeatedly reiterates in his petition for allowance of appeal that this case involves a large award of damages, the reason for the size of

CMC settled with plaintiffs following the announcement of the jury's verdict. *See* Ex. E to Pet. (trial court's opinion) at 12. Dr. Behlke and OB–GYN Consultants remain responsible for sixty percent of the total verdict of $20.5 million, plus delay damages and post–judgment interest.[5]

Essentially ignoring all of the above evidence proving that Dr. Behlke's malpractice increased the risk of the very sort of harm that Cody White suffered and was, additionally, a cause in fact of that harm, defendants' presentation instead focuses almost exclusively on another aspect of the testimony of plaintiffs' medical experts that has nothing to do with the plaintiffs' proof of causation.

In addition to testifying to a reasonable degree of medical certainty that Dr. Behlke's specific acts of malpractice increased the risk of harm that Cody White suffered and were a cause in fact of that harm, both Dr. Cetrulo and Dr. Tyrala also testified that it was not scientifically possible to quantify the exact proportion of the harm sustained by Cody White that resulted from Dr. Behlke's negligence and the proportion of the harm sustained by Cody White that resulted from Mrs. White's in

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the award is that this case involves a profoundly injured infant who is projected to have a normal life span during which he will need continuous, around–the–clock care for all of his needs. Although Dr. Behlke apparently endeavors to invoke the size of the damages award as a reason for added scrutiny, what is even more telling is that Dr. Behlke failed to challenge the jury's award of damages as excessive either on appeal to the Superior Court or in his petition for allowance of appeal filed in this Court. Because Dr. Behlke does not challenge and has not challenged the amount of damages as excessive, the amount of damages awarded provides no reason for any added scrutiny.

[5] Dr. Behlke is thus incorrect when he suggests in his petition for allowance of appeal that the jury found him liable for 100% of Cody White's damages. *See* Pet. at 10. In actuality, the jury found Dr. Behlke and OB–GYN Consultants liable for only 60% of those damages.

utero fetal maternal hemorrhage as it existed when Mrs. White arrived at CMC at 2:30 p.m. on June 30, 2001. *See* R.276a–78a (testimony of Dr. Cetrulo); R.538a (testimony of Dr. Tyrala).

As explained below, defendants are wrong in trying to equate an inability to assign a specific percentage of causation with an inability to prove factual causation. Rather, the testimony of plaintiffs' medical experts unambiguously established that Dr. Behlke's malpractice increased the risk of the very type of harm that Cody White suffered and, additionally, was a cause–in–fact of that harm. Further, the evidence was more than sufficient to sustain the jury verdict assigning liability against defendants for the full measure of harm to Cody White, since it was incapable of apportionment from any other causes, and defendants did not introduce any evidence to the contrary. The trial court agreed with plaintiffs, rejecting the very points that defendants are now seeking to advance in the trial court's lengthy and well–reasoned opinion denying defendants' post–trial motions. A copy of that 72–page opinion is attached as Exhibit E to the petition for allowance of appeal.

B. Facts Relevant To Juror Substitution

Jury selection in this case occurred on Monday, November 3, 2008 in the Lackawanna County, Pennsylvania courthouse. The process began in the morning and continued throughout the day, concluding in the evening several hours after the close of business. Judge Nealon was present in the courthouse during the day and

was available to resolve in person any challenges for cause that required his ruling. However, Judge Nealon had a commitment that required his presence in a neighboring county on the evening of November 3rd, and therefore Judge Nealon was no longer physically present in the courthouse when a problem with the jury selection process arose.

The pool of potential jurors called to undergo the voir dire process in this case originally consisted of more than 80 people. Each potential juror was assigned a number corresponding to the order in which his or her name appeared on the list of potential jurors that was provided to counsel. Judge Nealon's tipstaff was conducting the jury selection process.

Out of the total number of more than 80 individuals called to the courtroom, the trial court excused 47 jurors for cause. Because the juror selection process consisted of questioning the entire pool of jurors, followed by questioning each potential juror individually, followed by addressing challenges for cause, it was already late in the afternoon of November 3rd when the process of allowing the parties to exercise their peremptory strikes began.

Judge Nealon's tipstaff instructed counsel that jury pool members 1 through 61 constituted the group of jurors against whom counsel should exercise their peremptory strikes against jurors capable of serving on the main jury panel of 12 and that jurors 63 through 71 constituted the group of jurors against whom counsel should exercise their peremptory strikes against jurors capable of serving as alternates. Juror number 62 had previously been excused for cause. The goal as

understood by the trial court and the parties was to select 12 jurors for the main panel and two alternate jurors.

Defendants Dr. Behlke and the medical group to which he belonged, OB–GYN Consultants, received four peremptory strikes against the main panel. In addition, defendant Community Medical Center ("CMC") received four peremptory strikes against the main panel. Defendants thus received a total of eight peremptory strikes against the main panel. Although plaintiffs had asked to receive the same total number of strikes against the main panel as defendants received, Judge Nealon gave plaintiffs a total of six strikes against the main panel — two strikes fewer than what defendants collectively received.

With respect to potential alternate jurors, the trial court gave Dr. Behlke and CMC one peremptory strike each, and the trial court gave plaintiffs two peremptory strikes against potential alternate jurors.

The parties proceeded to exercise their peremptory strikes against both candidates to serve on the main panel and candidates to serve as alternate jurors. This process of exercising peremptory strikes took approximately one hour. During that process, plaintiffs exercised their peremptory strikes against main panel juror numbers 16, 23, 25, 26, 43, and 61 and against alternate juror numbers 63 and 64. These peremptory strikes were made known to opposing counsel and the trial court's tipstaff as they were exercised.

After the plaintiffs had completed exercising their peremptory challenges against both candidates to serve on the main panel and candidates to serve as

alternate jurors, but before the defendants had exercised their peremptory challenges against the alternate jurors, Judge Nealon's tipstaff and counsel for the parties realized for the very first time that the exercise of peremptory strikes had produced a main panel consisting of only 11 jurors instead of the necessary 12.

Judge Nealon's tipstaff placed a telephone call to Judge Nealon at 5:48 p.m. to report this problem. Trial transcript (T.T.) 11/5/08 at 69. At some later point that evening, Judge Nealon — in order to expedite the conclusion of the already lengthy jury selection process — instructed his tipstaff that the group of candidates capable of serving on the main jury should be extended by one additional person, to include juror number 63 (because juror number 62 had previously been excused for cause). T.T. 11/5/08 at 70–71, 73–74.

Juror number 63 — the juror whom Judge Nealon decided should be added into the pool from which the 12 main jurors were to be selected — was a juror against whom counsel for plaintiffs had already exercised a peremptory strike reserved for alternate juror candidates when the process of exercising peremptory strikes had originally occurred, at which time juror number 63 was identified as a potential alternate juror. Because plaintiffs had already exercised all six of their peremptory strikes against the original main jury pool consisting of jurors 1 through 61, counsel for plaintiffs had no remaining main jury strike to exercise against juror number 63 unless counsel for plaintiffs first rescinded one of the strikes that plaintiffs had exercised against another candidate for the main jury pool.

