In the Superior Court of Pennsylvania

No. 1213 MDA 2009

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.

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

BRIEF FOR PLAINTIFFS/APPELLEES

On appeal from the judgment of the Court of Common Pleas of Lackawanna County
at No. 03–CV–2663, Honorable Terrence R. Nealon, presiding

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I. COUNTER–STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Defendants/appellants Richard Behlke, M.D. and OB–GYN Consultants, Ltd. appeal from the trial court's order denying their post–trial motions seeking judgment notwithstanding the verdict, a new trial, or a reduction of the jury's verdict.

This Court is familiar with the very heavy burden a party bears in order to obtain j.n.o.v.:

> 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.

American Future Systems, Inc. v. *Better Business Bureau*, 872 A.2d 1202, 1215 (Pa. Super. Ct. 2005) (citation omitted), *aff'd*, 592 Pa. 66, 923 A.2d 389 (2007).

This Court is also familiar with the stringent standard that a party must satisfy in order to obtain a new trial:

> A new trial will be granted on the grounds that the verdict is against the weight of the evidence where the verdict is so contrary to the evidence it shocks one's sense of justice. An appellant is not entitled to

> a new trial where the evidence is conflicting and the finder of fact could have decided either way.

Betz v. *Erie Ins. Exchange*, 957 A.2d 1244, 1252 (Pa. Super. Ct. 2008) (internal quotations omitted).

And the standard for obtaining a remittitur is also very stringent. In *Gbur* v. *Golio*, 932 A.2d 203 (Pa. Super. Ct. 2007), this Court explained:

> The grant or refusal of a new trial because of the excessiveness of the verdict is within the discretion of the trial court. *Hall* v. *George*, 403 Pa. 563 170 A.2d 367 (1961). This court will not find a verdict excessive unless it is so grossly excessive as to shock our sense of justice. *Kravinsky* v. *Glover*, 263 Pa. Super. 8, 396 A.2d 1349 (1979). We begin with the premise that large verdicts are not necessarily excessive verdicts. Each case is unique and dependent on its own special circumstances and a court should apply only those factors which it finds to be relevant in determining whether or not the verdict is excessive. *Mineo* v. *Tancini*, 349 Pa. Super. 115, 502 A.2d 1300 (1986).

Id. at 212.

Here, Dr. Behlke and OB–GYN Consultants cannot satisfy any of these stringent standards necessary to obtain a reversal of the order (accompanied by a well–reasoned 72–page opinion) that Judge Terrence R. Nealon of the Court of Common Pleas of Lackawanna County issued denying those defendants' post–trial motions.

Unfortunately, the Brief for Appellants fails to set forth the facts in the appropriate light most favorable to the plaintiffs as verdict winners, necessitating the detailed recitation of the facts that follows.

II. COUNTER–STATEMENT OF THE QUESTIONS INVOLVED

1. Did the trial court properly deny defendants' motion for j.n.o.v. because plaintiffs introduced more than sufficient proof of causation under the "increased risk of harm" principle that both this Court and the Supreme Court of Pennsylvania have repeatedly endorsed in medical malpractice cases?

2. Did the trial court abuse its discretion in replacing a juror who had been selected in a manner that was prejudicial to plaintiffs with a juror who had been selected in a manner that was fair to all of the parties to this litigation?

3. Viewing the evidence in the light most favorable to the plaintiffs, did the trial court abuse its discretion in charging the jury on the doctrine of "increased risk of harm" causation that was central to plaintiffs' medical malpractice case against these defendants/appellants?

4. Did the trial court abuse its discretion in holding that (a) Dr. Eileen Tyrala, M.D. was qualified to testify regarding the subject of causation as an expert in the fields of pediatrics and neonatology and that (b) Dr. Tyrala did not testify beyond the fair scope of her expert report?

5. Have defendants waived their appellate challenge to the trial court's ruling that Dr. Tyrala did not testify beyond the fair scope of her expert report, when defendants' appellate brief does not challenge or seek to overturn the trial court's holding that defendants waived this particular challenge by failing to properly raise it in the trial court?

6. Did the trial court abuse its discretion in ruling that defendants were not entitled to a new trial on weight of the evidence grounds?

7. Did the trial court abuse its discretion in denying defendants' request for a reduction in the amount of the verdict?

III. COUNTER–STATEMENT OF THE CASE

A. Relevant Factual History

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. 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 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 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 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.[1] 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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[1] 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; 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.

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. 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.*

CMC settled with plaintiffs following the announcement of the jury's verdict. *See* 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.

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' appellate 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 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 in detail in the Argument section of this brief, 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 continue to press on appeal 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 C to the Brief for Appellants.

B. Relevant Procedural History

During the jury selection process, which occurred in this case on the afternoon and evening of November 4, 2008, the trial court's tipstaff accidentally miscalculated the number of venire members needed to produce the necessary number of jurors and alternates. *See* trial court's opinion at 28. As a result, a process that should have resulted in the selection of twelve jurors for the jury panel instead produced only eleven jurors. *Id.* At the time the error was discovered, plaintiffs had already exercised all six of the peremptory challenges to the main jury pool that the trial court had originally provided to plaintiffs and both of their two peremptory challenges to the alternate pool, while defendants had not yet exercised their two peremptory challenges to the alternate pool that the trial court had originally provided to defendants (consisting of four/one peremptory challenges

for Dr. Behlke and OB–GYN and another four/one peremptory challenges for CMC). *Id.*[2]

Due to the tipstaff's inadvertent error, plaintiffs' counsel were given the following unpalatable choice — allow onto the main jury panel of twelve a venire member against whom plaintiffs had already exercised a peremptory strike during the original jury selection process or place onto the jury an alternate juror whom plaintiffs had already stricken using a peremptory strike that could only be used against an alternate juror. *Id.*

Confronted with that unsatisfactory choice, plaintiffs' counsel decided to put Juror 26, against whom plaintiffs had originally exercised a peremptory strike, back onto the jury panel as jury panel member number 6. *Id.* Plaintiffs' counsel objected on the record to the prejudicial manner in which Juror 26 became jury panel member number 6 after plaintiffs had originally exercised a peremptory strike to remove Juror 26 from the jury panel. Trial transcript (T.T.) 11/5/08 at 64–76.

After the close of the evidence, and while counsel were in the midst of presenting their closing arguments to the jury, the trial court offered counsel for plaintiffs the option to replace jury panel member number 6, who had been selected

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[2] Plaintiffs had filed a motion *in limine* seeking a number of peremptory challenges equal to the total number that defendants would collectively receive. The trial court, however, originally granted six peremptory challenges to the plaintiffs and a total of eight to the defendants. *See* trial court's opinion at 27–28.

in a manner prejudicial to the plaintiff, with an alternate juror who had been selected in a manner that was fair to all parties, including the defendants.[3] R.992a.

Before offering that solution to counsel for plaintiffs at the closing argument phase of the trial, the trial court had not hinted, foreshadowed, or suggested to counsel for any of the parties in any manner that the trial court might allow plaintiffs to replace the unfairly selected juror with an alternate who had been fairly selected. Even though the alternate juror who ended up participating in the deliberations had been selected in a manner that was fair to all parties, counsel for the defendants nevertheless objected to the substitution (R.993a) and have argued that the trial court erred and abused its discretion in defendants' post–trial motions and now on appeal.

The testimony of plaintiffs' medical expert in the fields of pediatrics and neonatology, Dr. Eileen Tyrala, M.D., who provided expert testimony on the subject of causation, was presented to the jury at trial by means of videotaped deposition. Before the videotaped deposition was played for the jury on November 12, 2008, Judge Nealon heard argument from counsel outside the presence of the jury to address defendants' objections to certain aspects of Dr. Tyrala's testimony.

In the trial court's lengthy opinion explaining the basis for denying defendants' post–trial motions, Judge Nealon explained that defendants had waived

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[3] During the jury selection process that preceded the start of trial, counsel for defendants could have, but chose not to, exercise a preemptory strike against this particular alternate juror had counsel for defendants been dissatisfied with her, as counsel for defendants still possessed two preemptory strikes that could be exercised against alternate jurors at the time this particular alternate juror was selected.

any objection that Dr. Tyrala's testimony about the harm caused by Dr. Behlke's decision to administer pitocin (a drug used to induce labor that has the effect of further curtailing a fetus's oxygen supply) to Mrs. White. According to Judge Nealon's opinion, "At the time of trial, Dr. Tyrala testified at length about the aforementioned pitocin induction and its harmful consequences without any objection by defense counsel." Trial court's opinion at 38. "Defense counsel did not raise an objection to any of this testimony concerning the harm caused by the use of Pitocin." *Id.* at 39. As a result, Judge Nealon concluded that "Dr. Behlke and OB–GYN Consultants waived their objections to Dr. Tyrala's testimony about the Pitocin related harm by neglecting to object to her earlier testimony concerning the Pitocin administration's ominous sequellae and distinctly identifying Pitocin as the third contributing cause of Cody White's harm." *Id.* at 40.

Now, on appeal, Dr. Behlke continues to challenge the trial court's decision holding that Dr. Tyrala's pitocin testimony was within the fair scope of her expert report (a decision that the trial court relied on as an alternate basis for rejecting Dr. Behlke's argument), but Dr. Behlke's appellate brief contains no mention of or challenge to the trial court's independent and adequate holding that Dr. Behlke had waived any challenge to Dr. Tyrala's pitocin testimony by failing to make a timely objection. Moreover, and quite remarkably, the Reproduced Record that defendants/appellants have filed entirely omits the on–the–record hearing on the morning of November 12, 2008 at which the trial court heard and decided defendants' objections to the portions of Dr. Tyrala's videotaped deposition testimony that

plaintiffs intended to show to the jury. Thus, not only have defendants/appellants not challenged the trial court's waiver holding, but they have deprived this Court of any convenient way to evaluate the basis for the trial court's waiver holding because the portion of the transcript reflecting what objections Dr. Behlke's counsel did or did not make to Dr. Tyrala's videotaped testimony is not contained in the Reproduced Record on appeal.

Apparently at the trial court's suggestion, defendants refrained from filing a motion for a nonsuit at the close of the plaintiffs' case. Instead, defendants filed their motion for a nonsuit, and argued that motion, at the close of all the evidence. R.935a–37a. Because defendants' nonsuit motion was argued and filed at the close of all the evidence, it does not appear that defendants separately filed a motion for a directed verdict at the close of all the evidence. The trial court denied the nonsuit motion, thereby allowing the case to go to the jury.

As detailed elsewhere in this brief, the central issue that the jury had to decide was whether, as defendants had argued, prior to Mrs. White's arrival at CMC on June 30, 2001 the condition known as "fetal maternal hemorrhage" had already solely caused all of the devastating permanent hypoxic brain injuries afflicting Cody White. Or, as plaintiffs had argued, did defendants' actions in failing to perform a caesarean section on Mrs. White more promptly that day, Dr. Behlke's tragic decision to administer the oxygenation impairing medication pitocin in the mistaken belief that a vaginal delivery could be performed, and the resulting meconium aspiration that Cody White suffered at the time of his birth increase the

risk of the harm that Cody White suffered (i.e., severe oxygen deprivation to his brain) and in fact cause significant harm, and even death, to Cody White prior to resuscitative measures.

At trial, there was little to no disagreement between the parties concerning the devastating and permanent nature of Cody White's injuries, over the cost of caring for Cody White into the future, or over the net loss earning capacity calculations that plaintiffs provided to the jury. *See* trial court's opinion at 57–59 & n.18. Indeed, the only damages–related disagreement between the parties concerned Cody White's anticipated life span, but defendants in their appeal do not challenge the jury's finding in that regard. *See id.* 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."); *id.* at 58 n.18 (noting that an expert witness for the defense had testified that Cody "will only live to 35 years of age").

As mentioned above, at the conclusion of the nearly two–week trial of this case, and following deliberations, 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. *See* trial court's opinion at 12. The jury also found that CMC was causally negligent and apportioned 40 percent of the liability against CMC. *Id.* 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. *Id.* 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.* CMC settled with plaintiffs following the announcement of the jury's verdict. *Id.*

Dr. Behlke filed timely post–trial motions seeking judgment notwithstanding the verdict, a new trial, and a reduction in the amount of the jury's award. He also supplemented his post–trial motions after the balance of the trial transcript became available. Plaintiffs filed appropriate oppositions to those post–trial motions, as supplemented. In addition, both sides briefed these issues for the trial court's benefit, and the trial court heard oral argument on the motions. On June 17, 2009, the trial court issued its 72–page opinion and an order denying in full defendants' post–trial motions. This appeal followed.

IV. SUMMARY OF THE ARGUMENT

This is a case in which a pregnant mother came under the care of defendant Dr. Behlke reporting decreased movement of her full–term fetus. At the time the mother arrived at the hospital, the fetus's heart rate was stable in the 130's, the fetus's circulatory system was coping, and the fetus was compensating adequately from any decreased oxygenation he was experiencing from the naturally occurring condition of fetal maternal hemorrhage.