Counsel for plaintiffs raised a timely objection on the evening of November 3, 2008 to the resolution that Judge Nealon had ordered, because it would necessarily result in the main jury containing a juror whom plaintiffs had already stricken. By contrast, Judge Nealon's resolution would not cause the main jury to contain any juror whom either of the defendants had previously stricken. Plaintiffs asserted that by ensuring that the main jury would contain a juror whom plaintiffs had already stricken, plaintiffs had been prejudiced by the tipstaff's error and Judge Nealon's resolution. Defendants did not object to Judge Nealon's resolution of the error, presumably because they viewed it as beneficial for the main jury to contain a juror against whom the plaintiffs had previously exercised a strike.

As a result of Judge Nealon's resolution of his tipstaff's error, which resulted in juror number 63 being removed from the alternate jury pool and being placed instead into the main jury pool, plaintiffs' original exercise of a peremptory strike limited to alternate jurors against juror number 63 was no longer effective to keep juror number 63 from serving on the jury. Accordingly, counsel for plaintiff decided to rescind their previously exercised strike against juror number 26, thereby allowing her to serve on the main jury panel, and instead exercise that strike reserved for members of the main jury panel against juror number 63.

Thus, as a result of Judge Nealon's tipstaff's error, the main jury as finally constituted contained one juror (juror number 26) against whom the plaintiffs had previously exercised a peremptory strike during the original juror selection process.

The main jury as finally constituted did not contain any jurors or alternate jurors against whom the defendants had originally exercised a peremptory strike.

The two alternate jurors who were selected to serve on the jury as finally constituted were juror numbers 68 and 71. Those two alternate jurors, it is undisputed, were selected in a manner that was fair to both the plaintiffs and the defendants.

At the conclusion of the jury selection process on November 3rd, the jury consisted of 12 members of the main jury (one being juror number 26, against whom plaintiffs had originally exercised a peremptory strike) and two fairly selected alternate jurors. On Tuesday, November 4, 2008, the courthouse was closed due to election day. The trial of this case began on November 5, 2008.

On November 5th, Judge Nealon allowed counsel for plaintiffs to place onto the transcript, outside of the hearing of the jury, their objection to the prejudicial manner in which the tipstaff's jury selection error had been resolved. T.T. 11/5/08 at 64–76. On November 5th, however, Judge Nealon was unwilling to replace juror number 26 (against whom plaintiffs had originally exercised a strike) with one of the two alternates out of an understandable concern that, because the trial would last several weeks, having only one remaining alternate at the outset of the trial could result in a mistrial if more than one other juror was excused during the trial.

Early during the two–week trial of this case, one juror from the main panel was dismissed due to absence and was replaced by an alternate juror. At the conclusion of the trial, however, the final alternate juror, who had been selected in a

manner fair to both plaintiffs and defendants, remained available. And juror number 26, against whom plaintiffs had originally exercised a peremptory strike, remained on the jury panel. During the closing argument phase, and without any prior notice, Judge Nealon asked counsel for plaintiffs if they wished to make effective their originally exercised strike against juror number 26 and replace that juror, whom plaintiffs believed had been selected in a manner that was prejudicial to plaintiffs, with the remaining alternate juror, who had been selected in a manner that was fair to all of the parties. For the same reasons that counsel for plaintiffs had originally exercised a peremptory strike against juror number 26 at the outset of the case, counsel for the plaintiffs assented to Judge Nealon's proposal.

Dr. Behlke's argument that the timing of the juror substitution was prejudicial because counsel for plaintiffs could observe the reaction of the jurors during plaintiffs' closing argument is both waived and without any factual support in the record. The argument is waived because Dr. Behlke did not contemporaneously raise this specific objection on the record either when Judge Nealon first mentioned the possibility of substituting the alternate or at any time before the substitution occurred. R.992a–993a; 1001a; 1090a–91a. And the argument is without any factual support because counsel for Dr. Behlke did not place on the record any objection to or comments concerning the behavior of any of the jurors during closing arguments.

Although Dr. Behlke now contends that the trial court's prejudicial error in the jury selection process was fully cured before the trial began, that view was not

shared by either Judge Nealon or the plaintiffs. Rather, as Judge Nealon correctly recognized, plaintiffs retained their objection to the prejudicial error that occurred during the jury selection process, whereby a juror against whom plaintiffs had originally exercised a strike served on the jury panel, but no juror against whom defendants had originally exercised a strike served on the jury panel. As Judge Nealon explained on the record at trial in open court when the juror substitution occurred:

> THE COURT: Members of the jury, just so that you understand, going back I guess it was two weeks ago today when you were here for the jury selection process that you may recall went into the evening, and as I mentioned to you the first morning of trial, there was a bit of an administrative snafu that was not the fault of the parties or the lawyers it was actually a mistake that was made on our end. As a result of that mistake that we made administratively, there was an individual who was included in the jury selection pool that actually for reasons totally unrelated to whether that juror was qualified or competent or eligible to serve as a juror, again, it was purely a clerical administrative error, that individual should not have been in the pool and was inadvertently because of a mistake on our end put into the pool.
>
> I was concerned about on the very first day excusing that juror and substituting the first alternate in place of the juror because of a concern on my part that if during the course of the two–week trial we then lost one of the jurors because of a family emergency or illness or whatever the case may have been, once we dropped below 12 jurors we would then have to declare a mistrial and do the whole thing over again with a new jury.
>
> For that reason, I kept that individual in the jury panel, in the jury box, in the jury pool, until such time as I was convinced that we were now ready to begin to deliberate and had the luxury of now substituting the first alternate instead of that juror who, as I said, because of a clerical and administrative error on our part was inadvertently put into the jury pool, and I'm probably giving too much of explanation to you, but it's a long–winded way of me explaining to you now that I will be substituting the first alternate juror for Juror

> No. 6 who has had to sit through two weeks of this trial I realize because of the fact that we could not fall below 12 jurors.
>
> Again, this is not something that the parties or their lawyers had anything to do with it, it was a mistake that had happened on that Monday night, so when you retire to begin your deliberations now Alternate Juror No. 1 will be substituted as Juror No. 6.

R.1092a–94a.

As a result, the jury that deliberated and reached a verdict in this case consisted entirely of jurors who had been selected at the outset of the case in a manner that was fair to both plaintiffs and defendants.

III. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE DENIED

A. The Unanimous Three–Judge Superior Court Panel Correctly Ruled That The Trial Court Did Not Abuse Its Discretion In Resolving The Juror Substitution Issue Presented In This Case, And That Issue Does Not Satisfy The Criteria For Allowance Of Appeal

Dr. Behlke's petition for allowance of appeal promises to establish that the Superior Court's resolution of the juror substitution issue presented in this case is somehow contrary to the Constitution or statutory law of Pennsylvania, but Dr. Behlke's petition for allowance of appeal fails to deliver on that promise. All that Dr. Behlke's petition for allowance of appeal actually establishes is that the juror substitution issue is unimportant and of no applicability beyond the confines of this particular case. As a result, the issue is an unsuitable candidate for allowance of appeal. After all, the extraordinary remedy of allowance of appeal is reserved for

issues of wide applicability and overarching importance, which the juror substitution issue certainly is not.