Despite clear signs of impaired oxygenation to the fetus, Dr. Behlke deviated from accepted standards of care in delaying for more than four and one–half hours in delivering the fetus (thereby allowing the hemorrhage to persist) and, worse, in causing the fetus's brain to receive no oxygen whatsoever over a period of six to ten minutes as a result of the negligent decision to induce labor using the oxygen impairing medication pitocin. Meconium aspiration syndrome, and its consequent additional oxygen compromise, also ensued due to Dr. Behlke's negligence. Defendants' negligence increased the risk that Cody White would suffer the very harm that he did suffer — severe, permanent brain damage from lack of oxygen to the brain. As a result, Cody White sustained horribly severe brain damage that he must live with and suffer the effects of for the remainder of his natural life.

The trial court did not abuse its discretion in denying defendants' motions for judgment notwithstanding the verdict and a new trial. This case presents a quintessential example of "increased risk of harm" causation, where Dr. Behlke's negligence in failing to deliver the baby sooner and in administering the drug

pitocin to induce vaginal delivery with the side–effect of even greater oxygen deprivation to the fetus clearly increased the risk of harm of brain damage due to oxygen deprivation, and the fetus suffered that very harm.

Plaintiffs' medical experts' inability to precisely quantify the exact extent of additional harm that Cody White suffered as the result of defendants' negligence does not undermine their testimony that defendants' negligence was a real, significant, and substantial cause of Cody's injuries. Moreover, Pennsylvania law allows defendants to be held liable for all of plaintiffs' damages under these circumstances, because defendants' negligence was a substantial factor in causing those injuries. The trial court thus properly denied defendants' motion for j.n.o.v.

With regard to defendants' motion for a new trial, the trial court did not abuse its discretion when it replaced a juror who had been selected in a manner prejudicial to plaintiffs with a juror who had been selected in a manner that was fair to all parties. Moreover, defendants cannot show any prejudice. The trial court did not abuse its discretion in charging the jury on the principles of "increased risk of harm" causation; indeed, failing to give that charge would have constituted error. Plaintiffs' medical experts gave their causation opinions to a reasonable degree of medical certainty, and defendants' challenge to Dr. Tyrala's testimony is without merit and waived. Finally, the jury's verdict is not against the weight of the evidence, and the trial court properly rejected defendants' request for remittitur.

For all of these reasons, this Court should affirm the trial court's denial of defendants' post–trial motions.

V. ARGUMENT

A. The Trial Court Properly Denied Defendants' Motion For Judgment Notwithstanding The Verdict On The Issue Of Causation

1. Introduction

The trial court's ruling that denied Dr. Behlke's motion for judgment notwithstanding the verdict on the issue of causation properly relied on two longstanding and well–settled principles of Pennsylvania law.

The first principle, which the Supreme Court of Pennsylvania recognized over 30 years ago in *Hamil* v. *Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978), is a principle of law with particular applicability to medical malpractice actions such as this one. That principle of law provides that "[o]nce 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." *Id.* at 268, 392 A.2d at 1286.

Although the defendants challenge whether the "increased risk of harm" principle should apply to a case such as this one, the trial court correctly held (as we demonstrate below) that this is precisely the type of case for which our Supreme Court adopted that method of allowing a jury to conclude that the plaintiff has established causation.

The second principle of longstanding and well–established Pennsylvania law on which the trial court relied in upholding the jury's verdict is a principle of

damages allocation generally applicable in tort law. Moreover, it is a principle that that defendants' Brief for Appellants fails to directly address or confront. This principle of law provides that where two causes, one of which is the defendant's negligence, combine to produce indivisible injuries, the defendant may be held liable for the full amount of the plaintiff's damages if the defendant's negligence was a substantial factor in causing the injuries.[4]

Here, Mrs. White's preexisting fetal maternal hemorrhage and Dr. Behlke's negligence in treating Mrs. White after she arrived at CMC combined to result in the severe, indivisible brain damage injuries that Cody White must now live with for the rest of his life. Because the jury permissibly found under the increased risk of harm standard that Dr. Behlke's negligence was a substantial factor in causing those injuries, Pennsylvania law allows, and indeed mandates, that Dr. Behlke be held responsible for the full amount of plaintiffs' damages.

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[4] *See Carlson* v. *A. & P. Corrugated Box Corp.*, 364 Pa. 216, 224, 72 A.2d 290, 294 (1950) ("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.") (citation omitted); *Neal* v. *Bavarian Motors, Inc.*, 882 A.2d 1022, 1027–28 (Pa. Super. Ct. 2005) ("If two or more causes combine to produce a single harm which is incapable of being divided on any logical, reasonable, or practical basis, and each cause is a substantial factor in bringing about the harm, an arbitrary apportionment should not be made.") (internal quotations omitted); *Glomb ex rel. Salopek* v. *Glomb*, 530 A.2d 1362, 1365 (Pa. Super. Ct. 1987) (en banc) ("A court can direct the apportionment of liability among distinct causes only when the injured party suffers distinct harms or when the court is able to identify a reasonable basis for determining the contribution of each cause to a single harm.") (internal quotations omitted).

The trial court's post–trial opinion contains an extensive discussion of this generally applicable principle governing the allocation of damages under Pennsylvania tort law, *see* trial court's opinion at 47–50 & nn. 16–17, in the context of rejecting a challenge that Dr. Behlke had raised in his post–trial motions to the trial court's so–called "Concurring Causes Charge" to the jury. Now, on appeal, Dr. Behlke has abandoned that challenge to the "Concurring Causes Charge" by having failed to raise and brief any such challenge in his Brief for Appellants. Nor does Dr. Behlke's Brief for Appellants address or seek to distinguish the case law on which the trial court relied in holding that where two causes, one of which is the defendant's negligence, combine to produce indivisible injuries, the defendant may be held liable for the full amount of the plaintiff's damages if the defendant's negligence was a substantial factor in causing the injuries.

As explained below, the trial court properly applied this damages allocation principle here, and given Dr. Behlke's failure to argue and brief that question on appeal, he has waived any challenge thereto. *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.").

2. This is precisely the type of case in which the "increased risk of harm" principle may be used to prove causation in a medical malpractice action, and thus the trial court properly rejected defendants' request for j.n.o.v.

Judge Nealon's post–trial opinion persuasively explains at length, *see* trial court's opinion at 14–27, that this is precisely the very 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.

Defendants' appellate 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 delineates, 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* trial court's opinion 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 (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 quintessential case in which the relaxed, increased risk of harm burden of proving causation applies to allow the jury to find that the defendant's 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 well 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 the Supreme Court of Pennsylvania'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. In its ruling in that case, Pennsylvania's highest 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*, the Supreme Court of Pennsylvania 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*.