As this Court has repeatedly recognized, "'The discharge of a juror is within the sound discretion of the trial court. Absent a palpable abuse of that discretion, the court's determination will not be reversed.'" *Commonwealth* v. *Treiber*, 582 Pa. 646, 655–56, 874 A.2d 26, 31 (2005) (Eakin, J.) (quoting *Commonwealth* v. *Jacobs*, 536 Pa. 402, 410, 639 A.2d 786, 790 (1994) (citing *Commonwealth* v. *Black*, 474 Pa. 47, 56, 376 A.2d 627, 632 (1977))).

Because the juror substitution represented a permissible exercise of Judge Nealon's discretion to remedy the potential prejudice to plaintiffs arising from the original jury selection process, and because the substitution was at most harmless error, the timing of the substitution is immaterial. [6]

In *Lockley* v. *CSX Transportation Inc.*, 5 A.3d 383 (Pa. Super. Ct. 2010), the Superior Court recently recognized that where "the jury [that decided the case] consisted of competent and unbiased jurors, Appellant has not sustained any discernable prejudice as a result of an alternate taking the place of an impaneled juror erroneously stricken . . . ." *Id.* at 393. In *Lockley*, the Superior Court ruled that

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[6] As we have already explained above, Dr. Behlke's argument that the timing of the juror substitution was prejudicial because counsel for plaintiffs could observe the reaction of the jurors during plaintiffs' closing argument is both waived and without any factual support in the record. The argument is waived because Dr. Behlke did not contemporaneously raise this specific objection on the record either when Judge Nealon first mentioned the possibility of substituting the alternate or at any time before the substitution occurred. R.992a–993a; 1001a; 1090a–91a. And the argument is without any factual support because counsel for Dr. Behlke did not place on the record any objection to or comments concerning the behavior of any of the jurors during closing arguments.

the trial court had committed an error in dismissing one particular juror for cause. Nevertheless, because the alternate juror who served in place of the erroneously dismissed juror had been fairly selected, the Superior Court ruled in *Lockley* that the erroneous dismissal of the other juror did not necessitate a new trial. The Superior Court's recent ruling in *Lockley*, which the Superior Court panel in this case cited in footnote 3 on page 6 of its opinion, confirms that even if the juror substitution that occurred in this case were erroneous, Dr. Behlke is incapable of proving any resulting harm.

Although Dr. Behlke now contends that the trial court's error prejudicial to plaintiffs in the jury selection process was fully cured before the trial began, that view was not shared by either Judge Nealon or the plaintiffs. Rather, as Judge Nealon correctly recognized, plaintiffs retained their objection to the prejudicial error that occurred during the jury selection process, whereby a juror against whom plaintiffs had originally exercised a strike served on the jury panel, but no juror against whom defendants had originally exercised a strike served on the jury panel.[7]

Dr. Behlke's argument that seeking the input of plaintiffs' counsel on the juror substitution issue was erroneous misrepresents what actually occurred and

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[7] Judge Nealon's explanation to the jury makes clear that what happened during the jury selection process was "an administrative snafu that was not the fault of the parties or the lawyers * * * ." R.1092. Thus, Dr. Behlke is incorrect in arguing that what happened in the jury selection process was "contrived" by the parties (Pet. at 13) or "allowed a party to tamper with the jury during trial" (Pet at 9). Rather, there clearly was cause for the substitution, which was to have this case be decided by jurors who had been selected at the outset of the case in a manner that was fair to all parties.

fails as a matter of logic in any event. The purpose of the trial court's inquiry of plaintiffs' counsel was to resolve once and for all plaintiffs' objection to the prejudicial manner in which the jury selection process had occurred before trial. Plaintiffs' counsel was thus put to the choice of waiving that objection or having the trial court substitute an alternate who had been selected in a manner that was fair to all parties for the one juror who had been selected in a manner that was prejudicial to plaintiffs.

If Judge Nealon had simply made the substitution without first giving plaintiffs' counsel an opportunity to waive plaintiffs' objection to the prejudicial manner in which one of the jurors had originally been selected, the very same substitution would have occurred, and the identical jury containing the substituted alternate would have deliberated on the outcome of this case. Thus, Dr. Behlke's argument that the trial court abused its discretion in giving plaintiffs the option to waive their objection to the prejudicial errors that occurred in the jury selection process instead of *sua sponte* substituting a fairly selected juror for the unfairly selected juror amounts to nothing more than an inconsequential red herring.[8]

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[8] The three–judge Superior Court panel that decided Dr. Behlke's appeal did not suggest or hold that the juror substitution was itself improper or without cause. Rather, the panel merely stated in a footnote to its opinion that it "discourage[d] *the procedure* the trial court employed" in substituting the juror. Ex. B to Pet. at 6 n.2 (emphasis added). In another example of attempting to reinvent the record, Dr. Behlke in his petition for allowance of appeal writes that "[t]he Superior Court did not address the jury issue, except to say — in a footnote — that it 'disapproved'" of the substitution. Pet. at 17. The word "disapproved" — around which Dr. Behlke's petition has placed quotation marks to suggest that the Superior Court panel actually used that very word, *see* Pet. at 17 — in fact appears nowhere in the Superior Court's opinion.

Although the utter paucity of support for granting allowance of appeal on the juror substitution issue that Dr. Behlke's petition offers is revealing in its own right, what is even more significant is that the outcome Dr. Behlke is seeking would require this Court to disregard and overrule an established line of precedent that Dr. Behlke's petition for allowance of appeal entirely ignores.

In accordance with the Superior Court's recent ruling in *Lockley*, *supra*, this Court has repeatedly held, both in criminal and civil cases, that "[a] defendant is entitled to a fair trial and a fair tribunal. However, a defendant is not entitled to the services of any particular juror." *Commonwealth* v. *Carter*, 537 Pa. 233, 252, 643 A.2d 61, 70 (1994) (citations omitted); *see also Commonwealth* v. *Wallace*, 555 Pa. 397, 408, 724 A.2d 916, 922 (1999) (same); *Moffatt* v. *City of Carbondale*, 314 Pa. 31, 33, 170 A. 269, 270 (1934) (per curiam) (holding in a civil case that a party is "entitled to an impartial jury, but not to any particular juror or jurors"). Contrary to these earlier rulings of this Court, in this case Dr. Behlke is asking this Court to hold that he was in fact entitled to have the very juror originally selected in a manner prejudicial to plaintiffs be on the jury that determined the outcome of this case. But, even if a retrial were to be ordered, that juror would not be on the jury that decides this case on retrial, nor would the new jury be any more fair or impartial than the jury that has already reached a verdict in this case.[9]

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[9] The ruling of Maryland's highest court, in *State* v. *Cook*, 659 A.2d 1313, 1319 (Md. 1995), explains this very point with admirable clarity:

> [W]here an individual juror is improperly dismissed for reasons particular to that juror, the dismissed juror will not serve on a new

The trial court also properly exercised its discretion in denying Dr. Behlke's request for a new trial based on the harmless error doctrine due to defendants' inability to show prejudice. As Judge Nealon's post–trial opinion explains:

> Moreover, Dr. Behlke and OB–GYN Consultants cannot demonstrate any prejudice that they suffered from the juror substitution. Assuming *arguendo* that juror # 6 had remained as a juror and had voted in favor of the healthcare defendants, the jury's vote would have been 10–2 and would have yielded the same verdict under 42 Pa.C.S. §5104(b). *See Fritz* v. *Wright*, 589 Pa. 219, 240, 907 A.2d 1083, 1095–96 (2006).