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

To avoid any ambiguity whatsoever, Pennsylvania's highest 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, the Supreme Court of Pennsylvania returned to the issue presented in *Hamil* when, in *Mitzelfelt* v. *Kamrin*, 526 Pa. 54, 584 A.2d 888 (1990), the 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. Pennsylvania's highest 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*, the Supreme Court of Pennsylvania 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.

This 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).

As this 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 this 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* 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 the Supreme Court of Pennsylvania'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 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 White's 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*." 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 this 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* trial court's opinion at 25–26. Amazingly, Dr. Behlke's appellate brief does not even cite or discuss *Cruz*, which is a case in which this Court affirmed a $15.2 million award for the benefit of an infant who suffered brain damage due to negligent delays in the delivery process.[5]

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 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

[5] In *Cruz*, this 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.

> 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.

Trial court's opinion at 26–27 (footnote omitted).

Instead of citing to any of the numerous Pennsylvania state court rulings that have applied *Hamil* in the more than 30 years since that decision issued, or that have applied *Mitzelfelt* in the nearly 20 years since that decision issued, Dr. Behlke's Brief for Appellant seeks to take this Court on a curious journey apparently intended to discover *Hamil*'s "original meaning" by reviewing the holdings of the numerous cases on which *Hamil* itself relied. *See* Brief for Appellants at 23 n.4.

Regardless of the merits of an "original meaning" approach to discovering the substance of an appellate court's newly issued decision, the Supreme Court of Pennsylvania's decision in *Hamil* has been construed numerous times by that Court, by this Court, and by numerous other courts in the more than 30 years since it issued. The Supreme Court of Pennsylvania's decision in *Hamil*, that Court's later decisions (including *Mitzelfelt*) applying *Hamil*, and this Court's numerous published and precedential decisions applying both *Hamil* and *Mitzelfelt* constitute precedent that binds this panel. Dr. Behlke's Brief for Appellants ignores those binding precedents at its peril, especially after the trial court has held that this Court's decision in *Cruz* (a decision that the Brief for Appellants *entirely ignores*) compels affirmance.

Rather, what the Brief for Appellants does argue is 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. The Brief for Appellants then proceeds to argue 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. Defendants cite 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. Accordingly, the trial court did not err in denying defendants' motion for j.n.o.v., and this Court should therefore affirm that denial.

As this 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.

3. Because Dr. Behlke's negligence was a substantial factor in causing the indivisible harm that is Cody White's brain damage, defendants were properly held liable for the full amount of plaintiffs' damages

Throughout Dr. Behlke's Brief for Appellants, Dr. Behlke repeatedly expresses dissatisfaction with a separate, longstanding, and well–established principle of Pennsylvania law that 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.

Now, in his Brief for Appellants, Dr. Behlke is no longer advancing any challenge to the trial court's "Concurring Causes Charge," and thus any challenge to that charge is waived. *See Harris*, 880 A.2d at 1279 ("We have repeatedly held that failure to develop an argument with citation to, and analysis of, relevant authority waives that issue on review."). Moreover, Dr. Behlke's Brief for Appellant does not address or seek to distinguish any of the case law that Judge Nealon cited for the principle that it was proper here for the jury to award to plaintiffs all of their damages even if some portion of the harm sustained resulted from Mrs. White's

fetal maternal hemorrhage because there was no basis for the jury to logically make any apportionment between or among the causes.

Nevertheless, Dr. Behlke in his j.n.o.v. argument 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*, 866 A.2d at 379 (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), this 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*, this 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), the Supreme Court of Pennsylvania 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). The Supreme Court's ruling in *Carlson* requires 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.

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*, Pennsylvania's highest 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, the Supreme Court of Pennsylvania 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, this 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.

Finally, Pennsylvania law recognizes that "justice and public policy require that the wrongdoer bear the risk of uncertainty which his own wrong has created

and which prevents the precise computation of damages." *Delahanty* v. *First Pennsylvania Bank, N.A.*, 464 A.2d 1243, 1257 (Pa. Super. Ct. 1983). As the parties whose medical malpractice has caused substantial and permanent injury to Cody White, defendants properly bear that risk of uncertainty in this case.

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 on appeal, 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.

For these reasons, the trial court did not err in denying defendants' motion for judgment notwithstanding the verdict, and the trial court's judgment should therefore be affirmed.

B. The Trial Court Did Not Abuse Its Considerable Discretion In Denying Defendants' Motion For A New Trial

1. The trial court did not abuse its discretion in substituting a juror who was selected in a manner that was fair to all parties for a juror who was selected in a manner that was prejudicial to plaintiffs

During the jury selection process, which occurred in this case on the afternoon and evening of November 4, 2008, the trial court's tipstaff accidentally committed a miscalculation. As a result, a process that should have resulted in the selection of twelve jurors for the jury panel instead produced only eleven jurors. At the time the error was discovered, plaintiffs had already exercised all six of the peremptory challenges to the main jury pool that the trial court had originally provided to plaintiffs and both of their two peremptory challenges to the alternate pool, while defendants had not yet exercised their two peremptory challenges to the alternate pool that the trial court had originally provided to defendants (consisting of four/one peremptory challenges for Dr. Behlke and OB–GYN and another four/one peremptory challenges for CMC).

Due to the tipstaff's inadvertent error, plaintiffs' counsel were given the following unpalatable choice — allow onto the main jury panel of twelve a venire member against whom plaintiffs had already exercised a peremptory strike during the original jury selection process or place onto the jury an alternate juror whom plaintiffs had already stricken using a peremptory strike that could only be used against an alternate juror.

Confronted with that unsatisfactory choice, plaintiffs' counsel decided to put Juror 26, against whom plaintiffs had originally exercised a peremptory strike, back onto the jury panel as jury panel member number 6. Plaintiffs' counsel objected on the record to the prejudicial manner in which Juror 26 became jury panel member number 6 after plaintiffs had originally exercised a peremptory strike to remove Juror 26 from the jury panel. T.T. 11/5/08 at 64–76.

After the close of the evidence, and while counsel were in the midst of presenting their closing arguments to the jury, the trial court offered counsel for plaintiffs the option to replace jury panel member number 6, who had been selected in a manner prejudicial to the plaintiff, with an alternate juror who had been selected in a manner that was fair to all parties, including the defendants. R.992a.

During the jury selection process that preceded the start of trial, counsel for defendants could have, but chose not to, exercise a preemptory strike against this particular alternate juror had counsel for defendants been dissatisfied with her, as counsel for defendants still possessed two preemptory strikes that could be exercised against alternate jurors at the time this particular alternate juror was selected. *See* trial court's opinion at 28.

Before offering that solution to counsel for plaintiffs at the closing argument phase of the trial, the trial court had not hinted, foreshadowed, or suggested to counsel for any of the parties in any manner that the trial court might allow plaintiffs to replace the unfairly selected juror with an alternate who had been fairly selected. Thus, defendants' contention that counsel for plaintiffs had any

reason to evaluate jury panel member number 6's reaction to the evidence or plaintiffs' case and compare that reaction to the reaction of the remaining alternate juror is both unsupported in the record and absurd.

Even more importantly, defendants have failed to cite any case law establishing that the trial court abused its discretion in offering the juror replacement option to the plaintiffs. *See Starr* v. *Allegheny Gen. Hosp.*, 451 A.2d 499, 506 (Pa. Super. Ct. 1982) ("The substitution or withdrawal of a juror is within the sound discretion of the trial judge, whose decision will not be reversed in the absence of an abuse of that discretion."); *In re: De Facto Condemnation and Taking of Lands of WBF Assocs.*, 972 A.2d 576, 589 (Pa. Commw. Ct. 2009) ("The decision of whether to seat an alternate juror is within the judge's discretion.").

In advancing this argument, Dr. Behlke relies heavily on this Court's recent ruling in *Bednar* v. *Dana Corp.*, 962 A.2d 1232, 1236–37 (Pa. Super. Ct. 2008). As Judge Nealon correctly recognized in his opinion denying defendants' post–trial motions, however, *Bednar* is of no assistance to Dr. Behlke, because a decision holding that it is reversible error for a court to deny a party the absolute minimum of four peremptory strikes per side, which is all that *Bednar* held, is of absolutely no relevance to what happened in this case. *See* trial court's opinion at 30–31.

Rather, this case involves a trial court's providing, in essence, an extra peremptory challenge to one party in the interest of fairness, which Pennsylvania Rule of Civil Procedure 221(a) expressly allows. *See* Pa. R. Civ. P. 221(a) ("In order to achieve a fair distribution of challenges, the court in any case may (a) allow

additional peremptory challenges and allocate them among the parties."). Although Rule 221 would have allowed the trial court to give plaintiffs the same number of preemptory challenges as the defendants had collectively received, here the trial court initially gave the plaintiffs six strikes and the defendants a total of eight. Thus, even with the additional strike that the trial court later provided to the plaintiffs in order to achieve fairness under the circumstances presented, the defendants had still collectively received more strikes than the plaintiffs.

In concluding that he did not abuse his discretion in allowing the substitution of a juror selected in a manner fair to all parties for a juror who had been selected in a manner that was unfair to the plaintiffs, Judge Nealon relied on the following three cases: *Commonwealth* v. *Chmiel*, 585 Pa. 547, 576–81, 889 A.2d 501, 518–21 (2005) (holding that the trial court did not abuse its discretion in permitting prosecutor to belatedly exercise a peremptory challenge); *Gustison* v. *Ted Smith Floor Products, Inc.*, 679 A.2d 1304, 1312–13 (Pa. Super. Ct. 1996) (holding that the trial court's distribution of peremptory challenges is subject to an abuse of discretion review); and *Starr*, 451 A.2d at 506 (holding that the substitution of a juror is within the sound discretion of the trial judge, whose decision will not be reversed in the absence of an abuse of that discretion). Once again, Dr. Behlke's Brief for Appellants neither cites to nor discusses any of these decision on which the trial court relied in rejecting Dr. Behlke's new trial request.

Because *Bednar* involved "structural error" in failing to afford the parties the prescribed minimum number of peremptory strikes, this Court excused the

appellant from having to prove prejudice. Here, by contrast, the trial court did not violate Rule 221's express terms, and thus Judge Nealon was correct in concluding that to obtain a new trial, Dr. Behlke had to establish not only that error had been committed, but also that the error prejudiced him.

The trial court thus also properly exercised its discretion in denying Dr. Behlke's request for a new trial 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).

Trial court's opinion at 32.

Indeed, the alternate juror who was seated at the end of the case may have caused the jury to award less in damages than original jury panel member 6 would have approved. There is no way to know whether the substituted alternate juror had any or no effect whatsoever on the jury's deliberations. All that can be known is that the jury's verdict was by a margin of 11 to 1, demonstrating that the jury could still have returned an identical verdict even if original jury panel member 6 had remained on the jury but voted against the jury's verdict.

By offering plaintiffs the option to replace original jury panel member 6, who had been selected through a process that was unfair to plaintiffs, with an alternate juror who had been selected through a process that was fair to all parties, the trial court was in fact attempting to benefit the defendants by eliminating an otherwise

valid ground for objecting to the jury's verdict that plaintiffs would have possessed in the absence of that remedial action. The trial court's action thus did not prejudice defendants; instead, it actually protected defendants' interests by eliminating an otherwise valid ground for objecting to the jury's verdict that plaintiffs would have possessed in the absence of the trial court's action.

In conclusion, what the parties to this case were entitled to receive, and what they in fact did receive in the final analysis, was a jury that was selected via a method that was fair to all the parties. That was not originally the case, due to the tipstaff's unfortunate calculation error during the original jury selection process. But it ended up being the case, due to the substitution onto the jury of an alternate who had been selected in a manner that was fair to all parties, including Dr. Behlke, to replace a juror who had been selected in a manner that was prejudicial and unfair to the plaintiffs. Dr. Behlke cannot establish any vested right to have a verdict delivered by one particular juror or another; at most, what he and every other party is entitled to is a fairly selected jury, and that, in the end, is what all the parties to this case received.

For these reasons, the trial court did not abuse its discretion in denying defendants' motion for a new trial based on the juror substitution issue.

2. The trial court certainly did not abuse its discretion by giving the jury an "increased risk of harm" instruction in accordance with the *Hamil* and *Mitzelfelt* cases

Dr. Behlke's Brief for Appellants next advances an argument consisting of only three paragraphs in support of the proposition that the trial court abused its discretion in giving the jury an "increased risk of harm" instruction. The Brief for Appellants does not challenge the substance of the instruction, but rather only whether the "increased risk of harm" issue was in fact implicated in this case. According to the Brief for Appellants, an "increased risk of harm" instruction should only be given in cases where the defendant's conduct increased the plaintiff's risk of incurring harm "in the future." Brief for Appellants at 29.

This ground for a new trial appears to have been invented by someone who is ignorant of the entire *Hamil* and *Mitzelfelt* line of case law discussed at length above in this Brief for Appellees. The legal proposition that a jury may find causation if the defendant increased the risk of the harm that the plaintiff has actually suffered does not pertain to harm that will occur sometime in the future, after the trial has concluded. Rather, as explained in detail above, this legal proposition refers to harm that the plaintiff experienced before trial, which the jury is entitled to find occurred as a result of the defendants' negligence.