Ex. E to Pet. (trial court's opinion) at 32.

As Judge Nealon recognized, the verdict that the jury actually returned in this case was by a margin of 11 to 1, demonstrating that the jury could still have returned the identical verdict even if original jury panel member 6 had remained on the jury but voted against the jury's verdict. Because the juror substitution represented a permissible exercise of Judge Nealon's discretion to remedy the prejudice to plaintiffs arising from the original jury selection process, and because the substitution was at most harmless error, both Judge Nealon and a unanimous three–judge Superior Court panel have correctly ruled that no abuse of discretion occurred necessitating a new trial.

> jury if retrial is granted, and a new jury will be no fairer than the jury which originally decided the case. A litigant who argues on appeal that he or she did not receive a fair trial without the excused juror and seeks a new trial will have exactly what he or she got in the first trial—a jury which will not contain the juror excused from the original trial and is unlikely to contain any jurors similar to the juror excused from the original jury. * * * As there is no evidence that the alternate juror who replaced the excluded juror was partial or biased, the fair and impartial jury Cook would get on retrial is exactly what he got after juror number six was excused from the original trial.

Last but not least, the juror substitution issue is unsuitable for this Court's review both because the Superior Court decided this case by means of an unpublished memorandum decision that by definition is incapable of making any new law (*see* Superior Ct. I.O.P. §65.37(A) ("An unpublished memorandum decision shall not be relied upon or cited by a Court or party in any other action or proceeding")) and because the juror substitution issue arose in circumstances peculiar to this case which are unlikely to occur ever again.

At the end of the day, as the three–judge Superior Court panel that decided this case unanimously recognized, Dr. Behlke's juror substitution argument consists of nothing more than sheer speculation in lieu of any actual evidence of any prejudice to Dr. Behlke whatsoever. Because the juror substitution issue is both unimportant and of no applicability beyond the confines of this particular case, and because the Superior Court panel correctly ruled that Judge Nealon did not abuse his discretion in denying a new trial on this basis, the first ground raised in defendants' petition for allowance of appeal lacks merit, and the petition should be denied.

B. Viewing The Facts In A Light Most Favorable To Plaintiffs As Verdict–Winners, This Case Presents A Routine Application Of The Increased Risk Of Harm Doctrine That Does Not Satisfy The Criteria For Allowance Of Appeal

As Judge Nealon's post–trial opinion persuasively explains, *see* Exhibit E to Pet. at 14–27, this is precisely the type of case Pennsylvania courts had in mind in holding that the plaintiff in a medical malpractice case may rely on the "increased

risk of harm" doctrine to establish the element of causation. The unanimous three–judge panel of the Superior Court wholeheartedly agreed, adopting Judge Nealon's reasoning as its own in that court's unpublished, non–precedential memorandum opinion. *See* Exhibit B to Pet. at 3–4.

Defendants' challenge to Judge Nealon's rejection of their j.n.o.v. motion both fails to view the evidence in the light most favorable to the plaintiffs as verdict winners and also misrepresents the "increased risk of harm" doctrine itself. As Judge Nealon's opinion accurately describes, plaintiffs' medical experts testified in detail that Dr. Behlke's negligence in failing to perform a C–section on Mrs. White sooner was a cause in fact of, and increased the risk of harm of, the oxygen deprivation that resulted in the very severe brain damage that Cody White has suffered from and will continue to suffer from for the balance of his life. *See* Exhibit E to Pet. at 18–22, 26–27.

Although both of plaintiffs' medical experts conceded that the fetal maternal hemorrhage condition that Mrs. White exhibited on presentation to the hospital on that fateful day causes oxygen deprivation to the fetus, plaintiffs' medical experts further testified that Cody was adequately coping. Before the tragic decision to administer pitocin was implemented, Cody's heart rate had achieved homeostasis in the 130's, meaning that his brain and other vital organs were coping adequately with the available oxygen that his circulatory system was providing. R.228a, 253a–54a (testimony of Dr. Tyrala); R.513a, 514a–15a, 517a–18a, 525a (testimony of Dr. Cetrulo). Objective testing had confirmed not only the "GOOD FETAL HRT [heart

rate]," but also "FETAL BREATHING" movements, and that the amount of amniotic fluid remained normal. R.233a–35a, R.1469a. The fact that Cody did not exhibit long–term, widespread organ damage following his birth (R.520a–21a), and the fact that he had not passed meconium (the first fetal bowel movement) before arriving at the hospital (R.265a–66a, 531a), proved that the significant hypoxic brain injury occurred after Mrs. White came under the care of Dr. Behlke.

According to plaintiffs' medical experts, subjecting Cody to another four and one–half hours of reduced oxygen supply due to Dr. Behlke's failure to perform a C–section sooner caused additional harm to Cody. R.275a, 535a, 541a. Moreover, totally depriving Cody of any oxygen for the six– to ten–minute period immediately preceding his delivery was the cause of additional catastrophic brain damage to the fetus that resulted in Cody's suffering a terminal event and being born lifeless, without heartbeat or breath, before he was resuscitated. R.275a–76a, 526a–28a, 537a–38a. Whether this tragic period of total oxygen deprivation occurred due to pitocin administration (which Dr. Behlke had ordered in a horrendously negligent decision to induce vaginal delivery), due to allowing the fetal maternal hemorrhage to continue unaddressed for more than four hours, or some combination of the two is immaterial, given that Dr. Behlke indisputably bore full responsibility for administering pitocin and for allowing the fetal maternal hemorrhage to continue, unaddressed, for more than four hours after Mrs. White arrived at the hospital.

And, according to plaintiffs' medical experts, the oxygen supply to Cody's brain was further compromised by the serious meconium aspiration that occurred

while Mrs. White was at the hospital, which, according to Dr. Cetrulo, would not have occurred had Dr. Behlke performed a C–section to give birth to Cody in a timely, non–negligent manner. R.276a.

These facts, which represent the evidence when properly viewed in the light most favorable to the plaintiffs, make this a paradigmatic case in which the relaxed, increased risk of harm method of proving causation applies to allow the jury to find that the defendants' increasing the risk of the very injury that occurred to Cody White was a factual cause of the harm that Cody suffered. Like in a heart attack case, Cody White may have eventually died or sustained the same horrible brain damage had Mrs. White not sought medical attention when she did. But when Mrs. White presented to the hospital to place herself and her fetus into Dr. Behlke's care, the fetus was not already dead or horribly compromised; rather, the fetus was in a stable condition of homeostasis, with sufficient oxygen flow to its brain. R.228a, 234a–35a (testimony of Dr. Cetrulo). The severe brain damaging effects of ongoing hypoxia and ten minutes or more of total oxygen deprivation during the terminal event before resuscitation to which Cody was subjected due to the negligence upon negligence of Dr. Behlke provided abundant proof of causation and more than adequately supports the jury's verdict. R.262a–64a, 269a, 272a, 274a–76a (testimony of Dr. Cetrulo); R.534a–38a (testimony of Dr. Tyrala).

It was a heart attack that went untreated too long due to the negligence of a hospital that gave rise to this Court's ruling more than 30 years ago in *Hamil* v. *Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978), which is the case in which the

"increased risk of harm" method of establishing causation was first explicitly recognized.[10] In the opinion delivered in that case, this Court described the defendants' argument as follows:

> Defendant Bashline, on the other hand, notes that while Dr. Wecht's testimony may have established that an increased risk of harm to the decedent came about as a result of Bashline's negligent conduct, plaintiff nevertheless failed to introduce any testimony that the negligent acts or omissions did, with a reasonable degree of medical certainty, cause decedent's death; therefore, argues defendant, no prima facie case was established, and the case was properly taken from the jury at the first trial.

Id. at 268, 392 A.2d at 1286.

In announcing its holding in *Hamil*, this Court explained:

> We agree with the view of the Superior Court majority expressed in *Bashline I* that the effect of [Restatement (Second) of Torts] §323(a) is to relax the degree of certitude normally required of plaintiff's evidence in order to make a case for the jury as to whether a defendant may be held liable for the plaintiff's injuries: *Once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm*.

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[10] Dr. Behlke's contention in his petition for allowance of appeal that a plaintiff must be uninjured when he or she comes under the care of a physician in order to invoke the increased risk of harm doctrine would thus require this Court to overrule its seminal decision in *Hamil*, because in that case the plaintiff had already suffered a heart attack, which would ultimately prove fatal when left untreated, before coming under the defendants' medical care. Indeed, the increased risk of harm doctrine was specifically intended to apply to the situation in which the plaintiff already has a condition that could cause essentially the same harm to the plaintiff even in the absence of a physician's negligence. Requiring that a plaintiff be uninjured when he or she came under a physician's care to invoke the increased risk of harm doctrine would thus eviscerate the increased risk of harm doctrine, rendering it a nullity. Dr. Behlke has waived his ability to seek the overruling of the increased risk of harm doctrine both by failing to expressly seek that outcome now or at any of the necessary earlier stages of this litigation.

Id. at 269, 392 A.2d at 1286 (emphasis added).

To avoid any ambiguity whatsoever, this Court in *Hamil* summarized the contents of its holding in that case two more times:

> [We] hold that once a plaintiff has demonstrated that defendant's acts or omissions, in a situation to which Section 323(a) applies, have increased the risk of harm to another, such evidence furnishes a basis for the fact–finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm; the necessary proximate cause will have been made out if the jury sees fit to find cause in fact.
>
> * * *
>
> Where there is at issue the adequacy of medical services rendered in a fact situation to which Section 323(a) applies, therefore, a prima facie case of liability is established where expert medical testimony is presented to the effect that defendant's conduct did, with a reasonable degree of medical certainty, increase the risk that the harm sustained by plaintiff would occur.

Id. at 272–73, 392 A.2d at 1288–89.

Some twelve years later, in 1990, this Court returned to the issue presented in *Hamil* when, in *Mitzelfelt* v. *Kamrin*, 526 Pa. 54, 584 A.2d 888 (1990), this Court granted review to determine "what standard of proof is required in medical malpractice cases when there is a percentage of risk that that harm would occur, even in the absence of negligence." *Id.* at 57, 584 A.2d at 889.

In *Mitzelfelt*, the plaintiff became substantially confined to a wheelchair following a surgical procedure performed after the plaintiff appeared at a hospital complaining of difficulty walking, spasms of the upper and lower extremities, and urgency of urination. *Id.* at 58, 584 A.2d at 890. The defendant argued in that case that a directed verdict should have been granted in defendant's favor because

plaintiff's expert witness "was unable to state, with a reasonable degree of medical certainty, that the plaintiff's injuries were caused by the negligence of the anesthesiologist." *Id.* at 63, 584 A.2d at 892. This Court ruled in *Mitzelfelt* that the Court's earlier decision in *Hamil* controlled the outcome:

> In analyzing this case under the *Bashline* standard, we employ a two part test. The first step is to determine whether the expert witness for the appellants could testify to a reasonable degree of medical certainty that the acts or omissions complained of could cause the type of harm that the appellant suffered.
>
> * * *
>
> The second step is to determine whether the acts complained of caused the actual harm suffered by the appellant. This is where we apply the relaxed standard. As the experts all testified, twenty percent of patients do poorly after this surgery. As such, it would have been impossible for any physician to state with a reasonable degree of medical certainty that the negligence actually caused the condition from which Mrs. Mitzelfelt suffered. The most any physician could say was that he believed, to a reasonable degree of medical certainty that it could have caused the harm. Once Dr. Shenkin rendered this opinion, it then became a question for the jury whether they believed it caused the harm in this case.

Id. at 67, 584 A.2d at 894.

In summarizing its holding in *Mitzelfelt*, this Court explained:

> The expert physician testified that the drop in blood pressure could have caused the harm and thus, it became a function of the jury to decide if it actually did.
>
> A defendant cannot escape liability because there was a statistical possibility that the harm could have resulted without negligence. The fact that some other cause concurs with the negligence of the defendant in producing an injury does not relieve the defendant from liability unless he can show that such other cause would have produced the injury independently of his negligence. Once there is sufficient testimony to establish that (1) the physician failed to exercise reasonable care, that (2) such failure increased the risk of

> physical harm to the plaintiff, and (3) such harm did in fact occur, then it is a question properly left to the jury to decide whether the acts or omissions were the proximate cause of the injury. The jury, not the medical expert, then has the duty to balance probabilities and decide whether defendant's negligence was a substantial factor in bringing about the harm.
>
> We are not establishing a new principle of law in this case. We are merely re–emphasizing a well established principle that has existed since the *Bashline* case.

Id. at 68, 584 A.2d at 894–95.