To summarize, *Hamil*, *Mitzelfelt*, and the many other cases cited in response to defendants' j.n.o.v. argument hold that when medical malpractice increases the risk of the very harm that the plaintiff has sustained, the jury may find that the malpractice in fact caused that harm. Plaintiffs introduced an abundance of expert

testimony that defendants' medical malpractice increased the risk of the very harm that Cody White suffered and will continue to suffer for the rest of his life. Based on that evidence, the jury was entitled to find causation, as it did find.

The instruction that defendants are challenging was absolutely proper under *Hamil*. Defendants' efforts to inaccurately portray the issue of increased risk of harm as relevant only to injuries that may be sustained in the future, after trial is concluded, must be rejected as contrary to Pennsylvania law.

Here, Judge Nealon correctly recognized that Dr. Behlke's challenge to the "increased risk of harm" jury instruction was without merit. Judge Nealon's post–trial opinion explains:

> It is beyond legitimate dispute that increased risk of harm principles apply in obstetrical malpractice cases where the healthcare providers allegedly fail to promptly recognize and properly respond to apparent signs of fetal distress. *See e.g., Cruz*, 801 A.2d at 608–610; *Burton–Lister*, 798 A.2d at 240.

Trial court's opinion at 47.

Indeed, had Judge Nealon failed to give an "increased risk of harm" instruction in this case, *that* would have constituted reversible error. *See Jones* v. *Montefiore Hosp.*, 494 Pa. 410, 431 A.2d 920 (1981) (vacating and remanding for a new trial where the trial court had failed to give an "increased risk of harm" instruction despite plaintiff's request for such an instruction in accordance with *Hamil*).

For all of these reasons, the trial court did not abuse its discretion in giving an "increased risk of harm" instruction to the jury, when that was one of plaintiffs'

central theories of liability and the evidence more than adequately supported that theory.

3. Dr. Behlke's remaining four or five grounds for a new trial or remittitur are likewise devoid of merit

Perhaps unaware that Pennsylvania Rule of Appellate Procedure 2116(b) now allows the "Statement of Questions Involved" to encompass two pages of a party's appellate brief, the fourth and final question presented in Dr. Behlke's Brief for Appellants in fact seeks to raise at least five separate issues:

> 4. Whether the trial court erred and/or abused its discretion by permitting expert testimony from Plaintiffs which: (i) clearly was lacking in the necessary level of factual foundation and required degree of medical certainty; (ii) was presented by an expert unqualified under MCARE and (iii) was well beyond the fair scope of a medical expert's report and whether a new trial should be granted or the verdict reduced on weight of the evidence grounds.

Brief for Appellants at 5. Indeed, the Brief for Appellants later tacitly acknowledges that Question 4 raises at least four separate issues, because it devotes four separate subsections of the Brief for Appellants to addressing Question 4. And had the Brief for Appellants devoted separate subsections to its challenge to Dr. Tyrala's qualifications and whether Dr. Tyrala testified beyond the fair scope of her expert report, the Brief for Appellant would have confirmed that Question 4 in fact raises five separate issues.

Perhaps counsel for Dr. Behlke attempted to shoehorn four or five separate issues into Question 4 because otherwise the Brief for Appellants would be seeking to advance seven or eight separate issues, thereby giving rise to a presumption

(correct in this instance) that none of the issues being raised in the Brief for Appellants has merit. As former U.S. Supreme Court Justice Robert H. Jackson has observed:

> Legal contentions, like the currency, depreciate through over–issue. The mind of [a] judge is habitually receptive to the suggestion that a . . . court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one . . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Jackson, "Advocacy Before the United States Supreme Court," 25 Temple L.Q. 115, 119 (1951) (quoted in *Commonwealth* v. *Robinson*, 581 Pa. 154, 187 n.28, 864 A.2d 460, 479 n.28 (2004)).

In any event, the remaining five grounds for a new trial or remittitur have no more merit than the meritless grounds for j.n.o.v. or a new trial already addressed above. This Brief for Appellees now turns to address the substance of Dr. Behlke's final five arguments.

a. Plaintiffs' medical experts expressed their causation opinions with the requisite degree of medical certainty and an appropriate factual basis

This is most definitely not a case in which plaintiffs' medical experts failed to express their opinions with the requisite degree of medical certainty. One need only look at the transcripts of those experts' testimony to see that they in fact did express each and every one of their opinions to the necessary "reasonable degree of

medical certainty." R.274a–76a (testimony of Dr. Cetrulo); R.510a–16a, 534a–41a (testimony of Dr. Tyrala).

Accordingly, this Court's ruling in *Griffin* v. *University of Pittsburgh Medical Ctr.*, 950 A.2d 996 (Pa. Super. Ct. 2008) (holding that a medical expert's specific claim of a fifty–one percent degree of medical certainty does not equate to a reasonable degree of medical certainty), and the other cases on which defendants rely are of absolutely no relevance here.

Indeed, as Judge Nealon's post–trial opinion explains:

> Although Dr. Behlke and OB–GYN Consultants argue that *Griffin* warrants JNOV[6] due to the inability of the Whites' experts to quantify the precise degree of harm caused by the negligent medical care, the rationale in *Griffin* is inapplicable for two reasons. First, the expert in *Griffin* could not state within a reasonable degree of medical certainty whether the healthcare providers were even negligent. In contrast, Dr. Cetrulo unmistakably testified to a reasonable degree of certainty that Dr. Behlke was negligent in several respects. Second, and more importantly, the plaintiff in *Griffin* alleged that the hospital employees' negligence was the direct cause of her shoulder injury and did not advance an "increased risk of harm" theory of causation. In a malpractice action, "[w]hat the expert must demonstrate is that the negligence of the defendant either proximately caused the plaintiff's harm, or increased the risk of its occurrence." *Grossman* v. *Barke*, 868 A.2d 561, 572 (Pa. Super. 2005), *app. denied*, 585 Pa. 697, 889 A.2d 89 (2005); *Watkins* v. *Hospital of University of Pennsylvania*, 737 A.2d 263, 267 (Pa. Super. 1999). In the case at hand, the Whites pursued the latter theory of causation and their experts clearly testified to a reasonable degree of certainty that Dr. Behlke's negligence increased the risk of the harm that Cody White suffered. Since *Griffin* does not implicate or even address the increased risk of harm standard

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6 In the brief in support of defendants' post–trial motions, Dr. Behlke advanced this argument as a ground for j.n.o.v. R.1251a–54a. Now, on appeal, he advances this argument as a ground for a new trial. Because the nature of the argument Dr. Behlke is now raising has changed, this Court should find the argument waived. *See* Pa. R. App. P. 302(a); Pa. R. Civ. P. 227.1(b).

> articulated in *Hamil* and *Mitzelfelt*, it cannot serve as a basis for granting JNOV in this case.