The Superior Court has repeatedly invoked *Hamil* and *Mitzelfelt* in holding that the question of causation is properly submitted to the jury under factual scenarios indistinguishable from the facts of this very case. *See Vogelsberger* v. *Magee–Womens Hosp.*, 903 A.2d 540, 563–65 (Pa. Super. Ct. 2006); *Carrozza* v. *Greenbaum*, 866 A.2d 369, 380–81 (Pa. Super. Ct. 2004) ("Accordingly, in cases where the plaintiff has introduced sufficient evidence that the defendant's conduct increased the risk of injury, the defendant will not avoid liability merely because the plaintiff's medical expert was unable to testify with certainty that the defendant's conduct caused the actual harm.") (McCaffery, J.); *Sutherland* v. *Monongahela Valley Hosp.*, 856 A.2d 55, 60–61 (Pa. Super. Ct. 2004); *Cruz* v. *Northeastern Hosp.*, 801 A.2d 602, 609–10 (Pa. Super. Ct. 2002) (inability to determine precisely the extent to which mother's preexisting condition and hospital's negligence harmed fetus did not preclude imposing liability on hospital for harm caused to newborn child); *Billman* v. *Saylor*, 761 A.2d 1208, 1211–14 (Pa. Super. Ct. 2000); *Smith* v. *Grab*, 705 A.2d 894, 899–900 (Pa. Super. Ct. 1997). None

of those cases hold that a plaintiff's expert must testify in exact percentages concerning what would have happened in the absence of the physician's negligence.

As the Superior Court summarized in *Montgomery* v. *South Philadelphia Medical Group, Inc.*, 656 A.2d 1385 (Pa. Super. Ct. 1995):

> Therefore, where the plaintiff has alleged that the defendant's conduct increased the risk of injury, the defendant will not be relieved from liability merely because the plaintiff's medical expert was unable to say with certainty that the defendant's act caused the harm. So long as reasonable minds can conclude that the defendant's conduct was a substantial factor in causing the harm, the issue of causation may go to the jury upon a less than normal threshold of proof.

Id. at 1392 (citing *Mitzelfelt*, 526 Pa. at 68, 584 A.2d at 894–95).

What *Hamil* and *Mitzelfelt* and the many decisions from the Superior Court cited above hold, as a matter of law, is that the plaintiff in a medical malpractice case need not even adduce any expert testimony whatsoever that the defendant's deviations from the applicable standard of care in fact caused the injuries to the plaintiff. Rather, all that the plaintiff needs to introduce into evidence is expert testimony that the defendant's deviations from the standard of care increased the risk of harm to the plaintiff and that the plaintiff in fact sustained the very harm whose risk was increased by defendant's negligence. Under those circumstances, the question of whether causation exists is for the jury to decide.

Here, as Judge Nealon correctly held in his post–trial opinion rejecting Dr. Behlke's motion for j.n.o.v., plaintiffs' evidence is more than sufficient to satisfy the applicable standards imposed under *Hamil*, *Mitzelfelt*, and the many similar Superior Court rulings cited above. *See* Ex. E to Pet. (trial court's opinion) at 26–27.

Plaintiffs' expert witnesses unambiguously testified that Dr. Behlke's various acts of medical malpractice increased the risk of harm to Cody White by continuing to subject him to oxygen deprivation and by increasing the severity of that oxygen deprivation through the negligent administration of pitocin so that he was entirely deprived of all oxygen for a period of approximately ten minutes, if not longer, and he suffered meconium aspiration before being resuscitated. And plaintiffs' experts testified that the injuries that Cody White exhibited at birth, and will continue to suffer from for the rest of his life, are the very sort of injuries that oxygen deprivation causes.

Under this Court's holdings in *Hamil* and *Mitzelfelt*, plaintiffs herein were therefore excused from having to introduce any specific proof that defendants' negligence caused Cody White's injuries, because the evidence plaintiffs unquestionably did introduce made the question of causation an issue for the jury to decide. Nonetheless, plaintiffs' experts did further testify that defendants' negligence increased the risk and was a factual cause of substantial catastrophic harm. Thus, plaintiffs' experts' inability to assign a specific degree or percentage for which defendants' medical malpractice contributed to causing Cody White's injuries is immaterial, because, under the holdings of *Hamil* and *Mitzelfelt*, plaintiffs bore no burden of having their experts "say with certainty that the defendant's act caused the harm." *Montgomery*, 656 A.2d at 1392.

The trial court's opinion in this case correctly followed this very same process of reasoning in rejecting defendants' argument for j.n.o.v. First, the trial court ruled

that "the Whites' expert testimony as a whole was sufficient to establish the three elements necessary for the issue of causation to be submitted to the jury under *Mitzelfelt* and *Hamil*." Ex. E to Pet. (trial court's opinion) at 19. The trial court next correctly rejected defendants' argument that plaintiffs supposedly had "offered no competent medical evidence to support the conclusion that any delay [in delivery] caused additional harm to Cody." *Id.* at 21. The trial court proceeded to recognize that the Superior Court's decision in *Cruz* v *Northeastern Hospital*, 801 A.2d 602 (Pa. Super. Ct. 2002), was directly on point in holding, in a case involving very similar facts wherein both the mother's preexisting medical condition and the hospital's negligence contributed to causing devastating brain damage to a fetus about to be delivered, that *Hamil* and *Mitzelfelt* allowed the question of cause to reach the jury. *See* Ex. E to Pet. (trial court's opinion) at 25–26.[11]

The portion of Judge Nealon's opinion explaining his basis for rejecting defendants' j.n.o.v. argument based on a supposed lack of evidence of causation concludes:

> Viewing the causation evidence in the light most favorable to the Whites and affording them the benefit of every reasonable inference to be drawn from that evidence, we are unable to conclude that the law requires a verdict in favor of Dr. Behlke and OB–GYN Consultants or that a verdict for the movant was beyond peradventure. Examining the substance of the expert testimony in its entirety, the Whites' experts sufficiently testified to a reasonable degree of medical certainty that Dr. Behlke was professionally negligent, that his

[11] In *Cruz*, the Superior Court explained that it was plaintiffs' argument that "Adam's prolonged exposure to the toxic uterine environment increased his risk of harm and the extent of that harm; and that Adam actually suffered this harm" due to oxygen deprivation and the defendants' negligent failure to deliver him sooner. *Cruz*, 801 A.2d at 610–11.

> negligence increased the risk of serious brain injury to Cody White, and that Cody White did in fact suffer such severe neurological damage. Once those experts so opined, it then became a question for the jury to determine whether that increased risk was a factual cause of Cody White's harm. Accordingly, Dr. Behlke and OB–GYN Consultants have not established their entitlement to the drastic remedy of judgment in their favor notwithstanding the jury's verdict in this case.

Ex. E to Pet. (trial court's opinion) at 26–27 (footnote omitted).

Ignoring the substantial body of Pennsylvania appellate court precedent that supports the Superior Court's affirmance by means of an unpublished, non–precedential memorandum opinion in this case, Dr. Behlke instead seeks the stealth, *sub silentio* overruling of this Court's decision in *Hamil* by asking this Court to impose the requirement that "the plaintiff [be] uninjured at the time of treatment" (Pet. at 3) and the overruling of numerous Superior Court decision cited above by imposing the requirement that a plaintiff must establish "through statistical evidence, that the healthcare provider's alleged negligence deprived the plaintiff of a better outcome" (*id.*).

There can be no doubt, based on the expert testimony described above that the plaintiffs introduced in this very case, that the jury had more than adequate evidence to conclude, as the jury did conclude, that Dr. Behlke's negligence deprived Cody White of a better outcome. Indeed, what Dr. Behlke's petition for allowance of appeal fails to disclose is that it was Dr. Behlke's entire defense at trial that Cody White had already suffered all of the injuries that Cody exhibited at birth before his mother arrived at the hospital. If the jury had agreed with Dr. Behlke's view of the facts, the jury would have returned a verdict finding Dr. Behlke not liable. In other

words, the jury's actual verdict in this case resoundingly rejects Dr. Behlke's factual argument that Cody White had already sustained all of the injuries he exhibited at birth before his mother arrived at the hospital.

In addition to improperly seeking to reargue the facts of this case, Dr. Behlke's petition for allowance of appeal also contends that plaintiffs' experts' inability to assign a specific percentage to the *amount* of harm to Cody White that resulted from defendants' negligence should have led the trial court to enter j.n.o.v. in defendants' favor. Dr. Behlke's argument, in essence, is that an inability to assign a specific percentage of the amount of harm resulting from defendants' negligence is tantamount to an inability to opine that defendants' negligence caused *any* harm to Cody. Dr. Behlke cites no Pennsylvania case law applying *Hamil* as support for this argument, and defendants ignore the pertinent testimony of plaintiffs' medical experts, Drs. Cetrulo and Tyrala, which unmistakably establishes that defendants' negligence caused substantial and significant harm to Cody White.

As the Superior Court explained in *Montgomery*, 656 A.2d at 1392 (citing *Mitzelfelt*, 526 Pa. at 68, 584 A.2d at 894–95), "[s]o long as reasonable minds can conclude that the defendant's conduct was a substantial factor in causing the harm, the issue of causation may go to the jury upon a less than normal threshold of proof." That standard is easily satisfied here, as the trial court correctly ruled.

Although the condition of "fetal maternal hemorrhage" that Mrs. White exhibited when she reported to the hospital on the day Cody White would later be

born was a condition that would gradually expose her fetus to more and more risk due to oxygen deprivation over time, the testimony of Drs. Cetrulo and Tyrala clearly established that the fetus was coping. His heart rate was in the normal range of the 130's, evidencing a condition of homeostasis, he had fetal breathing, and he was compensating under the circumstances. So, even though he was experiencing some oxygen deprivation from loss of some of his blood cells into his mother's circulation, had Dr. Behlke performed delivery in a timely manner in accordance with accepted standards of care, four more hours of diminished oxygenation would have been avoided, the critical minutes of severe oxygen compromise and six to ten minutes of total oxygen deprivation and the resulting terminal event would not have occurred, and the fetus, with a remarkable innate ability to withstand some hypoxia without suffering brain injury, would have been born in a substantially better condition.

Five pieces of evidence, testified to by plaintiffs' medical experts, bear this out: (1) Cody White's heartbeat was in the normal range when Mrs. White reported to the hospital and remained in the normal range for hours, until Dr. Behlke made the tragic decision to administer pitocin to induce labor (R.228a, 253a–54a, 514a–15a, 517a–18a, 525a); (2) the amount of amniotic fluid surrounding Cody White was normal, evidencing that the maternal fetal hemorrhage was of recent origin (R.234a–35a); (3) when Cody was delivered, he did not appear swollen or edematous at the time of delivery, which is how he would have appeared had he experienced long–term oxygen deprivation prior to delivery (R.519a–20a, 524a); (4) Cody did not

suffer from persistent, widespread organ failure following birth, as he would have had he experienced long–term oxygen deprivation (R.520a–21a); and (5) Cody's passing of meconium (the baby's first bowel movement) occurred just before delivery, and not hours and hours before delivery as it would have had he actually experienced serious long–term oxygen deprivation (R.265a–66a, 531a).

Plaintiffs' medical experts further testified that, as a result of Dr. Behlke's failure to order an immediate C–section, Cody was subjected to continued oxygen deprivation for approximately four more hours. R.275a, 535a, 541a. As a result of Dr. Behlke's tragic decision to administer pitocin to induce Mrs. White's delivery, Cody was completely deprived of all oxygen for six to ten minutes, if not more, resulting in his essentially being "born dead" before he was resuscitated following delivery. R.275a–76a, 526a–28a, 537a–38a. This substantial period of complete oxygen deprivation certainly was the major cause of Cody's substantial brain injuries. And, finally, the delay in delivery and Dr. Behlke's decision to attempt to induce vaginal delivery by administering the medication pitocin resulted in Cody's meconium aspiration, which further compromised his ability to breathe after having been resuscitated following his birth. R.276a.

Based on all of this evidence, "reasonable minds can conclude that the defendant's conduct was a substantial factor in causing the harm." *See Montgomery*, 656 A.2d at 1392 (citing *Mitzelfelt*, 526 Pa. at 68, 584 A.2d at 894–95). Accordingly, the trial court properly allowed this case to reach the jury under the relaxed

proximate cause standard announced in *Hamil* and applied in numerous medical malpractice cases thereafter.

While purporting to take issue with the entirely proper application of the increased risk of harm doctrine to this case, Dr. Behlke is in fact dissatisfied with the application of a separate, longstanding, and well–established principle of Pennsylvania law. That principle of law, which Dr. Behlke is not challenging in this Court and failed to challenge in the Superior Court, allows a defendant whose negligence was a substantial factor in bringing about an indivisible harm to the plaintiff resulting from more than one cause to be held liable for the full amount of that harm if no reasonable basis exists for apportioning responsibility for the harm between or among the causes.

Originally, in his post–trial motions, Dr. Behlke advanced a challenge to the trial court's so–called "Concurring Causes Charge" in which Dr. Behlke requested a new trial because that charge was supposedly erroneous or inapplicable. The portion of Judge Nealon's post–trial opinion rejecting Dr. Behlke's argument in that regard appears in that opinion at pages 47–50 & nn. 16–17.

On appeal to the Superior Court, however, Dr. Behlke abandoned any challenge to the trial court's "Concurring Causes Charge," and thus any challenge to that charge is waived. *See Harris* v. *Toys "R" Us–Penn, Inc.*, 880 A.2d 1270, 1279 (Pa. Super. Ct. 2005) ("We have repeatedly held that failure to develop an argument with citation to, and analysis of, relevant authority waives that issue on review.").

Nevertheless, Dr. Behlke now seeks to seize on the testimony of plaintiffs' medical experts to the effect that they could not apportion the percentage of Cody's brain damage injury that occurred before Mrs. White reached the hospital and entered the care of Dr. Behlke to argue that plaintiffs cannot exclude the possibility that Dr. Behlke's negligent care resulted in no harm to Cody or aggravated the preexisting harm by only some small or insignificant amount.