Trial court's opinion at 24–25.

As with defendants' current j.n.o.v. argument addressed above, this argument that defendants are now advancing for a new trial posits that because plaintiffs' medical experts could not identify the precise degree of responsibility defendants' negligence played in causing Cody White's injuries, plaintiffs' experts should be understood as having failed to testify that defendants' negligence played any role in causing Cody White's injuries.

As explained above, there are two straightforward reasons why this argument for a new trial lacks merit and must be rejected.

First, an inability to assign a precise degree of responsibility is not the equivalent of failing to assign responsibility in fact. Dr. Tyrala, plaintiffs' neonatology expert, testified that Cody White's condition at birth would have been substantially improved over what it turned out to be in the absence of defendants' negligence. R.541a (testimony of Dr. Tyrala). And Dr. Cetrulo likewise testified that defendants' negligence was a cause–in–fact of the severe injuries that Cody White suffered. R.198a–99a.

And second — even in the absence of any such causation testimony from plaintiffs' medical experts — the jury would still have been presented with sufficient evidence under Pennsylvania law from which the jury could have found causation under the "increased risk of harm theory," for the reasons previously explained above.

In other words, as this Court explained in *Montgomery*, "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." 656 A.2d at 1392.

Accordingly, in demanding a new trial because plaintiffs supposedly failed to present evidence of causation that satisfies the "reasonable medical certainty" standard, defendants not only misrepresent the factual record in this case, but they also ignore applicable Pennsylvania law holding that the absence of any such evidence would be immaterial in a case such as this. For these reasons, defendants are not entitled to a new trial or any other relief based on this argument.[7]

b. The trial court did not abuse its discretion in finding (i) that Dr. Tyrala was qualified to give causation testimony and (ii) that Dr. Tyrala did not testify beyond the fair scope of her expert report

In *Ettinger* v. *Triangle–Pacific Corp.*, 799 A.2d 95 (Pa. Super. Ct. 2002), this Court explained that "[i]t is well established in this Commonwealth that the decision to admit or to exclude evidence, including expert testimony, lies within the sound discretion of the trial court." *Id.* at 110. This Court's ruling in *Ettinger* also

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[7] Defendants' use of the "gatekeeper" terminology, *see* Brief for Appellants at 30, may bring to mind the issue of reliability of the expert's testimony under *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923). It thus deserves to be noted that Dr. Behlke is not now raising on appeal, nor did he previously raise in the trial court, any *Frye*–related challenge to the testimony of plaintiffs' expert witnesses.

explained that "[t]o constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." *Id.*

Here, the trial court did not err or abuse its discretion in allowing Dr. Tyrala to testify. Moreover, the admission of Dr. Tyrala's testimony about pitocin — which was entirely proper, for the reasons explained below — was harmless because this very same evidence was already properly before the jury through the testimony of Dr. Cetrulo.

The trial court properly permitted Dr. Tyrala to testify in this case concerning the issue of causation and increased risk of harm. Dr. Tyrala did not testify concerning standard of care, and therefore it simply is not relevant whether Dr. Tyrala has practiced or taught neonatology within the past eight years. Dr. Tyrala's testimony established that she has engaged in the practice of medicine and has taught the practice of medicine within the past five years, and that she possesses an unrestricted physician's license, which are the qualifications that 40 Pa. Stat. Ann. §1303.512(b) requires for a physician to testify regarding causation.

As Judge Nealon correctly recognized in his post–trial opinion:

> During her trial testimony, Dr. Tyrala merely discussed causation and the nature of Cody White's harm, and as such, her competency was governed by Section 512(b) of the Act.
>
> Since Dr. Tyrala maintains an unrestricted license to practice medicine in Pennsylvania and she remains actively engaged in the practice of pediatrics, she clearly satisfied the statutory criteria contained in Section 512(b)(1)–(2) to testify about "causation and the nature and extent of the injury" sustained by Cody White. In the alternative, based upon her 23 years of experience in teaching and practicing pediatrics and neonatology from 1977 to 2000, her continued board–certification in those fields and her active clinical practice in

> pediatrics, the dual requirements of Section 512(b)(1) and (2) were waivable inasmuch as Dr. Tyrala was "otherwise competent to testify about medical or scientific issues by virtue of [her] education, training or experience." 40 P.S. §1303.512(b).

Trial court's opinion at 36.

Moreover, defendants' trial counsel, Mr. Feeney, stated on the record at trial that "I have no objection to her being offered as a pediatrician or her testifying as to causation." T.T. 11/12/08 at 9–10. Defendants' counsel's concession that Dr. Tyrala was qualified to testify as a medical expert regarding causation renders immaterial any issue regarding whether Dr. Tyrala was testifying in her capacity as a pediatrician or as a neonatologist and constitutes a waiver of defendants' present objection.

Finally, Dr. Tyrala did not testify beyond the fair scope of her report, and the trial court did not err in allowing her to so testify. Dr. Tyrala's expert report (marked P–36 for identification) specifically references on page two the administration of pitocin to Mrs. White and the effect of the decreased fetal heart tones and a sinusoidal pattern observed thereafter. R.1507a. Further, it was undisputed at trial that attempting to induce labor via pitocin administration may cause decreased oxygenation and a decrease in fetal heart rate. R.248a–49a.

Before allowing Dr. Tyrala's videotaped testimony to be shown to the jury, the trial court conducted a lengthy hearing outside the presence of the jury during which each and every one of defendants' specific objections to Dr. Tyrala's videotaped testimony was discussed, considered, and adjudicated. T.T. 11/12/08 at 3–58. Remarkably, defendants have omitted the transcript of this hearing from

their Reproduced Record on appeal. This omission is rendered all the more remarkable because one of the grounds that the trial court relied on in rejecting Dr. Behlke's argument that Dr. Tyrala had testified beyond the fair scope of her expert report was that Dr. Behlke's counsel had waived any such objections by failing to timely raise them during that on–the–record hearing. *See* trial court's opinion at 38–40. An issue not properly raised in the trial court cannot be raised on appeal. *See* Pa. R. App. P. 302(a); *Commonwealth* v. *Galvin*, No. 542 CAP, slip op. at 22 n.16, 2009 WL 5067602, at *13 n.16 (Pa. Dec. 28, 2009) ("As Appellant does not address the trial court's finding of waiver, and fails to develop this argument in any meaningful fashion in his brief before us, we find that he has waived this issue for purposes of appellate review.").