To begin with, the trial court properly rejected Dr. Behlke's argument in this regard, because the overall gist of the testimony from plaintiffs' medical experts was that Dr. Behlke's negligence played a very significant role in causing the oxygen deprivation that produced Cody's brain damage. *See Carrozza* v. *Greenbaum*, 866 A.2d 369, 379 (Pa. Super. Ct. 2004) (recognizing that a reviewing court must consider the entirety of an expert's testimony). The testimony from plaintiffs' medical experts that they could not allocate the responsibility for Cody's brain damage between causes is not the equivalent of saying that Dr. Behlke's negligence played no substantial causative role, nor was Dr. Cetrulo's testimony that he could not testify that Dr. Behlke's negligence was 10 percent or 90 percent responsible for Cody's injuries (R.277a) the equivalent of saying that Dr. Behlke's negligence only caused 10 percent of Cody's injuries or caused zero percent of those injuries.

In *Neal* v. *Bavarian Motors, Inc.*, 882 A.2d 1022, 1028 (Pa. Super. Ct. 2005), the Superior Court recognized that "[m]ost personal injuries are by their very nature incapable of division." (quoting *Capone* v. *Donovan*, 480 A.2d 1249, 1251 (Pa.

Super. Ct. 1984)). In *Neal*, the Superior Court also quoted the following two additional passages from *Capone* with approval:

> If the tortious conduct of two or more persons causes a single harm which cannot be apportioned, the actors are joint tortfeasors even though they may have acted independently.

and

> If two or more causes combine to produce a single harm which is incapable of being divided on a logical, reasonable, or practical basis, and each cause is a substantial factor in bringing about the harm, an arbitrary apportionment should not be made.

Neal, 882 A.2d at 1027–28 (quoting *Capone*, 480 A.2d at 1251).

Earlier, in *Carlson* v. *A. & P. Corrugated Box Corp.*, 364 Pa. 216, 72 A.2d 290 (1950), this Court explained:

> It is a familiar legal doctrine that where two tortfeasors are guilty of concurrent negligence each is responsible for the full amount of the resulting damage and is not entitled to any apportionment of liability. There is no reason why the same rule should not apply where one of the operative agencies, instead of being a tortfeasor, is a force of nature.

Id. at 224, 72 A.2d at 294 (citation omitted). This Court's ruling in *Carlson* would require the rejection of Dr. Behlke's argument that it was unfair and contrary to Pennsylvania law to hold defendants liable for all of plaintiffs' damages, if Dr. Behlke were in fact raising such a challenge.

Moreover, to the extent that defendants are arguing that they can only be held responsible for the proportion of the injuries to Cody White that defendants' negligence had caused, defendants' argument is directly contrary to Pennsylvania law. *See Martin* v. *Owens–Corning Fiberglas Corp.*, 515 Pa. 377, 528 A.2d 947

(1987). In *Martin*, this Court held that the defendant could be held liable for the full amount of damages necessary to compensate the plaintiff for injuries to his respiratory system resulting from a combination of asbestosis caused by defendant's products and emphysema caused by plaintiff's cigarette smoking, for which the defendant bore no responsibility. *Id.* at 381–85, 528 A.2d at 949–51. This result was proper, this Court ruled, because it was impossible to determine to what degree each cause had contributed to bringing about the single condition from which the plaintiff suffered. *Id.*; *see also Harsh* v. *Petroll*, 584 Pa. 606, 621–23, 887 A.2d 209, 218–19 (2005).

Similarly, the Superior Court explained in *Smith* v. *Pulcinella*, 656 A.2d 494 (Pa. Super. Ct. 1995) (Saylor, J.), that "an arbitrary apportionment should not be made" when two or more causes combine to cause a single harm. *Id.* at 496 (internal quotations omitted). Indeed, under Pennsylvania law, it is the burden of the defendants, and not the plaintiffs, "to present evidence of such a nature that damages could be apportioned." *Corbett* v. *Weisband*, 551 A.2d 1059, 1079 (Pa. Super. Ct. 1988) (*citing Martin* v. *Owens–Corning Fiberglas Corp.*, *supra*). Defendants did not present any such evidence, nor do they argue that they did present any such evidence, and thus defendants' apportionment argument is both legally and factually unsupported.

The testimony of plaintiffs' medical experts that they were unable to apportion the precise degree of harm that Cody White suffered due to Dr. Behlke's negligence and due to the naturally occurring fetal maternal hemorrhage was

elicited by counsel for plaintiffs to avoid having the jury undertake any arbitrary (and thus legally erroneous) apportionment of damages. Plaintiffs' medical experts did not admit, either in their direct testimony or on cross–examination, that Dr. Behlke's negligence was not a real and substantial cause of plaintiffs' harm. As a result, defendants' apportionment argument is not only waived due to defendants' failure to actually raise it directly, but it is also without any legal or factual support when viewing the evidence in the light most favorable to plaintiffs, as must occur in connection with addressing Dr. Behlke's request for j.n.o.v.

As the unanimous three–judge Superior Court panel's unpublished ruling recognized, the trial court properly allowed this case to reach the jury under the relaxed increased risk of harm proximate cause standard announced in *Hamil* and applied in numerous medical malpractice cases thereafter. Because this case merely presents a routine application of that standard, defendants' second and final ground for allowance of appeal lacks merit, and their petition should be denied.

IV. CONCLUSION

For all of the foregoing reasons, defendants' petition for allowance of appeal should be denied.

Respectfully submitted,

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Jeffrey M. Kornblau
Lynn Sare Kornblau
Kornblau & Kornblau, P.C.
610 Harper Avenue
Jenkintown, PA 19046–3207
(215) 576–7200

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

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

Service by first class mail addressed as follows:

Eugene P. Feeney, Esquire
Weber, Gallagher, Simpson,
Stapleton, Fires & Newby, L.L.P.
201 Penn Avenue
Suite 400
Scranton, PA 18503
(570) 961–2120
Co–counsel for Appellants Richard Behlke, M.D. and OB–GYN Consultants, Ltd.

James C. Sargent, Jr., Esquire
Lamb McErlane, PC
24 East Market Street
P.O. Box 565
West Chester, PA 19381–0565
(610) 430–8000
Co–counsel for Appellants Richard Behlke, M.D. and OB–GYN Consultants, Ltd.

Michael Perry, Esquire
O'Malley, Harris, Durkin & Perry, P.C.
345 Wyoming Avenue
Scranton, PA 18503
(570) 348–3711
Co–counsel for Community Medical Center Health Care Systems

Matthew W. Rappleye, Esquire
Stevens & Lee, P.C.
P.O. Box 1594
Lancaster, PA 17608–1594
(717) 399–6656
Co–counsel for Community Medical Center
Health Care Systems

Dated: February 14, 2011

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458