Moreover, defendants additionally had notice that the deleterious effects of pitocin were at issue pursuant to the expert report of Dr. Cetrulo (R.1496a, marked P–35 for identification), and thus defendants were prepared to and did in fact present rebuttal evidence on that very point. The trial court did not abuse its discretion in holding that defendants were not entitled a new trial on this basis, and this Court should therefore affirm.

c. The trial court did not abuse its discretion in denying a new trial on "weight of the evidence" grounds

Next, Dr. Behlke advances an argument consisting of three short paragraphs in which he contends that the trial court abused its discretion in failing to grant a new trial on "weight of the evidence" grounds. *See* Brief for Appellants at 34–35.

As the Supreme Court of Pennsylvania explained in *Armbruster* v. *Horowitz*, 572 Pa. 1, 813 A.2d 698 (2002), "a new trial should be granted only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Id.* at 9–10, 813 A.2d at 703 (internal quotations and emphasis omitted).

Explaining his reasons for rejecting defendants' "weight of the evidence" argument for a new trial, Judge Nealon wrote:

> [I]n attempting to establish the causal negligence of the defendant health care providers, the Whites introduced the expert testimony of Dr. Cetrulo, Dr. Tyrala and Joanna McGrath, R.N., as well as some inculpatory statements made by certain CMC nurses. The jury was at liberty to accept the opinion testimony of the Whites' experts as more credible and reliable than that submitted by the defense experts.
>
> The question presented by a weight of the evidence challenge is not whether the trial judge would have reached a different verdict if [s]he had been the trier of fact; rather, the relevant inquiry is whether the verdict was so contrary to the evidence as to shock one's conscience or sense of justice. Since the jury was free to determine the credibility of the lay and expert witnesses and to resolve the conflicts in the evidence presented, it cannot be said that the jury's verdict shocks our conscience or sense of justice. Accordingly, the request for a new trial on the ground that the verdict was against the weight of the evidence will be denied.

Trial court's opinion at 51–52.

Dr. Behlke's appellate brief offers no argument other than to observe that *defendants'* experts testified that, in their view, all of the harm to Cody White had occurred before Mrs. White came to the hospital[8] and that the jury awarded a large verdict. Neither of these reasons suffices to hold that the trial court abused its discretion in denying a new trial on "weight of the evidence" grounds.

d. The trial court did not abuse its discretion in refusing to order a remittitur

Finally, Dr. Behlke's Brief for Appellants advances an argument consisting of only four paragraphs in support of reducing the amount of the jury's verdict. Judge Nealon's post–trial opinion devotes more than ten pages to explaining why the jury's verdict is not excessive or subject to remittitur. *See* trial court's opinion at 52–64. Suffice it to say that Dr. Behlke's four–paragraph argument on appeal responds to little if any of the trial court's lengthy and detailed explanation of why a remittitur is not appropriate here.

Defendants begin their remittitur argument with the clearly incorrect assertion that "all of the testifying experts (Plaintiffs' experts included) agreed that the injuries to Cody White were caused by fetomaternal hemorrhage . . . ." Brief for Appellants at 35–36. In actuality, as discussed in detail in the preceding sections of

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[8] As Judge Nealon's post–trial opinion correctly observes, even defendants' medical experts conceded that Cody White's condition changed for the worse after pitocin was administered to Mrs. White as a result of Dr. Behlke's tragically erroneous decision to induce natural childbirth. *See* trial court's opinion at 22 n.10.

this brief, plaintiffs' experts provided more than sufficient evidence to allow the jury to find, as the jury did find, that defendants' medical malpractice was a cause of Cody White's devastating permanent injuries — a real, significant, and substantial cause of those injuries.

To the extent that defendants may be arguing that they can only be held responsible for the proportion of the injuries to Cody White that defendants' negligence had caused, this too is incorrect and waived, for reasons already explained above. Indeed, defendants' argument is directly contrary to the Supreme Court of Pennsylvania's holding in *Martin* v. *Owens–Corning Fiberglas Corp.*, 515 Pa. 377, 528 A.2d 947 (1987). In *Martin*, Pennsylvania's highest 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, the Supreme Court of Pennsylvania 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, this 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). Moreover, 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 and waived.

Finally, Pennsylvania law recognizes that "justice and public policy require that the wrongdoer bear the risk of uncertainty which his own wrong has created and which prevents the precise computation of damages." *Delahanty* v. *First Pennsylvania Bank, N.A.*, 464 A.2d 1243, 1257 (Pa. Super. Ct. 1983). As the parties whose medical malpractice has caused substantial and permanent injury to Cody White, defendants properly bear that risk of uncertainty in this case.

Based on these principles of Pennsylvania law, the trial court did not abuse its discretion in denying Dr. Behlke's so–called remittitur request.

With regard to the substantive standard governing a remittitur request, in *Gbur* v. *Golio*, 932 A.2d 203 (Pa. Super. Ct. 2007), this Court explained:

> The grant or refusal of a new trial because of the excessiveness of the verdict is within the discretion of the trial court. *Hall* v. *George*, 403 Pa. 563 170 A.2d 367 (1961). This court will not find a verdict excessive unless it is so grossly excessive as to shock our sense of justice. *Kravinsky* v. *Glover*, 263 Pa. Super. 8, 396 A.2d 1349 (1979). We begin with the premise that large verdicts are not necessarily excessive verdicts. Each case is unique and dependent on its own special circumstances and a court should apply only those factors which it finds to be relevant in determining whether or not the verdict is excessive. *Mineo* v. *Tancini*, 349 Pa. Super. 115, 502 A.2d 1300 (1986).

Id. at 212.

Here, of course, defendants fail to make any actual remittitur argument in their brief. They do not contend that the jury's award of damages is too large given the actual extent of the injuries that Cody White in fact suffered and will continue to suffer for the remainder of his life. Moreover, the life care and rehabilitation expert witnesses who testified for the opposing parties were remarkably consistent in valuing the amount and nature of those damages, and there was no evidence offered by the defense challenging the plaintiffs' economic expert evidence. *See* trial court's opinion at 58–59. Indeed, defendants have omitted the relevant damages–related testimony from the Reproduced Record because it is not truly at issue on appeal.

Last but not least, Judge Nealon's opinion notes that Dr. Behlke has not raised any remittitur challenge under the MCare Act and holds that he has therefore waived any such challenge. *See* trial court's opinion at 52. Dr. Behlke does not seek to raise any MCare Act challenge to the jury's verdict in his Brief for Appellants, nor does he challenge the trial court's finding that he waived that argument by failing to assert it before the trial court.

For all of the foregoing reasons, this Court should affirm the trial court's rejection of defendants' remittitur request.

VI. CONCLUSION

The trial court did not err in rejecting the argument that defendants advance on appeal for entry of judgment notwithstanding the verdict, and the trial court did not abuse its discretion in denying defendants' motion for a new trial or remittitur. Accordingly, the judgment from which defendants have appealed should be affirmed.

Respectfully submitted,

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